

TOWNSHIP OF LOWER MAKEFIELD  
ZONING HEARING BOARD  
MINUTES – DECEMBER 21, 2021

The regular meeting of the Zoning Hearing Board of the Township of Lower Makefield was held in the Municipal Building on December 21, 2021. Mr. Zamparelli called the meeting to order at 7:30 p.m.

Those present:

Zoning Hearing Board:       Anthony Zamparelli, Chair  
  Pamela VanBlunk, Vice Chair  
  Matthew Connors, Secretary  
  James Dougherty, Member  
  Peter Solor, Member

Others:                             James Majewski, Director Planning & Zoning  
  Barbara Kirk, Township Solicitor  
  Adam Flager, Zoning Hearing Board Solicitor  
  Frederic K. Weiss, Supervisor Liaison

APPEAL #21-1906 – GABRIEL DECK & ALEXANDRA CALUKOVIC-DECK  
Tax Parcel #20-049-004-001 & 20-039-004-002  
INTERSECTION OF WOODLAND DRIVE AND WEST SCHOOL LANE, YARDLEY, PA 19067  
(Continued from 11/30/21)

Mr. Edward Murphy, attorney, was present with Mr. Justin Geonnotti, engineer, on behalf of the Applicants. Mr. John Fenningham, attorney, was present with Mr. Vincent Fiorvanti, engineer, on behalf of Scott and Kathy MacDonald, Opposition Parties to the Appeal.

Mr. Fenningham stated he circulated to all Counsel and Mr. Majewski two additional Exhibits that are responsive to the concluding Testimony of both Mr. Fiorvanti and Mr. Geonnotti on November 30.

Mr. Fenningham noted what he has marked as Exhibit VF-8 is a letter on the mast-head of Cavanaugh's Surveying Services of Doylestown, PA dated December 15, addressed to Mr. Fiorvanti under seal of Patrick A. Cavanaugh, Professional Registered Surveyor in the Commonwealth.

Mr. Fenningham asked Mr. Fiorvanti to advise the Zoning Hearing Board that this letter was in response to the question about survey equipment, calibration, and tolerance of survey results. Mr. Fiorvanti stated as was discussed at the last Hearing, he requested this letter to certify the accuracy and the methods of surveying that was employed at the site under his direction. He reviewed what the letter states with regard to how the elevations were surveyed. He stated it also mentions the tolerance and accuracy of the system at .1' vertically which he believes is the same as the Applicant's.

Mr. Fenningham asked that this letter be admitted into the Record.

Mr. Murphy stated Exhibit VF-8 does make reference to a Survey Plan, but that Survey Plan has not been produced as part of this proceeding.

Mr. Fiorvanti stated there is not a separate Plan, but one of his Exhibits has the results of that survey shown on the Exhibit. He stated that Exhibit shows the elevations that were surveyed compared to the elevations that were on the Applicant's Plan. He stated there is therefore an Exhibit of his that has the results of that survey, and that Exhibit has already been Testified to. Mr. Fiorvanti reminded that Board that he had Testified that they were 2/10<sup>ths</sup> lower. He stated they also showed their elevations in a different color. Mr. Zamparelli asked if that Plan is based on the results of the survey, and Mr. Fiorvanti agreed.

Mr. Murphy stated there is no way without a Plan that they can verify the accuracy of the points that Mr. Cavanaugh's Plan represents. Mr. Fiorvanti stated that is no different than he being able to verify the accuracy of the Exhibits that the Applicant has produced. Mr. Murphy stated he produced a Plan. Mr. Fiorvanti stated the Plan that he produced is the Plan with the surveyor's results under his seal.

Exhibit VF-8 was accepted.

Mr. Fenningham asked Mr. Fiorvanti is a Certified Land Surveyor in the Commonwealth, and Mr. Fiorvanti agreed.

Mr. Fenningham asked Mr. Fiorvanti if he assess the Rebuttal Testimony offered on November 30 by Mr. Geonnotti on his assumption that Mr. Fiorvanti's survey was not originating from a fixed field point, and Mr. Fiorvanti stated that he did. Mr. Fenningham asked if he agreed with that, and Mr. Fiorvanti stated he did not. Mr. Fenningham asked Mr. Fiorvanti if he surveyed from a fixed point at the site.

Mr. Fiorvanti stated this was discussed briefly when they went through his Exhibits, and the conclusion was that their results were roughly 2/10ths lower than the Applicant's field work; and they had discussed the implications of that. Mr. Fiorvanti stated when Mr. Geonnotti was discussing the difference in the elevations, he mentioned that Mr. Fiorvanti had surveyed fixed objects to compare. Mr. Fiorvanti stated if they are surveying something that is 2' wide by 4' long, top of an inlet grate, it could be not level; so they could have been on one side and they were on another side. He stated they did actually hit their benchmark, and Mr. Geonnotti had mentioned that they have a nail at the benchmark there. Mr. Fiorvanti stated he saw that on the Plans, and he made sure that their surveyors hit it which is essentially sitting the rod on the head of a pin so that you can get an accurate comparison for that. He stated if you look at his Exhibits, there is one benchmark identified as a "mag nail," and their elevations are shown there and he feels they are minus .17 compared to that one. He stated some of the inlets are minus .22 or on average about 2/10ths lower. He stated they did hit the benchmark so that is an accurate representation and an accurate comparison.

Mr. Fenningham asked if that provided assurance that Mr. Fiorvanti's survey Exhibit incorporating the Cavanaugh survey field work is true and accurate, and Mr. Fiorvanti agreed. He added that it does show that their elevations were a rough average of 2/10ths lower than theirs based on the exact same spot.

Mr. Fenningham asked Mr. Fiorvanti if he also prepared an Exhibit based on the exchange of Testimony on November 30 that has been marked as Exhibit VF-7, and Mr. Fiorvanti agreed, and that it was under his seal. Mr. Fiorvanti noted the Exhibit which is the same Exhibit that he had previously submitted. He stated Mr. Geonnotti had indicated that topography is not a consistent surface elevation, and when you look at any piece of ground, the slopes, the contours, and the terrain varies. Mr. Fiorvanti stated there are areas which are consistent, but they have bumps, holes, and streams cut through; and that is what the contours represent. He noted on the slide the 88 contour and the 89 contour. Mr. Fiorvanti stated he had indicated when he was Testifying about this was that it was not consistent; and where the contours are closer together, it is steeper, and where they are farther apart it is less steep. He stated that is how the 3D model works. Mr. Fiorvanti stated he was not saying that they were consistent, and Mr. Geonnotti stated they were "not consistent here either," and Mr. Fiorvanti stated that could be true. He stated this is why he added additional details on the slide he showed. He stated when you go out in the field, there are spot elevations which they

talked about, which is almost like going on a Surveying Plan. He stated when the surveyor is out in field, he has a rod with a reflector or a satellite dish receiver, and he gets elevations at different spots on the ground. He stated if there is an area that is relatively constant in slope, and if there is a top of a hill and the bottom of the hill, you get some shots at the top of the hill and some shots of the bottom of the hill which could be 20' down. He stated the computer then calculates contour elevations in that area. He stated if it is a constant slope, those contours show the approximate grade between those to points; and that is how you interpret the 3D model, and it is relatively accurate. Mr. Fiorvanti stated if there is a spot between the two spot elevations that is very low or very high or on top of a bank or something that is unusual, the surveyor is supposed to get on there and take an elevation of it.

Mr. Fiorvanti noted the slide and showed an elevation at the top of 88.8, and he noted another area of 89.6 and the orange line between the two. He stated the computer calculates that if the one is; 88.8 and the other is 89.6, 89 will be close to the 88.8, and he showed that on the slide. He noted another point in another direction and he showed 89.6 and 88.8, so between the two of them if you take a constant slope between the two of them, he showed the location of 89. He stated that is repeated over and over, and the computer generates the contours, and between two contours, the elevations are consistently changing. He noted a spot where it is 88 and another spot at 89. He stated in the absence of any other information in between, it is a constant grade, and that is how the computer is modeling it because that is what the surface of the ground is. He stated it is a constant grade between 88 and 89, and if you divide that into ten, that is the elevation between the two points. Mr. Fiorvanti noted two other points and stated if it was steeper at one point and flatter at the other point, there would be an elevation mark and the surveyor should have put a spot elevation there. He stated if it went up 10% at one location and "dead flat" at another location, there would be a bank. He stated in the absence of a spot elevation, this is the elevation that the computer model sends on the ground.

Mr. Fiorvanti stated he is saying that they are not consistent which is why the slopes vary, and that is why the lengths of the cones vary because it is not consistent.

Mr. Fiorvanti showed another point of 88.2 elevation on the Exhibit, which he feels is the "crux of the entire case. He stated the elevation of the floodplain was taken as 88 flat all the way across, but he established that is not really true. He stated it may be 88 at certain spots, but at the edge of the

house which was 42' away, the Applicant said it 88.2. Mr. Fiorvanti stated when he reads the profile, he feels it is 88.3, and he showed where he feels that is and where he feels 88.2 is. He stated the Applicant noted the 88.2 spot elevation, and Mr. Fiorvanti showed how close that is to the 88 contour and it is 5' away from it. Mr. Fiorvanti stated the Applicant took that 5' and offset the line 2 ½' and came 50' away. Mr. Fiorvanti showed a spot on the Plan and stated if it is 88.2 there 5' away, it is 88.2 at another location 5' away; and Mr. Fiorvanti stated that is not true. Mr. Fiorvanti showed a spot on the Exhibit and stated if it is 88.2 there and there is no spot elevation, they have no idea what it is. He stated all they know is that between two spots he showed on the Plan, it is 1' and there is a gradual increase in elevation between the two points. Mr. Fiorvanti stated if you take the average, he showed where 88.2 would be.

Mr. Fiorvanti noted the red dots, and if he were to take 2 ½' for each tenth, that is about a 4% grade; and the grade here is 1 ½" between two points he showed on the Plan. He stated if he were to continue with the slope, each of the circles shown are 2 ½' – and he showed 88.1, 88.2; and if he were to continue with that slope he showed, 88.3, 88.4, 88.5 all the way up to 89, and that is in the middle of the house. He showed where 89 would be. He stated it is not that steep. He stated the way to interpret the 3D model is that 88 is at a location he showed on the slide and he showed 89 at another location. He stated if he were to take a computer-generated elevation from this model, he showed where 88.2 would be unless he had some other spot elevation to tell him that. He stated they cannot take a spot elevation 50' or 60' away and say that is the elevation at a spot he showed on the Plan which is 2' away from the house. Mr. Fiorvanti stated that is the water surface elevation. Mr. Zamparelli asked if there was a spot elevation in that area, and Mr. Fiorvanti stated there are no spot elevations at all between the points he showed on the Plan. He stated what you would do is use the contours that the computer calculated and then it is an even grade between them.

Mr. Fiorvanti stated there was discussion about the rain garden and the stormwater systems. Mr. Fiorvanti stated he believes that they are in the floodplain at 88.2 or 88.3 at an area he showed on the Plan. He showed another Exhibit which had been previously submitted. He noted the 88.2 elevation which he feels is the crux of the entire case. He stated assuming there is a 2/10ths difference, with a 100-year storm, he showed where 88.2 would be. He noted the stormwater system which he does not feel works for peak rate control. He stated he either heard Testimony or read it that there was infiltration in the rain garden area. He stated in the floodplain,

he does not believe that it can handle rate control; and he feels it will not only re-direct water because it will hit the house, and he does not feel it will have any chance of controlling peak flows. He noted a location on the Plan and stated whatever flow goes past there, recognizing that he believes he heard 700 cubic feet per second in the FEMA Study, it will be worse if this is built. He stated it will make a bad situation worse, the peak flows will go up, and the water will be re-directed. He stated the reason he believes this is because the rain garden is going to discharge into an inlet he showed on the Plan. He stated this is an existing inlet that comes to the stream. He stated the invert of that inlet is elevation 84.18, and this was from the Applicant's data. He stated the piping system goes into the stream where water elevation is 88.2. He stated the bottom of the pipe is 84.2 so the pipe is under water. He stated the top of the grate of the inlet is 88.3 and the bottom is 84/85, and it is connected to the stream. He stated water is going to flow up into it. He stated they are trying to discharge a rain garden into an inlet that 4' deep, and it is completely full of water already.

Mr. Zamparelli asked Mr. Fiorvanti if he is saying that the stream is going to backflow into the pipe and Mr. Fiorvanti agreed. He added the stream will backflow into the pipe which is completely full of water. He stated if you go down 1" into the inlet that they are tying into, the water is already there and has 4' of water in it. He stated the rain garden will fill with water, and it cannot push the water into the pipe. He noted the elevation of 89 where the rain garden is; and he stated if they dig the rain garden down 1' they are at 88, and the water will come back into the rain garden, and the rain garden will be filling full of water. He stated it will also be trapping water from uphill and will be getting water from the roof. He stated the rain garden will be full of water already, and it cannot get out because the pipe is full of water. He stated it will overflow, and the water will go around the house, backfilling on the side of the house, and flowing around.

Mr. Fiorvanti stated looking at the fifty-year storm, that elevation is almost the same as the one hundred-year storm. He stated instead of the pipe having 4' of water in it, it will have 3 ½' of it. He stated looking at the profile, the 100, the 50, and the ten-year storm are on there; and there is only about 1' difference. He stated it will be completely full and maybe overflowing; and if you take his 2/10ths, it is coming out of the top of the inlet. Mr. Fiorvanti stated he does not believe this situation will work for the peak flows and will make a bad situation worse.

Mr. Zamparelli asked if this pipe is existing, and Mr. Fiorvanti agreed. Mr. Zamparelli asked if that situation that Mr. Fiorvanti is describing happens now. Mr. Fiorvanti stated if there is a 100-year storm, the pipe will be full of water up to the top of the grate. Mr. Fiorvanti stated during that type of situation, it would be hard to get more water into it. Mr. Fiorvanti stated it is a situation you see at the Shore when there is high tide, and the water comes out of the inlets. Mr. Zamparelli stated they did not hear that that happens during a regular rainfall, and Mr. Fiorvanti stated that would be during the 100-year storm event or the 50. He stated the design standard is the 100-year storm, and during the 100-year storm it is not going to work.

Mr. Murphy noted Exhibit VF-8, the letter from Pat Cavanaugh, and he stated that this confirms that when Mr. Cavanaugh “did whatever he did,” he never accessed the site; and Mr. Fiorvanti agreed. Mr. Murphy stated it indicates that he identified fixed locations at or near the intersection, and Mr. Fiorvanti agreed.

Mr. Murphy stated Mr. Geonnotti has seen VF-7 and VF-8, and Mr. Fiorvanti has confirmed that whatever Pat Cavanaugh did, it was not done on site as compared to Mr. Geonnotti’s survey. Mr. Murphy stated they just heard Mr. Fiorvanti’s presumptions and conclusions on Exhibit VF-7. Mr. Murphy asked Mr. Geonnotti to comment on the Cavanaugh Survey Plan and certain of the Testimony Mr. Fiorvanti gave.

Mr. Fenningham stated he objects to the terms Mr. Murphy used of “assumptions and presumptions,” and none of that is in the Record tonight; and this is Mr. Fiorvanti’s expert Testimony. Mr. Fenningham stated nor is Cavanaugh making any assumptions, and his letter just declares the calibration and the tolerance responses.

Mr. Zamparelli stated they seem like assumption.

Mr. Murphy stated he did not say that Cavanaugh made assumptions, just that Mr. Fiorvanti made certain assumptions.

Mr. Geonnotti noted Exhibit VF-7. He stated at the last Hearing they asked for a Plan itself signed and sealed by Pat Cavanaugh which correlated the points that he located in the field with the points that they checked into in the field. Mr. Geonnotti stated the reason they asked for that was that they wanted to have a comparison that they were shooting the exact same locations to confirm the discrepancy which was 2/10ths or .17, .22 as Mr. Fiorvanti stated earlier

tonight. Mr. Geonnotti stated they have not seen that Plan, and they only see a signed and sealed letter that says “that a survey crew at your discretion surveyed various locations at fixed structures,” but they do not see a Plan which shows those points in detail that they could compare to.

Mr. Geonnotti stated they also asked for a point file which is the raw data file from the survey. He stated the reason they asked for that is because they could have taken that file, inserted it into their survey, and in AutoCAD compared the points; but they did not see that file. He stated Mr. Fiorvanti alluded to previous Exhibits which showed points being .17 or .22 less than his, but they did not see that Exhibit either; and they would have seen his benchmark and the corresponding differences between the two. He stated all we are seeing here is a letter certifying that a survey crew was at or near the intersection of Woodland and not on the site. Mr. Geonnotti stated the survey was based on datum 88 and a tolerance of .1’ vertically which is standard for GPS and is also what he used on the site.

Mr. Geonnotti stated while they appreciate the letter certifying that a survey was done and that they used a certain kind of equipment; but they do not have a Plan signed or sealed. Mr. Geonnotti stated even tonight Mr. Fiorvanti stated multiple times: “we believe, we think, and we did not access the site.” Mr. Geonnotti stated he feels it is really just hearsay at this point, and he has not seen a Plan that shows the discrepancy between their two points that they could back into and have a discussion about without the signed sealed Plan from Mr. Cavanagh, not Mr. Fiorvanti since he was not the surveyor of Record.

Mr. Geonnotti stated Mr. Fiorvanti laid out tonight that the difference between the contours not being evenly spaced supports his previous argument, and he agrees with that. Mr. Geonnotti stated what is shown on the Plan is not all the survey that he picked up in the field since the Plans get very cluttered if you show all the field points, so they pick and choose a number of spot shots that they show on the Plan. He stated his raw data/point file has many more shots. He stated the surveyor picks up various locations, and everything that is shown on the Plan is based on a field shot which has vertical data associated with it; but they have not shown it all on the Plan. He stated their 3D model does take that into account so between the spot shots shown on the Plan, there is additional field data which they did take into account; and that is why they certified the survey saying it is accurate. Mr. Geonnotti stated Mr. Fiorvanti was not on the site to confirm the locations as were shown. Mr. Geonnotti



stated he could provide them the field data, and it is signed and sealed by his surveyor that it is accurate. He stated when he says it is 88.2, they are comfortable with that, and they are signing and sealing that with certainty.

Mr. Murphy stated Mr. Fiorvanti Testified tonight that he felt the stormwater design for the rain garden adequate. Mr. Murphy stated at the last Hearing a Board member asked as to what design standard Mr. Geonnotti had designed the rain garden to, and he recalls that Mr. Geonnotti was uncertain about the standard; and he asked if he has since the last Hearing checked into and confirmed what design standard that was that the rain garden was designed for.

Mr. Geonnotti stated the rain garden was designed for the 100-year storm. He added that the previous Application was fifty, and during the last meeting he incorrectly stated it was fifty; however, they re-designed it for 100.

Mr. Murphy asked Mr. Geonnotti if he agrees with Mr. Fiorvanti's conclusion that the rain garden would not function in a 100-year storm event, and Mr. Geonnotti stated he does not. Mr. Geonnotti stated the whole crux of the Testimony was based on the house being in the floodplain and the flood waters going around the house during a 100-year storm, filling up the rain garden. Mr. Geonnotti stated based on their field data, being on the site with the surveyor, they are comfortable that they are not in the floodplain; and that is why they re-designed the house from the earlier proceedings. He stated the house is not in the floodplain, and therefore the flood waters will not be going around the house. He stated the rain garden is designed to hold water during the storms and then discharge it at a slower rate so that has all been taken into consideration as part of the design.

Mr. Fenningham stated Mr. Geonnotti indicated that there are additional field point that were not reflected on the Exhibit, and they were not in the Record. Mr. Fenningham stated Mr. Geonnotti is just stating that he has other data that they did not show on the Exhibit, but to "trust them" that they did this. Mr. Geonnotti stated everything that is field located has an elevation assigned to it which they do not show on the Plan as it would just get too cluttered. He added that there is a density to a survey that you are taking points at a certain grid throughout the site, and you do not show every single one of those spot shots.

Mr. Fenningham asked Mr. Geonnotti would agree that his survey also is based on fixed points off the Bausinger's property outside of the parcel. Mr. Geonnotti asked for clarification, and Mr. Fenningham asked if the culvert that he referred

to within the Bausinger's property or outside of their parcel Lot line.

Mr. Geonnotti asked what culvert he was referring to, and Mr. Fenningham stated Mr. Geonnotti had stated that the one that Mr. Fiorvanti referred to was variable, and he surmised that he might not have had a fixed survey point. Mr. Geonnotti asked Mr. Fenningham is confusing culvert with inlet. Mr. Fenningham stated he was just using Mr. Geonnotti's terminology, and asked whatever Mr. Geonnotti said Mr. Fiorvanti may not have had a fixed point, where was that fixed point inlet that he was referring to. Mr. Geonnotti stated he used the word inlet – not a culvert. Mr. Fenningham asked if that inlet was within the Bausinger property or outside the bounds of the Bausinger property, and Mr. Geonnotti stated it was within the right-of-way.

Mr. Fenningham stated the Cavanaugh and Fiorvanti survey team did not cross into the Bausinger's actual property, rather they surrounded the property doing their survey work with fixed points along the perimeter and consistent with the inlet fixed points that were on the Applicant's survey. Mr. Fenningham stated they tied those fixed points into the FEMA benchmark so that while they were not on the premises, they still were able to perform a true and accurate survey so it is a "red herring" to say they were not on the site exactly. He added that they did not need to be on the site.

Mr. Zamparelli asked Mr. Fenningham why they cannot produce the Plan.

Mr. Fiorvanti stated they do have the data shown on one his Plans. He showed the Exhibit which was offered early on, and he Testified when he submitted it they checked the points, one of which was the project benchmark – benchmark mag nail elevation 92.86. He stated right underneath of that is elevation 92.69 minus 0.17. He stated he one of the points that he has circled in pink has been on the Exhibit already with seal and his survey data that Cavanaugh surveyed under Mr. Fiorvanti's direction. He stated he did produce a Plan showing their data, and he Testified to it and pointed it out. He stated they even checked into the benchmark. He stated the Plan has been here, and he has been Testifying to it. He stated he used their surveyors with their GPS network, and he told them what to locate, and it has been on the Plan the whole time. He stated it is 2/10ths lower even at the benchmark. He stated the Plan has his seal, and it was surveyed in the field showing the exact points that they used. Mr. Fiorvanti stated when he shows an inlet it could be 6" one way or another on an inlet, but the mag nail is literally a nail; and the elevation they got on there is minus .17 lower than that. He stated he therefore does have an Exhibit that is sealed, with his name, with the field data on it, and with the elevations in comparison.

Mr. Fenningham stated it is one of the Exhibits that admitted into the Record based on Mr. Fiorvanti's Testimony prior to November 30.

Mr. Fenningham Moved for Admission of Exhibit VF-7. There was no Objection.

Ms. Kirk stated initially when this Application was submitted on February 25, 2021 the Township had concerns about the lay-out of the Plan, the location of the proposed house, and the number of Variances that were requested. She stated as a result of the Township Administration voicing concerns, the Applicant went back and did revisions to the Plan which helped to reduce the overall scale of Variances being requested from seven Variances to four.

Ms. Kirk stated during the course of Testimony in order to address additional concerns that the Township had, she had asked a series of questions as to whether or not the Applicant would be agreeable to certain Conditions. She stated those Conditions being: That any wetland buffer area be extended to 50' with any additional trees being planted as may be recommended by the Township, that the wetland buffer area will be restricted on Record by the filing of a Conservation Easement or Declaration of Restrictions to prevent any further building within that area, that a split rail fence be installed to set off the wetland buffer area, and that all stormwater roof gutters be connected to downspouts directly connected and flowing into the proposed rain garden.

Ms. Kirk stated to assist the Board, she drafted a Summary of the Variances presently requested with those four Conditions. She provided copies to Mr. Fenningham and Mr. Murphy and to the Board provided Mr. Murphy Mr. Fenningham have no Objection; which they did not.

Ms. Kirk stated as a result of the Applicant's agreement to the imposition of those Conditions should the Board determine that the requested relief be granted, the Township accepts the Revised Plans as submitted by the Applicant. She stated the Township has no other independent review or information to assume that the Applicant has not accurately depicted the survey. She stated she understands that Mr. Fenningham's client opposes that and has offered expert Testimony to contradict the Applicant's engineer's Testimony. Ms. Kirk stated she will leave that to the Zoning Hearing Board as being a credibility assessment.

Ms. Kirk stated the Township is satisfied that the Applicant revised the Plans addressing the Township's concerns; and should the Zoning Hearing Board determine that the requested relief be grant, the Township would ask for the

imposition of the four Conditions on Record with the understanding that any Declarations of Restrictions be Recorded before a Building Permit can be issued. She stated other than that, the Township does not have any other opposition to the Application.

The summary provided by Ms. Kirk was marked as Exhibit T-1.

Mr. Fenningham thanked the Board for their patience and attention during the Hearings. He stated notwithstanding the Township's position as noted in T-1, his clients do not believe that those Condition will mitigate or ameliorate the site conditions which they oppose.

Mr. Fenningham stated neither Mr. and Mrs. Deck or the Bausingers Testified in support of this Application, and it was only the Testimony of Justin Geonotti.

Mr. Fenningham stated on August 31 he presented Scott MacDonald and his Direct Testimony, and he was cross-examined and was asked questions by Township Counsel and also by some of the Board members. Mr. Fenningham stated his client's opposition was seemingly challenged, and he asks why. Mr. Fenningham stated the Zoning Ordinance provisions at issue per the Revised request for relief exist to protect the natural resources and also to protect his clients' property and downstream properties. He stated it is clear in that sense.

Mr. Fenningham stated on August 31 it was during cross-examination and questions to Scott MacDonald that Mr. Fenningham's client opposed this Application in an effort to deflate the value of the Bausingers' flag lot. Mr. Fenningham stated he was asked, insinuating that he had then made an offer to purchase the property at a deflated value, and Mr. MacDonald Testified that he did not make any offer and was simply of a view that this property should not be developed in the way that it was proposed; and in his view he thought it should be kept as open space for the preservation of the natural resources. Mr. Fenningham stated if Mr. MacDonald was not correct in that, the Board would have heard from the Bausingers so Mr. McDonald's Testimony in that regard is indisputable and not re-butted.

Mr. Fenningham stated he would argue that behind the aggressive request for Zoning relief in this case is the desire to deal with the fact that is Note 7 (2) of Exhibit A-4 – Zoning Plan. He stated the Note states: "Due to the extent of natural resources on site, no building envelope exists." He stated this Application is viewed in opposition either as a method to argue a point of

a de facto taking by the Township in enforcing its regulations and Ordinance associated with this particular property or it is intended to ignore the Ordinance provisions in terms of protecting the natural resources.

Mr. Fenningham stated he feels that is a stark admission in Exhibit A-4 that there is no building envelope. He stated that is evidence of the legislative intent behind the Zoning Ordinance to protect the natural resources particularly on this property as explained in the Applicant's own Exhibit A-4. He stated those Ordinance provisions preclude development of this particular flag lot as proposed, and it is clear that the intent to maximize either the profitability of the property or its development potential, those goals do not satisfy the elements of a Variance as a matter of law. He stated those elements do not support an argument of an unnecessary hardship imposed on the Applicant, in this case the Applicant as Equitable owner and the property owners being the Bausingers.

Mr. Fenningham stated there is 100% opposition from the residents to this Application, and there is not a single person who spoke in support of this Application. He stated his clients and those residents granted Party Status and those residents who simply spoke and gave the Board their points of view during Public Comment are equally entitled to the relief afforded by the Zoning Ordinance as well as the relief afforded by the Stormwater Management Act, a State Statute, as well as the relief afforded by Pennsylvania Appellant Case Decisions that deal with stormwater run-off onto adjoining properties.

Mr. Fenningham stated he believes at the first Hearing that he presented, he addressed the Township Ordinance about the wording that said, "excess run-off onto adjoining properties." Mr. Fenningham noted a Case that he sent to all Counsel, including Mr. Flager, which is the Kowalski Case. He stated the measure of determining an upgradient or upstream property owner's liability to a downstream property owner for water run-off is "however slight." He stated that measure of legal liability for causing water to run onto an adjoining property owner's property is triggered by what is referred to as "the common enemy rule" is rain water that flows naturally down a hill. He stated that is not what we are talking about here. He stated what we are talking about is what the Kowalski Case addresses and prior Cases in our Commonwealth that are a hundred years old that dealt with a property owner artificially altering the site conditions and causing water to be diverted or directed in a certain direction with both volume and velocity as considerations.

Mr. Fenningham stated whether this Board grants Variance relief as requested and whether or not the Township issues Building Permits, the upstream land-owner, which could be the Decks, could be sued in Court under the Kowalski standard. He stated that was mostly recently applied and reinforced on November 16, 2021 by the Pennsylvania Superior Court in the Morgan versus Millstone Case. He stated he can send Counsel copies of this as he did not bring extra copies this evening. Mr. Fenningham stated this is what drives this opposition in addition to all the facts that the Board heard during the Hearings. He stated there is a Zoning Law, a State Statute, and Case Law that he submits is on point in connection with this Application and the exact relief requested here.

Mr. Fenningham stated the Bausingers in selling the property to the Decks as a buildable lot are seeking to maximize the profitability to the highest and best use and seeking to maximize the development potential which Case Law says is not grounds for granting a Variance relief, and it is actually the opposite.

Mr. Fenningham stated there are two primary issues in this Case. He stated the first is that the dwelling structure is located in the floodplain, and he states that based on Mr. Fiorvanti's expertise and his presentation of his Exhibits. He stated he understands that Mr. Geonnotti does not agree with that; but Mr. Fiorvanti also does not agree with Mr. Geonnotti. He asked if this is a battle over experts as has been suggested, or is it a battle to protect natural resources. Mr. Fenningham stated he feels the Board should look at the level of natural resources that are impacted by this proposed development including removal of trees and ripping out the evergreens and shrubs along the flag pole area that will allow the water to cascade down the flag pole. He stated the Board should think about the surrounding site conditions that will be changed and altered, and that artificial change and altering gives rise to the responsibility of the upgrade property owner to not allow water to invade the downstream properties.

Mr. Fenningham stated the second issue is that the development of this property, including the stormwater improvements, will increase peak flows. He stated that is what Mr. Fiorvanti was saying on November 30 and what he said again tonight. Mr. Fenningham stated the Applicant has not submitted rate flows or velocity flows, and the Board has not been told how quickly the water will flow. He stated if the Board looks at the photographs that he presented through Scott MacDonald and the videos, you can visually gauge the velocity of the upstream water flowing down through the creek and over its banks because the photographs show that islands are created within the creek meaning that the water is carving out land, and you can see tree

roots are supposed, and the trees look like they are ready to fall, and you will see that the creek beds have collapsed in certain areas. Mr. Fenningham stated most importantly on the issue of vegetation, you will clearly see that the vegetation is submerged and overwhelmed by the flowing water coming across from the Bausingers' property to the MacDonald's property to the Dodds' property, and downstream to Silver Lake. Mr. Fenningham stated he feels that evidence before the Board is indisputable.

Mr. Fenningham stated it is the location of the house, which is one issue, and the argument of the BFE, the Base Flood Elevation, whether it is one-tenth, two-tenths which, while it is an engineering-site measurements, it equates to feet. He stated if there is a variable tolerance, it can go either way. He stated the Board has to be comfortable with the possibility that the Base Flood Elevation is 2' from the rear wall or in the middle of the house. He stated if there is a variable tolerance, it is almost to the front wall of the house. He stated it could go the other way, but that would still be within the house.

Mr. Fenningham stated Mr. Fiorvanti made the point that in the New Jersey resorts, if the tide is high and it rains, the water does not go anywhere except up and it floods the intersections and the streets.

Mr. Fenningham stated the Testimony before the Board is that the proposed rain garden is at an elevation that it is supposed to flow into the inlet and down to the stream, but the water is already going to fill up that inlet and the rain garden will be filled up. He stated the gutters that the Township says is a Condition will continue to pump water, and there will be an overflow situation. Mr. Fenningham stated he submits that it is indisputable that will happen.

Mr. Fenningham stated there were serious questions to his client, Mr. MacDonald, as to his efforts to mitigate the flooding of his property. Mr. Fenningham stated the downstream property has no legal affirmative obligation to do that and mitigate, and it is the upgradient property owner that has that legal responsibility. Mr. Fenningham stated it was submitted that the MacDonalds could plant vegetation; however, he believes that Mr. Tritt withdrew that when he saw the videos and photos, and he said "I feel your pain." Mr. Fenningham stated Mr. Tritt stated that when it rains it is half way up his property, and he feels he got a better sense. Mr. Fenningham asked that the Board look at the photographs and keep in mind the flow of water upstream beyond the Bausingers' property but coming down and being altered if this property is developed.

Mr. Fenningham asked the Board to focus on Exhibits MAC-1, MAC-4, MAC-9, MAC-11, and MAC-21, the photograph which shows the creek flow carving out the islands in midstream. He stated MAC-22 shows the creek beds collapsing. He also asked that they look at the picture marked MAC-28, where they will see the pre-development conditions of this area of the Township.

Mr. Fenningham stated four videos were offered through Mr. MacDonald. Mr. Fenningham stated the Chair had asked that evening how hard it was raining during the videos, and Mr. Fiorvanti provided that Testimony and it was equivalent to a two-year storm which is 2.3" to 3.2" in a twenty-four hour period. Mr. Fenningham asked the Board to imagine the conditions beyond a two-year storm. He stated around Labor Day there were major storms, and they should imagine the flow beyond a two-year storm.

Mr. Fenningham stated Mr. MacDonald Testified that the "creek cannot handle any more water," and the proposed mitigation improvements, the rain garden, etc. are overstated and insufficient. Mr. Fenningham stated Case Law says that the fact that Mr. MacDonald and other public speakers are Lay Witnesses does not reduce or diminish the value or the persuasiveness of their Testimony, and the Board can take that Testimony into consideration equally with expert Testimony in this Case. He stated they live the situation.

Mr. Fenningham asked if his clients are at liberty to take affirmative action like building a natural resource barrier or even a dam on their property line with the Bausingers' property, adding he would submit that they are not. He stated the same case, Kowalski, would not allow a property owner to divert water artificially backwards to flood upstream if that is conceivable. Mr. Fenningham noted the Hoover Dam which backs the water up and it could be pushed back upgrade by artificial means. He stated the MacDonalds could not do that. He stated the flow of water artificially altered must be addressed at its source, and he believes the Testimony is that the source is above the Bausingers' property.

Mr. Fenningham stated Mr. Fiorvanti raised the point that the Township's regulations require an environmental study if a property is within two miles of the River, and this property is. He stated there is not an environmental study in the Record.



Mr. Fenningham asked the Board to consider what the Pennsylvania Courts have said that the upgradient property owner cannot artificially alter the flow of water and cause harm downstream.

Mr. Fenningham stated Mr. Fiorvanti also Testified that the 5,000 square foot Small Project Exemption should not be granted in this case, and he compared it to a property that is flat but has no river near it, that has no creek, that is not in the floodplain, and you consider the Exemption in that regard. He stated he understands that it was pointed out that the Zoning Hearing Board does not grant that Exemption, but he feels that the Board can take into account and consideration that that Exemption should not apply, and that this property is in the floodplain. Mr. Fenningham stated at the March 16 Hearing Mr. Majewski advised the Board that the property at issue is within the floodplain and near the wetlands area of the intersection; and that is in the Minutes. Mr. Fenningham stated he is bewildered by the fact that the Township has not withdrawn its opposition, but has proposed Conditions that would allow the natural resources not to be fully protected.

Mr. Fenningham stated Mr. Fiorvanti has said that the stormwater management proposals themselves will be under water, and they will not serve the purpose of protecting his clients' property or diminishing the flow downstream. He stated it is important to recognize that the crux of the case is that the house is located in the floodplain or it is so very near the edge of the floodplain if you accept Mr. Geonnotti's analysis, that they should ask themselves what will be the impact of that, and what will happen if the water does flow and there is a ten, twenty, fifty or hundred-year storm event. Mr. Fenningham stated he does not feel the Board can ignore that element.

Mr. Fenningham also asked the Board to reflect on the fact that the original Application was very, very aggressive in both the size of the proposed dwelling and the location of the building. He stated only when the Township indicated opposition was it withdrawn. He stated that was after he had met with Mr. Murphy and Mr. Geonnotti informally and told them that his clients were going to oppose this formally. He stated then there was a Revised Application, but it is still an aggressive Application. He stated the house is still in the floodplain, and it is still impacting the natural resources by all of the Testimony the Board has heard.

Mr. Fenningham stated Mr. Geonnotti's Testimony has been "malleable, it has been changing, it has been ebbing and flowing like the creek does." He stated at the end of the November 30 transcript, Mr. Geonnotti stated that his Plan was designed to address the fifty-year storm; and how tonight he said he was mistaken, and he really designed it to address the one-hundred year storm. Mr. Fenningham stated he also stated the graphic plotting was a mistake, and it was boilerplate legend; however, when he revised the second Plan, he still did not take that Note off. Mr. Fenningham stated he feels the Board should look at that Note carefully as it states if there are any concerns, "you better go get a FEMA Study done because we are not really sure." He stated the Board should think of Note 32 in the contemplation of this Case. He stated based on the Testimony of Mr. Fiorvanti, the neighbors, and Mr. MacDonald that this is a result-oriented design; and it is to bring the BFE just below the proposed building site, deal with the buffer areas, ignore the restrictions, and open up the envelope to let something be built there. He stated he feels that is wrong.

Mr. Fenningham stated Mr. Fiorvanti prepared various Exhibits which were presented to the Board, and he illustrated the site point where he drew on the nail and did his calculations. He stated they purposely did not trespass onto the Bausinger's property, but Mr. Fiorvanti Testified that they were able to conduct a true and accurate survey, and reduce those results to his Exhibits. Mr. Fenningham stated he finds it lacking in credibility the counter-argument was "they did not have a Plan." Mr. Fenningham stated the Board also does not have all the Plan data that Mr. Geonnotti stated he had back in his office, but did not put on the Plan submission. Mr. Fenningham stated Mr. Geonnotti did not say that Mr. Fiorvanti was wrong as there are site points, but he stated he had other data that did not "show up here." Mr. Fenningham stated he feels Mr. Geonnotti was saying the Board should listen to him and not Mr. Fiorvanti.

Mr. Murphy stated they presented through Mr. Geonnotti the evidence that everyone acknowledges that is unrefutable which is because of the application of the various Township Ordinances that regulate the various natural resources on the site, there is no building envelope on the site. Mr. Murphy stated the opponents suggest that evidences an intent by the Township that sites like that need to be preserved; however, Mr. Murphy stated what the Law says is that a property owner is entitled to make a reasonable use of their property as it is currently Zoned. He stated the Zoned to be developed as a single-family home. He stated absent relief from the Ordinance, they cannot do that.

Mr. Murphy stated that Ms. Kirk and Mr. Fenningham referred to the original Plan that contemplated a larger home in a different location on the site; and as a result of input from their opponents and the Township, a Revised Plan was submitted that dramatically reduced the size of the house, changed its location, and eliminated multiple Variances that had been originally requested.

Mr. Murphy stated he does not believe anyone would quarrel with the fact that the size of the home today on the Plan that is before the Board is consistent if not smaller than other homes in the neighborhood. He stated the scope of the relief that they are seeking as a result of the reduction in size of that home is in their view the minimum relief that they could obtain in order to build a reasonably-sized on the Lot. He stated if they do not obtain relief, the site is sterilized. He stated the Zoning Hearing Board has dealt with similar Applications in the past, some of which he has been involved in. He stated in the event that the Board would reject the Application and sterilize the Lot, there will be a Claim against the Township for a de facto taking because effectively that is what would occur here if the Board does not grant relief.

Mr. Murphy stated with regard to the issue of the survey, it is a matter of credibility, and he appreciates the fact that some Board members have experience in this. He stated the Board has heard Mr. Geonnotti Testify as to how their survey was done. He stated that survey was done in January of this year, and they did not submit the Application until a couple of months after that; and they did the survey with no preconceived notion of what it would show or how they would lay out a house. He stated if there is a result-oriented outcome, it is the Opponents having done the survey after they had already expressed their Opposition and knew where they wanted to go and “magically” their surveys differs from the Applicants. He stated the Opponents survey was done many months after they entered the Case and expressed their opposition.

Mr. Murphy stated in terms of what obligation a property owner has, he feels it is ironic that the Opponent does not feel the need to take any care to mitigate any impact that his property has on other downstream property owners; and if he did, he would not have mowed and manicured his grass to the edge of the creek which some Board members previously inquired of.

Mr. Murphy stated he feels that it is above reproach that anyone could argue that the Revised Plan and revised scope of relief and all the precautions that they have taken in the design of the Plan and the stormwater measures does

everything possible to mitigate any adverse effect on downstream properties. He agreed that their Plan does presume that the proposed home is not in the floodplain.

Mr. Murphy stated they believe that they are entitled for relief and have made the case that they are entitled to relief. He stated no one has challenged the fact that there is no building envelope based on the way the Ordinance is today. He stated they are willing to accept the Conditions that the Township outlined in Exhibit T-1 as a Condition of any relief that the Zoning Hearing Board may grant. Mr. Murphy stated under the Ordinance, they are entitled to build a single-family on the property.

Mr. Edward Boock, 598 Countess Drive, stated it is not that there is not an envelope to building on – it is negative. He stated the front setback is actually further back than the rear setback. He stated the two engineers are 2/10ths apart, and each one of them stated that there is a 1/10<sup>th</sup> margin of error which means that the middle is the overlap which would be the likely place for it to be; and he believes that overlap put the property in the floodplain. He stated they are asking for reasonable accommodation to build the house, but as members of the community they want to have the same reasonable accommodation for properties downstream and that our community is not damaged; and he asked the Board to consider that.

Mr. Boock stated he feels it is reasonable with a Township that has all of these setbacks to require them to have a setback off of the floodplain. He stated they are asking for the normal setback and then they are asking for the 100' wetland buffer area so they are at 120' for what they are asking. He asked if it is fair and reasonable to give them 110' and have them 10' off the floodplain to give a little bit. He stated they are entitled to build a property, but they are not entitled to build whatever size property they want. He stated they could make the footprint of the house a little bit smaller to grant that little bit of space difference.

Mr. Boock stated when he brought up the point that the downspouts from the house behind it upstream would flow right to the rain garden, the Board asked him if that was in the calculations, but he had no idea; however, we never asked the Applicants if that was in their calculations because that is all additional water that is going to overflow directly into the creek if it is not in their calculations, and that is a substantial amount of water.

Mr. Boock stated whenever someone wants to put something over top of a piece of infrastructure, it is also brought up by the Zoning Hearing Board that if that has to be replaced or fixed who will pick up the cost of that replacement. He stated they want to build a long driveway over a storm pipe; and if that storm pipe has to be replaced or fixed or if the Township wants to put in grease traps or oil traps at the end to prevent road dust and things from getting into the creek, he asked who would pay the cost of removing the driveway and replacing the driveway; and he asked if that would fall onto the Decks or would that fall onto the Township. He stated in previous cases the Zoning Hearing Board pushed back on residents for things, but he has not heard them push back on this particular project. He stated this project will effect one hundred properties downstream and the lake which serves as a public park for the community. He stated he feels by eliminating the buffer zone for the water run-off, which the point of is to purify and filter some of the water, and collecting it in a rain garden and injecting the excess water directly into a storm drain and then directly into the creek, they are likely to be creating dirtier water for the Township because they are by-passing the wetlands buffer area which is serving as a filter. He stated this project will create dirtier and higher volumes of water which will cause erosion and other issues, that is not reasonable to accommodate this. He stated they could come back with another Plan that is more reasonable to the surrounding properties and the community in general.

Mr. Boock stated their rain garden was about 30% smaller than what their water calculations were, and he has never seen the Zoning Hearing Board take a Plan that “was so far off” and not question it a little bit to find out where that extra space is going to go. He stated he would like to know where they are putting the other 30% of the rain garden.

Mr. Zamparelli stated he always feels the Board does what is reasonable and take into consideration public comment.

Ms. Nancy Powers, 31 Edgewood Road, stated she stands by her original comments. She stated she is at the end of Edgewood Road, and she is vehemently opposed, and she thinks it is destructive for the all the reasons that were already mentioned. She stated she is restating the obvious, which is her severe opposition to the Township granting this Variance.

Mr. Zamparelli thanked the Applicants and the opposition for the work they did for their clients. He stated the public comment has also been tremendous, and the Board does consider that. Mr. Zamparelli stated if there is to be a Motion it should be very specific and accommodate what the Township has requested and anything else that should be considered.

Ms. VanBlunk stated she would like Mr. Flager to address some of the Case Law. She stated the Board did not get a copy of the Decision that was provided to the Zoning Hearing Board solicitor, and she particularly noted the Kowalski Case. Mr. Fenningham stated he provided all Counsel with copies of the Kowalski Case in June. He stated with regard to the Morgan/Millstone Case, he has a copy with him this evening that he could provide to Mr. Flager. He stated that is the November 16, 2021 Decision of the Pennsylvania Superior Court.

Mr. Murphy stated he does not believe Kowalski is applicable at all because it deals with other issues dealing with stormwater not with the issue that is in front of the Board. Mr. Fenningham stated it dealt with the development of an upgradient property that caused water to slow onto Kowalski's property so it is on point. Ms. VanBlunk asked if that was a Zoning Decision or a Civil Case, and Mr. Fenningham stated it was a Civil Lawsuit. Mr. Murphy stated it was Superior Court, not Commonwealth Court, not a Zoning Case. Mr. Fenningham stated it was a case brought for continuing trespass and public and private nuisance, and it made Law in Pennsylvania. He stated it underscored the prior Law and made it clear what the upgradient property owner's obligation is if it artificially changes the direction of surface water flow. He stated it indisputably added that the measurement, however, slight, which is what the Morgan Case upheld an Injunction granted to the downstream property owner to cause the upstream property owner to be compelled to abate the flow. Mr. Fenningham stated if the Board is inclined to grant relief and the property is developed, and there is however slight water flow, the Decks will be open to litigation to abate whatever harm is caused by surface water flowing onto downstream properties. Mr. Fenningham stated the Case Law in Pennsylvania says that legal liability exists whether a Zoning Board grants relief or whether a Township issues Permits for building, regardless that the property owners' rights are equal to if not greater than the upstream property owner who wants to change things and cause change in the direction of surface water. He stated he feels that is a fair summation of the Cases.

Mr. Murphy stated that has always been the case.

Ms. VanBlunk asked about the de facto taking, and she would disagree slightly with Mr. Murphy about a ruling yea or nay is 100%, and it is only on the Plans submitted – perhaps not a different submission. She stated she would like to know more about that since she did not hear Mr. Fenningham say anything about that when Mr. Murphy mentioned it. Mr. Murphy stated the Board could meet in Executive Session with Mr. Flager.

Mr. Solor noted the environment study which has been mentioned, and he asked where in the review process that would take place. Mr. Majewski stated this property is within two miles of the Delaware River. He stated the property abuts Silver Creek which flows to Silver Lake, to the Golf Course, and then to the Delaware Canal which then goes south of Bristol before it enters the Delaware River. He stated since technically the property is not within the Delaware River, that would not be applicable in this Case.

The Board went into Executive Session at this time.

When the Board reconvened, Mr. Flager stated that the Board met in Executive Session and discussed some of the legal issues related to the requested Variances.

Mr. Solor stated in reviewing the Township's Exhibit 1 with the proposed Conditions, he asked if the Decks would consider further Conditions beyond what was proposed by the Township such as the point about access for maintenance to the culvert, potentially a description pushing back the property boundary a little bit farther to account for a split between the differences regarding base flood elevation.

Mr. Murphy stated the issues that have been raised tonight about the specifics of the stormwater design of the rain garden, etc. normally would be Conditions of approval that would be subject to Mr. Majewski and the Township engineer's review, and they would accept that. He stated they would consider other Conditions subject to the review of the Township engineer and Mr. Majewski. He added that with regard to the Sewer Easement that is Recorded, if they were to build over it with the driveway, if the pipe within the Easement would have to be replaced, the pipe would be replaced, the property owner would have to re-pave the driveway; and that would be acceptable.

Mr. Dougherty stated he found both engineer experts to be believable. He stated this discussion is very difficult. He stated he is struck by the fact that no one came out in support of this, but there are one hundred people in the Township who are against this. Mr. Zamparelli stated that it is not uncommon that those who come out are against the Appeals.

Ms. VanBlunk stated she believes that property owners should be able to do with their property within the Township Ordinances, but she feels the Township has Ordinances for a reason, although not is to say that Variances cannot be granted. She stated her concern is that our Township have serious water problems, and a man died fifteen years ago during a very bad storm when there was serious flooding; and the Township responded to that. She stated she lives next to a creek and sees what happens when it rains hard, and it goes from a trickle to 4' to 5' and then it goes back down when the rain stops. She stated she now has a beaver dam next door to her property. She stated she sees what water can do. She stated she feels the equitable property owner is "playing with fire/playing with water," in that it is so close. She stated when she had her house removed from the floodplain, a few feet mattered in height. She stated the margin of error here is so close that she is very concerned that the neighbors will be effected as well as the property owner five years in the future. She stated she has grave concerns over the Plans.

Mr. Zamparelli stated he always had the opinion that they should be careful in telling people that they cannot do something with their Lot, although he does not people should be able to do anything with their Lot. He stated it is a Constitutional right to do something with your Lot; and if it has to be adjusted to get approval, that is what needs to be done. He stated he agrees that they are close, and he noted Ms. VanBlunk indicated that they had to raise their house. Mr. Zamparelli stated he does not feel that the Township is going to take over the Lot. He stated he agrees that there are issues around the Township with water.

Mr. Connors stated they have heard a lot from a number of people about the floodplain, the wetlands, stormwater, and building on this property; and it all ties back to the stream. He stated he agrees that water is very powerful and can do a lot of damage; however, he is concerned with the fact that the stream has no protections. He stated the stream is not healthy until you get past Ramsey. He stated there is a section between the Ramsey loop where it is in people's back yards, but it is protected by a lot of plantings and a lot of trees. He stated the stream is generally healthy there; and once you get above that it actually turns into a detention basin in a group



of people's back yards and it goes off into the woods. He stated downstream they have heard from the Lake Association that the Lake is very fragile, and he would agree with that; however, as you go down there, there is very little protection and almost everyone there has grass right up to the edge of the stream, and they are taking away all the protections of the stream. He stated if something goes wrong, grass does not hold well. He stated he would like to see a lot more protection for the stream and the wetlands associated with this project, but he also knows the power of water.

Ms. VanBlunk stated the homes were built in the 1960's, the area is being built out, and the water has no place to go except for the back yards. Mr. Connors stated a lot of those people decided to take away all of the plantings and the protections for the stream.

Mr. Dougherty stated he agrees that Constitutionally people should have the right to develop their land, and they have talked about making additional accommodations above and beyond what Ms. Kirk has suggested, and he would like to hear more about that. He added that he is concerned about the water resource and the ability to mitigate stormwater. He asked if there are ideas as to water mitigation that could be discussed and possibly be added into the Motion.

Ms. VanBlunk stated she feels this is up to the Applicant to do, which they did do by having discussions with the Township and Mr. Fenningham.

Ms. VanBlunk moved and Mr. Dougherty seconded to Deny the Appeal.

No vote was taken on that Motion at this time.

Mr. Solor moved to approve the Appeal and to Amend the proposed Township Conditions to include additional wetland restoration in the buffer zone and adjacent to the creek to help mitigate overall flows going downstream, and also include that the Conservation Easement be signed prior to the issuance of a Building Permit.

Mr. Flager asked for further clarification about the wetland restoration, and Mr. Solor stated it would be within the wetland buffer zone to the creek as defined that it include more than just additional trees, and it should include appropriate wetland plantings in discussion with the Township engineer, and also that the Conservation Easement be signed prior to the issuance of the Building Permit. Mr. Connors stated the language with regard to the

planting is a little vague, and Mr. Solor stated he is open to discussion. Mr. Connors asked if he would be open to identifying a density of plant material and a criteria that it be implemented by a landscape architect, and Mr. Connors agreed. Mr. Connors stated if the Motion would add minimum plant density within the stream corridor/wetland buffer of 2' by 2' for the entire area, he would support that Motion. Mr. Solor agreed. Mr. Solor stated he was going to term it as appropriate wetland plantings.

Ms. Kirk asked if the density proposal as offered by Mr. Connors is something that the Township is able to measure. Mr. Majewski stated there are a number of ways to restore wetland buffers and stream corridor buffers with a variety of plantings – grasses, trees, and shrubs. He stated the density of 2' by 2' might not work throughout that area, but he feels they are on the right track saying that appropriate wetland plantings subject to the review and approval of the Township and a landscape architect.

Mr. Connors stated it could be a problem if anyone who wanted to build anything would just put in a few shrubs, and he wants something that is very robust. He stated if they are comfortable with that, he would adjust the language. Mr. Majewski stated they should add “at an appropriate density.”

Ms. VanBlunk asked if they are just talking about on the edge, and Mr. Connors stated he is talking about the whole buffer. He stated if you look at the buffer currently, it is basically just grass. He stated if they could restore that, it would help with the water and slow the stream down so that the stream could work as it is supposed to. Ms. VanBlunk stated what would stop the owner from cutting the landscaping down ten years from now, and Mr. Connors stated it would be Deed Restricted.

Mr. Murphy stated what has been described would be acceptable to the Applicant.

Mr. Connors stated there has been a lot of discussion about the location of the floodplain, and he asked if the Applicants would be open to a requirement of a 50' swath over the run at a 10' interval/10' grid to really define what the floodplain is. Mr. Majewski stated he was thinking about that since the Opponents had indicated their surveyor said there was a 0.1' error, and the Applicant's engineer has one elevation while the other engineer has a 2/10ths difference, and that might be right in the middle given that 0.1' margin of

error that is typical for that type of equipment. He stated he feels it would be appropriate to get additional elevation information along the rear of the home to confirm the floodplain. He stated also as part of the Building Permit process, it would be required that they have the home elevated above that elevation since even if they are not in the floodplain, it would still need to be elevated. Mr. Connors stated he is mindful of people downstream not wanting to the floodplain impacted, and he agrees with them. He stated he was would like to “blow the point density up in that area for the survey,” and have them submit that Plan, signed and sealed, as part of the Development package so that it is on Record, and we can require the elevation points for that building footprint as well. Mr. Majewski stated that would make sense.

Ms. Kirk asked for a clarification of the third Condition that was just discussed. She asked how we are going to get additional elevation info, and she asked if they are going to rely on FEMA maps. Mr. Connors stated he would propose that the surveyor go back out. Ms. VanBlunk asked which one. Ms. Kirk asked if they are going to ask each of them to choose a third party. Mr. Connors stated he is proposing that the developer goes back out, and every 10’ in a grid, take an elevation shot; and that would be on both sides of where the floodplain line is, based on elevation. He stated that higher point density would allow for a more accurate representation of the floodplain, and it would be for the entire run as it pertains to the back yard. Mr. Zamparelli stated that would make it definitive where the floodplain is, and Mr. Connors agreed that would be his intent. Mr. Zamparelli stated he would agree with that.

Mr. Flager stated if it was found to be in the floodplain, they would not be able to comply, and they would need an additional Variance. Mr. Connors stated he would suggest that they not come in for that Variance, but to adjust their building “for print.” Mr. Solor stated he would agree with this.

Ms. Kirk stated she wanted to make sure that any Conditions imposed would be able to be clearly enforced.

Mr. Majewski noted what the proposed Conditions for approval would be besides the ones that the Township had recommended as follows:

- 1) Provide additional wetland restoration with appropriate wetland plantings to mitigate downstream flooding, use appropriate plant density subject to review and approval of the Township engineer and a landscape architect;

- 2) The Conservation Easement be signed prior to the issuance of a Building Permit;
- 3) The Applicant to provide additional elevations on a 10' by 10' grid in the area of the floodplain to confirm the exact location of the floodplain.

Mr. Solor added that should be done by a licensed surveyor.

Mr. Murphy stated the grid would be where the rear dwelling line would be.

Mr. Connors stated he wants to make sure of where the floodplain is, and Mr. Majewski wants to know where the building is, horizontally and vertically. Mr. Connors stated he knows it has been submitted, but he wants it on the Record that the stormwater system will be sized for the one hundred-year storm. Mr. Connors stated the Township indicated that they wanted a split rail fence, and Ms. Kirk agreed. Ms. Kirk stated at Mr. Majewski's recommendation, it should be that a split rail fence be placed in the buffer area to clearly identify the buffer area to prevent any other type of structures or other impervious encroachment in that area. Mr. Solor asked with regard to the split rail fence, have they not sometimes required signage on the fence, and Mr. Murphy agreed. Mr. Solor asked that to be added as well.

Mr. Zamparelli stated it should be made clear in the Motion that they do not want the structure in the floodplain. Ms. VanBlunk stated the Application states that it is not a floodplain. Ms. VanBlunk stated she feels the Amendment make the Applicant prove with additional evidence that it is not in the floodplain; and if it is, the Application by default is not approved. Mr. Solor stated they would have to adjust the building envelope. Ms. VanBlunk stated that is not her understanding. She stated her understanding is that if it is in a flood zone, then the Applicant would have to come back with a whole new Plan and a whole new Application. Mr. Connors stated he would presume that if they wanted to build in the floodplain, they would have to come back in because the Board is not approving building in the floodplain. Mr. Flager stated that is correct as they have not requested a Variance to build in a floodplain. Mr. Connors stated if that line comes in, and they choose not to come back in, they would need to adjust their building footprint in order to be compliant. Mr. Flager stated they would not be able to build the Plans as submitted. Mr. Connors asked if they would need to come back in if they

reduce the building footprint to stay out of the floodplain; and Mr. Flager stated provided that the modification would not require additional Zoning relief, they would not have to come back in.

Ms. VanBlunk stated there is a margin of error; and if they do the additional survey with the points discussed in the Motion, and the margin of error is plus or minus 1/10<sup>th</sup> she feels it has to be outside the margin of error.

Ms. VanBlunk stated she is very uncomfortable with this being so close.

Mr. Flager stated Ms. VanBlunk does not want it 2" outside; and Ms. VanBlunk stated she does not want it 2" because she feels the floodplain could easily shift 2" a year.

Mr. Fenningham suggested three additional considerations as follows: That the 5,000 square foot Small Project Exemption be denied in this context, adding they are now evaluating on-site conditions review with a great degree of specificity. He stated he feels that it should be expressly stated that the further evaluation should be not within the "looseness" of the Small Project Exemption, which he feels does not apply. He stated the second consideration would be that the Board require full rate/velocity control calculations which they do not have and have not been submitted. He stated the third would be that the MacDonalds be allowed to participate in this "post-Motion effort/presentation/review" with the Building Office otherwise they are "in Limbo." He stated they have the choice of Appealing the Board's Decision or are waiting to see what happens; and he stated he has learned over the past twenty-nine years that "everything happens at this level," and beyond this level of public participation, an Opponent/Party is "not invited to the dance."

Ms. Kirk asked what Mr. Fenningham is looking for the MacDonalds to participate in. Mr. Fenningham stated the Board is asking the Applicant to submit more presentation to the Township which he and the MacDonalds will not get the opportunity to review and comment on. Mr. Murphy asked if he is talking about the flood plain elevation information, and Mr. Fenningham stated he is talking about whatever further presentation is being invited from the Applicant to prove what they did not prove here. Mr. Fenningham stated the Applicants stated that they proved it, but he is saying that that they did not prove it.

Mr. Murphy stated he understands that the Township engineer is being asked to be the arbiter of the Applicant's position versus Mr. Fenningham's position, and the Applicants have been asked to provide additional calculations to

Mr. Majewski as Mr. Connors recommended, and Mr. Majewski will be the arbiter. Mr. Fenningham stated his point is that they are being excluded from that evaluation.

Mr. Connors stated he is not going to give Mr. Fenningham's client the ability to review what he wants to design. Mr. Fenningham stated the Board would possibly be granting interim relief based on what has been presented which was subject to his review and opposition, and the next step would be to ask for a supplemental presentation which is not open to review.

Mr. Flager stated from a procedural and legal perspective, he does not know how they would do what Mr. Fenningham is requesting. He stated there is an Appeal period; and all of the things that are being discussed are going to be after the Appeal period runs. He stated if they would not agree with it he asked if they would they have veto power, and the Appeal period would have already passed. He stated from a legal procedural perspective, he does not know how they could carry out Mr. Fenningham's request although he understands why he is asking for it. Mr. Fenningham stated it is intended to be constructive. He stated if anyone files an Appeal, it stays further action; and in his experience, other Townships "shut the door" until the Appeal is resolved. He stated he is saying they do not want that to be the case, and if they can constructively participate in that process there could be a win/win." He stated he cannot forecast because he does not know exactly what is going to be required. He stated he is hearing that the Applicant is "getting another bite of the apple, and they are out of the picture." Mr. Zamparelli stated they are indicating that Mr. Majewski is reviewing it. Mr. Fenningham stated this is more complex than the ordinary Zoning relief being granted. He stated he is concerned that they would have to state that since they do not know what is going to happen, they will protect their rights by filing an Appeal, and that would then shut down the process. He stated he is not trying to shut down the process, but they could be in a position of having no choice.

Mr. Flager stated they are trying to shut down the process in that they are opposing the Application. He stated if the Board were to deny the Application, the process would be over.

Mr. Fenningham stated at this point there are two pending Motions which he finds very unusual. He stated the first Motion was to deny the Application, and then they moved away without a vote on that Motion, to consider an expansive "speaking Motion" which is to be formulated. He stated he feels it is worthy of the Board's evaluation, but he feels it requires a collaborative

effort to find out what would be the proposed Conditions. He stated he knows he has the right to Appeal, but he also feels that shuts down the process which he is not advocating.

Ms. VanBlunk stated usually the Board makes recommendations to an Applicant for certain provisions asking them if they would agree to accepting those Conditions. She stated the Title Record Holder and the Equitable Owner are not present so we do not know if they will accept the Conditions. Mr. Murphy stated he indicated that they would accept them. Ms. VanBlunk stated while this is a complicated Appeal, they usually ask the residents who are in opposition if they “could live with these proposals.” Mr. Zamparelli stated they have done that on certain cases. Ms. VanBlunk stated a number of people who have Party Status. She asked Mr. Fenningham’s clients would consider something like this. Mr. Fenningham stated the Condition is to do a further evaluation and issue a report to Mr. Majewski, but they do not know what that report will contain, and whether they agree that it is any more credible than what they have seen at the Hearings which caused the Board to pause.

Ms. Kirk stated she understands what Mr. Fenningham is saying; however, on behalf of the Township, she would oppose the imposition of a Condition that is open-ended that requires the Township to consult with Mr. Fenningham and his client because there is no finality to the issue at hand and if there becomes a time where there is a conflict, she would ask how that would get resolved as they would be past “the Zoning matter.” Mr. Zamparelli agreed.

Mr. Fenningham stated what he is requesting is that they be provided the report, and they would issue comments to the Township and participate by providing their input. Ms. Kirk asked what would the purpose of that be. Mr. Fenningham stated if there is an evaluation involved in determining whether the Applicant has presented sufficient data, whether the data is consistent with what the Applicant concludes, he heard Mr. Connors say a “bright line – if it is in the floodplain – no relief.” Mr. Fenningham stated based on what he has presented with his expert, he does not know how they could change the outcome – and it will still be “this variance of expert opinion.” He stated what he did hear was a very definitive grid evaluation fixing the floodplain “with all of the criticisms and critiques about how it was done” before the Board. Mr. Fenningham stated if they get that definitive report, he is just asking for the opportunity to see it; but “in the darkness of not getting it,” he may have to file an Appeal.

Ms. Kirk stated if Mr. Fenningham believes that a report has been submitted, he has the right to request that report through the Right To Know Law.

Mr. Fenningham stated he has a thirty-day Appeal period, and the Township could take thirty days to answer his Right to Know Request.

Mr. Flager stated it would be like filing an Amicus Brief, and they want to have an opinion on it and have Mr. Majewski and the Township engineer to review it. Mr. Fenningham stated they want the Township to have the benefit of their input. Mr. Flager stated there could be a compromise that any of these submissions would be shared with Mr. Fenningham. Mr. Connors stated he can do that through the Right to Know. Mr. Flager stated the only issue with that is that you initially have the five-day period, and additional time can be requested, and he is not sure how quickly the process will move, and there could potentially have a time issue if there has been an approval with the Township. Mr. Zamparelli stated sharing information is fine, but he would not want them coming back. Mr. Flager stated the Board could make a Condition that the 10' elevation grid and the Buffer Plan with plantings could be shared with Mr. Fenningham. Ms. VanBlunk stated she does not know that would be happening within thirty days. Mr. Flager stated the issue that Mr. Fenningham is bringing up is that if he knows he can have access to that, and there is an Amicus, and he could submit any comments to the Township, at least his clients feel as though they are part of the process even though they have no power explicitly over it; and they at least know that their comments will be submitted to and reviewed by the Township, although the decision would still be made by the Township.

Mr. Fenningham stated as far as it being in the floodplain or not would could be done would to defer and ask the Applicant to supplement this Record. He stated no Decision would be made and no Appeal period would begin to run, and the supplementation would be on this Record and the Parties would have the right to review the presentation, and then the Board would make their Motion, and they would be outside of the issue of sharing or not sharing the information.

Ms. VanBlunk stated that tonight is her last Zoning Hearing Board. Mr. Murphy stated he knows that it is her last meeting, and he does not want to “have to deal with a different Board who has not read the Transcripts” having to weight in at a future time.



Mr. Dougherty asked Mr. Majewski how he would feel about working with Mr. MacDonald or receiving his input on this project. Mr. Majewski stated he has no problem with sharing information with the Applicant as a Right to Know; and if they saw anything that they felt which is out of order, they would work that out. He added that both Witnesses were very credible, and the difference was a couple of inches, and he feels it will be right down the middle; and done the proper way, he feels it will satisfy everyone “to the extent that they can be satisfied.”

Ms. VanBlunk stated she feels they need to clarify the second Motion. She agreed to withdraw her Motion to deny.

Mr. Majewski reviewed the Conditions of the second Motion as follows:

- 1) The wetland buffer area be extended 50’ with additional trees being planted as recommended or required by the Township including provide additional wetland restoration with appropriate wetland plantings to mitigate downstream flooding. Use appropriate plant density subject to the review and approval of the Township engineer and a landscape architect;
- 2) The wetland buffer will be further restricted on the Record by the Filing of a Conservation Easement Declaration of Restrictions which will prohibit any future construction of any buildings or structures within the buffer rea. Said Easement will be signed prior to issuance of the Building Permit;
- 3) The wetland buffer area will be set off by a split rail fence including appropriate signage so that nothing can encroach into it;
- 4) All stormwater roof gutters will be constructed to downspouts that are directly connected and flow to the proposed rain garden;
- 5) Provide additional elevations by a licensed surveyor on a 10’ by 10’ grid in the area of the floodplain to confirm that the proposed building will not be within the regulated floodplain;

- 6) The design of the stormwater management system for the 100 year storm subject to the review and approval of the Township engineer.

Mr. Flager stated the only question is whether they want a buffer outside of the floodplain. Ms. VanBlunk stated she wants it outside of the margin of error, and she believes Mr. Connors was okay with that; and Mr. Connors agreed. Mr. Flager stated that would then need to be Amended accordingly.

Mr. Solor moved to approve the Appeal for the four listed Variances with the proposed Conditions as just read including that the survey that will include the base flood elevation determination includes the variance for margin of error.

Mr. Connors seconded. Motion carried with Mr. Connors, Mr. Solor, and Mr. Zamparelli were in favor and Mr. Dougherty and Ms. VanBlunk were opposed.

#### OTHER BUSINESS

Ms. VanBlunk was thanked for her years of service to the Township.

There being no further business, Ms. VanBlunk moved, Mr. Solor seconded and it was unanimously carried to adjourn the meeting at 10:10 p.m.

Respectfully Submitted,

Matthew Connors, Secretary

