

1. Appellant is the Lower Merion School District, a public school district organized and operating pursuant to the Public School Code, with offices located at 301 East Montgomery Avenue, Ardmore, PA 19003 (the “School District”).

2. Appellee is Lower Merion Township, a township of the first class, with offices located at 75 East Lancaster Avenue, Ardmore, PA 19003 (the “Township”).

3. The School District is the legal owner of certain properties located at 1860 W. Montgomery Avenue and 421 Saybrook Road within the Township (collectively, the “Property”).

4. On or about July 15, 2019, the School District filed Application LD #3829 with the Township (the “Application”) seeking preliminary land development approval for a preliminary land development plan for the Property prepared by Chester Valley Engineers dated July 15, 2019, as last revised on September 20, 2019, which consisted of the following: (i) the consolidation of the two parcels which comprised of the Property into one single 22 acre parcel; (ii) the demolition of all structures on the Property; and (iii) the construction of a new middle school building with a footprint of approximately 108,113 square feet, an athletic track, an athletic field, 4 tennis courts, 198 surface parking spaces and related improvements (the “Plan”).

5. On October 10, 2019, the Building & Planning Committee of the Township Board of Commissioners held a public meeting to consider the Application and the Plan. At that meeting, the Building & Planning Committee recommended granting conditional preliminary land development approval of the Application and the Plan.

6. During the October 10, 2019 public meeting of the Building & Planning Committee of the Township Board of Commissioners, the School District specifically objected to certain recommended conditions of approval, as set forth in greater detail herein. The

Building & Planning Committee of the Township Board of Commissioners recommended to impose those conditions over the objection of the School District.

7. On October 16, 2019, the Township Board of Commissioners held a public meeting to consider the Application and the Plan. At that meeting, the Township Board of Commissioners voted to grant conditional preliminary land development approval of the Application and the Plan.

8. During the October 16, 2019 public meeting before the Township Board of Commissioners, the School District again objected to certain conditions that were recommended to be imposed by the Building & Planning Committee of the Township Board of Commissioners. The Township Board of Commissioners voted to impose those conditions over the objection of the School District.

9. On October 30, 2019, the Township issued a written decision as required by the Pennsylvania Municipalities Planning Code (the “MPC”) granting conditional preliminary land development approval of the Application and the Plan (the “Conditional Approval”). A true and correct copy of the Conditional Approval is attached hereto and incorporated herein as EXHIBIT A.

10. The Conditional Approval includes all of the conditions which the School District objected to at the public meetings before the Building & Planning Committee of the Township Board of Commissioners and the Township Board of Commissioners.

11. On November 11, 2019, the undersigned counsel sent a letter to Daniel Bernheim, Esquire, President of the Board of Commissioners, seeking clarification regarding certain conditions of approval and how the Township intended to determine compliance with those conditions for purposes of final plan approval. A true and correct copy of the November 11,

2019 letter to Daniel Bernheim, Esquire is attached hereto and incorporated herein as EXHIBIT B.

12. A preliminary plan must be approved if it meets all specific, objective requirements under a subdivision and land development ordinance. *CACO Three, Inc. v. Board of Sup'rs of Huntingdon Tp.*, 845 A.2d 991, 993 (Pa. Cmwlth. 2004) (citing *Herr v. Lancaster County Planning Commission*, 625 A.2d 164 (Pa. Cmwlth. 1993)).

13. A preliminary plan is essentially conditional in nature in that after its approval, the developer must still fulfill all the requirements to obtain final approval. *Caco Three, Inc.*, 845 A.2d at 993-994.

14. A preliminary plan containing minor defects correctable by amendment must be approved subject to a condition that necessary corrections be made. *Id.*

15. Further, it is well established that a preliminary plan may not be denied on general, non-specific stands, such as the potential danger to the health, safety and welfare. *Id.* at 996 (citing *Sculffer v. Plymouth Township*, 379 A.2d 1060 (Pa. Cmwlth. 1977); *Harrisburg Fore Assoc. v. Board of Supervisors of Lower Paxton Township*, 344 A.2d 277 (Pa. Cmwlth. 1975)).

16. The Commonwealth Court has previously held that in the context of a conditional preliminary plan approval “if the applicant objects to the conditions, an aggrieved party may appeal the matter to the trial court for a determination of whether the objected-to conditions are legal. In making such a determination, the trial court may consider whether the conditions are appropriate to effectuate compliance with relevant statutes and ordinances and, if so, whether the objected-to conditions are reasonable in order to make the plan be in compliance. The trial court may strike conditions that are not legal. *Koller v. Weisenberg Twp.*, 871 A.2d 286, 292 (Pa. Cmwlth. Ct. 2005).

17. The School District has and continues to object to the following conditions of approval (the “Challenged Conditions”), which it believes are illegal, intentionally vague, are not appropriate to effectuate compliance with relevant statutes and ordinances, and are not reasonable to make the Plan be in compliance:

a. Condition of Approval #2 – The Applicant shall work with the Township to resolve the capacity issues at the Gulph Creek Pump Station.;

b. Condition of Approval #3 – The proposed building shall be constructed substantially as shown on the undated architectural plans and elevations prepared by Spiezel Architectural Group submitted to the Township on September 20, 2019 with the exception of any de minimis changes, including those mutually agreed to with staff.;

c. Condition of Approval #5 – The Applicant shall work with the Township staff to find additional ways to incorporate stone from the demolished building and retaining walls into the project.;

d. Condition of Approval #9 – The required 10 foot buffer shall be planted for the full width along the perimeter of the property abutting residential properties including the possible future connection to the off-site athletic fields. A note identifying the location of the future connection shall be added to both the civil site plan and the landscape plan.

e. Condition of Approval # 27 – The Applicant shall coordinate with the Township to investigate the installation of appropriate traffic calming measures on the following streets associated with this project with the understanding that the installation may not occur until after the school is complete and fully occupied: N. Stone Ridge Lane, Saybrook Road, Clairemont Road, Spruce Lane, Cedar Lane and Willowbrook Lane.;

f. Condition of Approval #37 – The Applicant shall pay the Township \$500,000 of the costs of off-site improvements relating to or occasioned by the proposed development, including but not limited to any and all design and construction costs for the improvements to or at the intersection of Montgomery Avenue and Spring Mill Road and on any neighborhood or other street. The contribution to the Township shall be submitted immediately following the award of the offsite improvement contracts.; and

g. Condition of Approval #39 – The Applicant shall work with the Township to allow free pedestrian access to and from the site from Saybrook Road during non-school hours when students are not assembled on site including evenings, weekends, and holiday/summer recess.

18. Conditions of Approval #2 and #27 are intentionally vague as to potentially require the School District to construct and/or contribute to off-site improvements at the Gulph Creek Pump Station and for traffic calming measures on surrounding streets. Condition of Approval #37, however, is unambiguous in its directive that the School District make a \$500,000 contribution towards the costs of off-site improvements relating to or occasioned by the proposed development.

19. Section 503-A(b) of the MPC explicitly provides that “No municipality shall have the power to require as a condition for approval of a land development or subdivision application the construction, dedication or payment of any offsite improvements or capital expenditures of any nature whatsoever or impose any contribution in lieu thereof, exaction fee, or any connection, tapping or similar fee except as may be specifically authorized under this act.

53 P.S. 10503-A(b).

20. Conditions of Approval #2, #27 and #37 all seek to impose upon the School District the requirement to construct or contribute towards off-site improvement in clear violation of the Section 503-A(b) of the MPC. These conditions of approval should be struck from the Conditional Approval as illegal conditions in violation of the MPC.

21. Condition of Approval #3 imposes upon the School District a requirement that the building be constructed substantially in accordance with architectural elevations provided to the Township except for de minimis changes mutually agreed to with Township Staff.

22. While the School District intends to construct the building substantially in accordance with the submitted architectural elevations, the Township's imposition of this condition handcuffs the School District's ability to make more than de minimis revisions to those preliminary renderings without obtaining the approval of the Township Staff.

23. Condition of Approval #3 is in no way related to the Plan or intended to effectuate compliance with the MPC and/or the Lower Merion Township Subdivision and Land Development Ordinance (the "SALDO"). Rather, it is an attempt by the Township to maintain control over the architectural and aesthetic aspects of the development through a condition of approval imposed during the land development approval process.

24. As such, Condition of Approval #3 is illegal in that it is not intended to address a deficiency that would bring the Plan into compliance with the MPC, the SALDO or other applicable statutes, ordinances or regulations and therefore should be struck from the Conditional Approval.

25. Condition of Approval #5 requires that the School District integrate stone from demolished buildings and retaining walls into the project. Condition of Approval #5 is not intended to address a deficiency that would bring the Plan into compliance with the MPC, the

SALDO or other applicable statutes, ordinances or regulations. Rather, it is an attempt by the Township to require the preservation and integration of certain structures and/or materials on the Property that were not listed on the Lower Merion Township Historic Resource Inventory.

26. As such, Condition of Approval #5 is illegal in that it is not intended to address a deficiency that would bring the Plan into compliance with the MPC, the SALDO or other applicable statutes, ordinances or regulations and therefore should be struck from the Conditional Approval.

27. Conditions of Approval #9 and #39 require that the School District provide pedestrian access routes throughout the Property. These conditions were imposed without regard for the fact that the Property will be utilized as a public middle school and that the School District has a duty and obligation to provide a safe environment. The School District's determination as to the appropriate public access that should be provided to the Property (which is done in consultation with school security experts) is paramount to that duty and obligation to provide a safe environment.

28. Nonetheless, the Township has failed to identify to the School District a statute or ordinance that requires that the Plan provide pedestrian access as required in Conditions of Approval #9 and #39.

29. Conditions of Approval #9 and #39 are not intended to effectuate compliance with the MPC, the SALDO, or other applicable ordinance or regulation. Instead, it is an attempt by the Township to elevate its priority of pedestrian-friendly development over the School District's mandate to provide a safe school environment.

30. As such, Conditions of Approval #9 and #39 are illegal as they are not intended to address a deficiency that would bring the Plan into compliance with the MPC, the SALDO or

other applicable statutes, ordinances and regulations and therefore should be struck from the Conditional Approval.

31. The Conditional Approval includes 72 conditions of approval. The School District has objected to those 7 conditions which are clearly illegal and were imposed for reasons other than to bring the Plan into compliance with the MPC, the SALDO and other applicable statutes, ordinances or other regulations.

WHEREFORE, the School District respectfully requests that this Honorable Court grant this Land Use Appeal and strike the Challenged Conditions from the Conditional Approval on the basis that the Challenged Conditions are illegal.

Respectfully Submitted,

**KLEHR HARRISON
HARVEY BRANZBURG LLP**

Dated: November 27, 2019

/s/ Carl S. Primavera
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Matthew J. McHugh, Esquire
Attorneys for Lower Merion School District

FROMHOLD JAFFE & ADAMS

Dated: November 27, 2019

/s/ Fred B. Fromhold
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