

**IN THE MATTER OF:** : **BEFORE THE BOARD OF**  
 : **COMMISSIONERS,**  
 : **SWATARA TOWNSHIP,**  
**APPLICATION FOR CONDITIONAL USE** : **DAUPHIN COUNTY, PA**  
**MUSHROOM HILL, LLC** :  
 : **NO. 2019-004-BOC**

## **DECISION**

### **I. FINDINGS OF FACT**

The Board of Commissioners of Swatara Township (the “Board”) makes the following Findings of Fact:

#### **THE APPLICATION**

1. On, September 6, 2019, Mushroom Hill, LLC (“MH”) submitted an application (the “Application”) to Swatara Township (the “Township”) seeking a conditional use for the construction of an industrial warehouse distribution facility (the “Project”), pursuant to §295-28(H) (Table) (Schedule of Uses) of the Swatara Township Zoning Ordinance of 2010, as amended (the “Ordinance”).

2. The Application was administratively complete when submitted and consists of a letter dated September 6, 2019, submitted by Charles M. Suhr, Esq., on behalf of the Applicant (the “Application”), along with the following:

- a. The Application form;
- b. A Narrative Attachment explaining the requested relief;
- c. Preliminary Traffic Assessment Report;
- d. A site plan showing the proposed improvements; and
- e. A check in the amount of \$750 as the filing fees for the Application.

## **THE PROPERTY**

1. The property subject to the Application is a certain ±165 acre tract of land located within Swatara Township bounded by Penhar Drive to the west, Mushroom Hill Road to the east, Chambers Hill Road to the south, and US Route 322 to the north. (the “Property”). (Exhibit A-3)
2. The Property is owned by Smith Land & Improvement Corporation (“Smith Land”). (Exhibit 4, Exhibit 5 and Exhibit 6)
3. MH has entered into a Purchase Agreement, dated March 20, 2019, with Smith Land to purchase the Property for use as a warehouse distribution facility. (Exhibit 7)
4. The Property is located primarily within the C-G General Commercial Zoning District, and partially within the M-L Light Manufacturing Zoning District and the R-S Single-Family Residential Zoning District, as set forth in the Ordinance.
5. The Application relates primarily to the portion of the Property within the C-G Zoning District.

## **HEARING, PARTIES AND EXHIBITS**

1. After proper legal advertising and posting of the Property, as required by the Pennsylvania Municipalities Planning Code (the “MPC”), 53 P.S. §10101 et seq., the Board conducted hearings on the Application on the following dates:
  - a. October 9, 2019;
  - b. November 13, 2019;
  - c. December 18, 2019; and
  - d. January 15, 2019.

2. MH was represented by Charles M. Suhr, Esq., of Stevens & Lee, 17 N. 2<sup>nd</sup> Street, Harrisburg, Pennsylvania 17101. (Exhibit 4; N.T. 7)

3. The Board was represented by its solicitors, Scott T. Wyland, Esq. and Kurt E. Williams, Esq. of Salzman Hughes, P.C., 354 Alexander Spring Road, Suite 1, Carlisle, PA 17015.

4. The Township did not participate as a party at the hearing. However, certain members of the Township staff presented testimony and exhibits (*see e.g.*, Township Exhibits A-I and N.T. 245).

5. Numerous residents of Swatara Township were present at the hearings and either obtained party status, or provided comments on the Application. A listing of resident parties is set forth in **Exhibit “1”**, attached hereto.

6. MH introduced the following exhibits, which were received into evidence without objection:

- a. Bio – Frank Petkunas (Exhibit 1);
- b. CRG Brochure (Exhibit 2);
- c. Application for Conditional Use (Exhibit 3);
- d. Deed – Book 49, Page 127 (Parcel No. 63-027-024) (Exhibit 4);
- e. Deed – Book 49, Page 138 (Parcel No. 63-035-001) (Exhibit 5);
- f. Deed – Instrument No. 20120012612 (Parcel No. 63-039-036) (Exhibit 6);
- g. Purchase Agreement (Exhibit 7);
- h. Conditional Use Plan (Exhibit 8);
- i. Site Plan (Color) (Exhibit 9);
- j. Bio – Fred Ferraro (Exhibit 10);
- k. Site Plan (Color) (Revised) (Exhibit 11);

- l. Bio – Jarred Neal, P.E. (Exhibit 12);
- m. Transportation Impact Study (9/27/2019) (Exhibit 13);
- n. Plan – Studied Intersections (Exhibit 14);
- o. Concept Plan – Roadway Improvements (Original) (Exhibit 15);
- p. Concept Plan – Roadway Improvements (Revised) (Exhibit 16);
- q. Plan with Profiles (Exhibit 17); and
- r. Applicant’s Proposed Conditions of Approval (Exhibit 18).

7. The Township Zoning Officer introduced the following exhibits, which were received into evidence without objection:

- a. Public notice of hearings (Exhibit TWP-A; TWP-B; TWP-C; and TWP-E);
- b. Photos of posting of the Property (Exhibit TWP-D);
- c. Notice to neighboring property owners (Exhibit TWP-F);
- d. Planning Commission Review Letter dated October 7, 2019 (Exhibit TWP-G);
- e. Building and Codes Department Memorandum dated October 7, 2019 (Exhibit TWP-H); and
- f. Proof of Publication from December 10, 2019 (Exhibit TWP-I).

8. The residents/objectors introduced the following exhibits, which were received into evidence:

- a. Environmental Monitoring information (Exhibit Brown-1);
- b. Swatara Action Team Requests (Exhibit Brown-2);
- c. Summary of CRG’s Conditional Use (Exhibit Brown-3);

- d. Land Development Process with HOP (Exhibit Brown-4);
- e. Air Quality Resolution (Exhibit Brown-5);
- f. Photographs (Exhibit Noles-1);
- g. Resolution from CD School Board (Exhibit Faleshock-1); and
- h. Email on Warehouse Proposal (Exhibit Garlic-1).

### **TESTIMONY AND PUBLIC COMMENT**

1. MH presented testimony from the following witnesses:
  - a. Frank Petkunas;
  - b. Fred Ferraro; and
  - c. Jarred Neal, P.E., qualified as an expert traffic engineer.
2. MH witnesses provided the following testimony:
  - a. Frank Petkunas is employed by CRG Integrated Real Estate Solutions (“CRG”) and is based in Conshohocken Pennsylvania. N.T. 12.
  - b. CRG is the sole owner of MH, a single purpose entity set up to develop the Property. N.T. 15.
  - c. Frank Petkunas is authorized to testify on behalf of both CRG, as well as MH. N.T. 15.
  - d. CRG is a national real estate development company with warehouse development projects throughout the United States. N.T. 13-14; Exhibit A-2.
  - e. CRG’s facilities are leased to national tenants, primarily for distribution of consumer and nondurable products. N. T. 14.

f. The site plan for the proposed development is set forth in Exhibit 8 and proposed approximately 1.2 million square feet of warehouse distribution space over four buildings. N.T. 20, Exhibit 8.

g. One proposed building ±176,000 square feet is within the ML Zoning District, and is permitted as of right. N.T. 20; 23.

h. Three buildings are proposed within the C-G Zoning District: Building A and Building C at ±350,000 square feet, and Building B at ±319,000 square feet. N.T. 20; 23; Exhibit 8; Exhibit 9.

i. Primary access to the Property has not been finally determined; however, initially access is proposed with an intersection on Penhar and Chambers Hill Road, with an emergency access on Mushroom Hill Road. N.T. 20-21.

j. Parking is provided for 100 employees for each building. N.T. 21.

k. No truck parking or truck dock doors will be along the southern building faces, but, rather, will be along the US-322 side, away from the residential area. N.T. 24-25.

l. The Property is over 15 acres in size. N.T. 26.

m. The buildings are being built on a speculative basis, as no tenants have been identified. N.T. 27

n. Potential users will be distributing consumer products, receiving products on a daily basis on a large truck, stored on a short-term basis to be broken down and distributed out on smaller trucks the next day. N.T. 27.

o. Speculative development (*i.e.*, without an identified tenant) is common industry practice. N.T. 28.

p. No adverse environmental impacts are anticipated. Truck noise is mitigated by putting the trucks as far away from the residential area as possible, and all distribution activity will take place indoors. N.T. 29-30.

q. No smoke, steam, noxious fumes, dust, litter, glare or electrical disturbance would be generated, as no manufacturing will be occurring, and litter and trash will be contained. N.T. 30.

r. Public water and public sewer will be provided to the buildings. N.T. 30.

s. The site layout, internal circulation, parking and buffering requirements set forth in the Zoning Ordinance are met with the proposed layout. N.T. 31; Exhibit 9.

t. The Project will not substantially change the character of the residential neighborhood to the south, primarily as the buildings are set to the north as far as possible, truck activity is limited to the north side of the buildings, and additional buffering will be added along the southern Property line. N.T. 32; N.T. 29-30.

u. The buildings will have ESFR Sprinkler Systems, and no hazardous or toxic materials will be stored in the buildings. N.T. 33.

v. The Property does not have any wetlands or critical wildlife areas, and steep slope areas will not be unnecessarily disturbed. N.T. 33; Exhibit 3.

w. The hours of operation will be 24 hours per day, with the bulk of activity occurring between 7 a.m. and 9 p.m. N.T. 34.

x. Fred Ferraro oversees the design, entitlements and construction of buildings for CRG and is authorized to testify on behalf of both CRG, as well as MH. N.T. 36-37.

y. Fred Ferraro testified on the changes to the Application recommended by the Township Planning Commission, as generally shown on Exhibit 11 and as follows:

i. An emergency road access is shown from Rupp Road through the Property. N.T. 39

ii. A nature trail with public access, constructed and maintained by MH, is shown through the Property. N.T. 39-40.

iii. Additional buffering is shown along the southern Property line adjacent to the residential neighborhood. N.T. 41.

iv. The access point on Chambers Hill Road would be eliminated, with all traffic accessing the Property through Penhar Drive. N.T. 42.

z. Jarred Neal, P.E., is a traffic engineer with Traffic Planning and Design and is an expert traffic engineer. N.T. 44-46; Exhibit 12.

aa. Jarred Neal prepared a Traffic Impact Study (“TIS”) for the Project in accordance with and in the standard format approved by PennDOT. N.T. 47; Exhibit 13.

bb. The TIS studied the following intersections:

i. Penhar Drive and Lewis Road/SR 322 East Ramp;

ii. Chambers Hill Road and Penhar Drive;

iii. Penhar Drive and Paxton Street;

iv. Paxton Street and SR 322 West Ramps;

v. SR 322 and Mushroom Hill Road;

vi. Chambers Hill Road and Cordial Lane/Proposed Site Driveway; and

vii. Penhar Drive and Proposed Site Driveway. Exhibit 13, Exhibit 14.



cc. Traffic counts were obtained at the studied intersections, as set forth in Exhibit 13, Table 1.

dd. The Project proposes 169 weekday, morning peak hour trips and 171 weekday, afternoon peak hour trips. Exhibit 13, p. 7.

ee. The TIS proposes specific roadway improvements to the proposed site driveway and Penhar Drive, the proposed site driveway and Chambers Hill Road, the Penhar Drive and Chambers Hill Road intersection, and Penhar Drive and SR 322 East Ramps. Exhibit 13, p. 1-2.

ff. With the proposed roadway improvements, the intersections studied will meet the level of service requirements set by PennDOT when the traffic generated by the Project in an estimated 2024 opening year and 2029 design year is included. Exhibit 13, Table I.

gg. All of the proposed roadway improvements will require approval and permitting by PennDOT, which will occur concurrently with the land development plan process for the Project. N.T. 60-61.

hh. Possible alternate access to the Property with no driveway on Chambers Hill Road was studied, resulting in no significant changes to the conclusions set forth in the TIS with similar roadway improvements being made along Penhar Drive. N.T. 61-63; Exhibit 16.

ii. Access to the Property off US 322 is not feasible and would likely not be permitted by PennDOT. N.T. 63.

jj. The Project, as an industrial warehouse distribution facility, would generate approximately 90% less traffic than a shopping center on the Property. N.T. 65.

kk. When representatives of the Applicant and the Township met with PennDOT, PennDOT recommended the following:

i. That driveway access to the Project is maintained on Chambers Hill Road, and is restricted to a right-in, right-out turning movement.

ii. That the driveway access to the Project from Penhar Drive have a restriction prohibiting the left-out turning movement. N.T. 97-100;

ll. Additional screening for the adjacent residential areas is to be located along the southern border of the Property, as generally set forth in Exhibit 17.

mm. The additional screening would create a visual barrier of the southern side of the proposed buildings. N.T. 107.

3. Testimony and/or cross examination of the Applicant's witnesses was provided by various parties/objectors as follows:

a. Brian Faleshock questioned Mr. Ferraro about whether trees were the most effective sound barriers in a residential area, to which Mr. Ferraro replied "I don't know." N.T. 115. Mr. Ferraro did respond that "[y]es, it sounds like [that] way would be more sufficient than trees." N.T. 116.

b. Mr. Ferraro further testified under cross examination from Mr. Faleshock that he was aware of the residential area as well as the nearby elementary school but "[a]t this point, were not looking at those arguments.": N.T. 117.

c. Under cross-examination from Lisa Neiter, Mr. Petkunas testified that the Applicant had no prospective tenants for the Project. N.T. 141.

d. Eric Epstein testified regarding the Application that “In general, we just believe that this should be rejected on its face. It’s general planning, it does not have substantiation. More importantly, this is the crux of the argument tonight. Their Application lacks facts. Supporting documentation, and any evidence. It’s based on a promise. And I think we need a little more than that.” N.T. 185.

e. Eric Epstein also testified that the Board may place limits on the hours of operation of the Project. N.T. 194; Ordinance §295-18.C.(5).

f. Eric Epstein further testified that the Application should be rejected on its faced based on a lack of facts presented. N.T. 185. Specifically:

i. The traffic study submitted is premature and based on outdated materials. Exhibit A-3, para. C.; N.T. 185.

ii. Lack of information regarding site geology, erosion, geography, hydrology, sedimentation, sewage, and steep slopes. Exhibit A-3, para. B.7.; N.T. 186, 193.

iii. Lack of information regarding the proposed scale of operations. Exhibit A-3, para. B.2.; N.T. 190.

iv. Lack of information regarding environmental impact. Exhibit A-3, para. B.3.; *Id.*

v. Lack of information regarding geophysical evaluations and local karst geology. *Id.*

vi. Lack of subdivision plan. N.T. 191.

vii. Lack of information regarding impact on the surrounding neighborhood. Exhibit A-3, para. B.5.; *Id.*

viii. Lack of information regarding significant hazards. Exhibit A-3, para. B.6.; N.T. 192-193.

ix. Lack of information regarding specifics on hours of operation. Exhibit A-3, para 8; N.T. 193-194.

x. Lack of earth berms in combination with landscaping within buffer yards to provide additional protection to dwellings and residential areas.<sup>1</sup> N.T. 203; Ordinance §295-123.D.(5)(i).

g. Meghan O'Neill testified regarding the lack of required 70-foot buffer yard<sup>2</sup> at Building C.<sup>3</sup> N.T. 207.

h. Ms. O'Neill also testified in opposition to the Project operating on a 24/7 basis. N.T. 209.

i. Bob Goucher testified regarding the number of vehicular fatalities in the area around the Project and the need to get truck traffic routed to major highways and off of Chambers Hill Road, which is a residential area. N.T. 221-222. Mr. Goucher further testified that the area lacks sidewalks and is curvy and windy and is a recipe for disaster. N.T. 222. He testified that Chambers Hill Road is not equipped to handle truck traffic. *Id.*

j. Chad Martin testified that the Applicant submitted an incomplete application and therefore the Board had a legal basis to reject the Application. N.T. 230.

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<sup>1</sup> An earth berm may be required as a condition of a conditional use approval. Ordinance §295-123.D.(5)(i).

<sup>2</sup> Buffer Yard is defined in the Ordinance at §295-22. As "A strip of land that separated one use from another or feature and is not occupied by any building, parking, outdoor storage or any use other than open space or approved pedestrian pathways.

<sup>3</sup> Ordinance §295-123.D.(1)(b), requires a 70-foot Buffer Yard against a principal dwelling or an undeveloped residentially zoned lot. Upon closer examination of Exhibit A-8, the Board find that Building D also lacks the required 70-foot Buffer Yard. See Exhibit A-8, pp. C2.1 and C2.2.

k. Michael Tuckey testified that the Project was going to change the character of the community and was definitely going to hurt the community in that way. N.T. 231. He further testified that traffic study was inadequate. *Id.*

4. Public comment was taken by the Board on January 15, 2020, a representative sampling of which is outlined below:

a. Andrew Ralston, Esq., representing Feeser's Foods, provided comment that the proposed use, without providing the information required by Ordinance §295-94.1., is not a permitted use in the Township. N.T. 261-262.

b. Lisa Neiter commented that the Applicant's traffic study was already one year old. N.T. 263. Ms. Neiter also commented that the proposed buffer zone was inadequate. N.T. 264.

c. Meghan O'Neill commented that the Project will change the character of the neighborhood and have a negative impact on the surrounding community. N.T. 268.

d. Bill Bragonier, a retired geologist, commented that there are several issues concerning the Project being built where proposed, including:

1. Groundwater contamination from blasting and septic drain field leaks. N.T. 270.
2. Radon. N.T. 271
3. Warehouse construction on karst geology. N.T. 269.

e. Robert Helm commented regarding the long-term exposure health concerns to residents near the Project area from diesel exhaust emissions, including irritation to the respiratory tract, asthma and COPD. N.T. 272-273. Mr. Helm also commented that those adversely affected by these impacts could file lawsuits for accountability and compensation

against the Township Administration for having approved the project while being fully aware of the probability of the consequences it would have on the health of nearby residents. N.T. 273.

f. Tom Garlic commented that a warehouse located 35 feet from his property line would result in him hearing it, seeing it and smelling it and therefore, it would alter the characteristic of his neighborhood. N.T. 277.

g. Michael Tuckey commented that the Application is not complete and shows insufficient buffering between the Project and nearby residences. N.T. 278.

h. Bob Hopstetter commented on an informal poll of the room taken earlier in the evening by Mr. Tuckey when he asked by show of hands, who present was in favor of the Project (N.T. 277). Mr. Hopstetter commented that he did not see if the Applicant raised their hands, but with over 120 people present at the hearing, no one raised their hand in favor of the Application. N.T. 296.

i. Michael Gilberthorp commented that there may be federally protected migratory game birds, including falcons, hawks, eagles and plenty of doves, that nest on the Project site and use it as a wait point in their flights to north and south. N.T. 300-302. Mr. Gilberthorp also commented that there is a school near the proposed site and we don't know what [Megan's] law violator is going to be driving a truck into that site. N.T. 301. Further, Mr. Gilberthorp commented that he was concerned with the protection of children and residents who may be bicycling or walking along Chambers Hill Road and that truck drivers from Kentucky, or from Arizona or New Jersey who will be coming to the site will not be vetted in order to protect the children that are going to be so close in the elementary school. N.T. 301.

j. Lee Barkus echoed one of Mr. Gilberthorp's concerns in his comments, stating that he cannot ride his bicycle along Chambers Hill Road anymore as there isn't a sufficient berm to walk.

## **II. LEGAL STANDARDS FOR CONDITIONAL USES**

1. A conditional use is nothing more than a special exception which falls within the jurisdiction of the municipal legislative body (i.e. the Board of Supervisors) rather than the zoning hearing board. *Bailey v. Upper Southampton Twp.*, 690 A.2d 1324, 1326 (Pa.Cmwlth. 1997). The fact that a use is permitted as a conditional use evidences a legislative decision that the particular type of use (in this case, warehouses) is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community. *Id.*; *Northampton Area Sch. Dist. v. East Allen Twp. Bd. of Supervisors*, 824 A.2d 372, 376 (Pa.Cmwlth. 2003); *Abbey v. Zoning Hearing Bd. of East Stroudsburg*, 559 A.2d 107, 109 (Pa.Cmwlth. 1989); *Warren Cty. Probation Ass'n v. Warren Cty. Zoning Hearing Bd.*, 414 A.2d 398, 399 (Pa.Cmwlth. 1980); *Foster Grading Co. v. Venango Twp. Zoning Hearing Bd.*, 412 A.2d 647, 649 (Pa.Cmwlth. 1980).

2. In *EQT Production Company v. Borough of Jefferson Hills*, 208 A.3d 1010 (Pa. 2019), the Pennsylvania Supreme Court held that in a Borough's conditional use proceeding, lay testimony concerning the applicant's existing operations in another municipality was admissible, relevant and probative of the question whether the application proposing the same use and operations would adversely affect the health, safety and welfare of the Borough's residents.

3. Appellate courts reviewing a governing body's adjudication of a conditional use application generally should defer to the interpretation rendered by the governing body. *See Smith v. Zoning Hearing Bd.*, 734 A.2d 55, 57 (Pa.Cmwlth.), *appeal denied*, 561 Pa.

664, 747 A.2d 904 (1999). “[A]s the entity charged with administering a zoning ordinance,” the governing body possesses knowledge and expertise regarding the ordinance. *Id.* at 58.

4. Therefore, a conditional use application that satisfies objective standards of the Zoning Ordinance must be granted unless the opponents present sufficient evidence that the use will generate adverse impacts not normally generated by this type of use, and that these impacts will pose a substantial threat to the health and safety of the community. *Greaton Props., Inc. v. Lower Merion Twp.*, 796 A.2d 1038, 1045 (Pa.Cmwlt. 2002); *In re Cutler Group, Inc.*, 880 A.2d 39, 43 (Pa.Cmwlt. 2003). Such evidence cannot consist of mere speculation, bald assertions, or personal opinions and perceptions of the effect of the use on the community. *Id.* Rather, opponents must demonstrate that there is a *high degree of probability* that the use will cause a substantial harm that is not normally associated with the proposed use. *Id.*; *Ruddy v. Lower Southampton Twp. Zoning Hearing Bd.*, 669 A.2d 1051, 1057 (Pa.Cmwlt. 1995).

5. Finally, the Board has it within its fact-finding power to draw adverse inferences from the failure of the Applicant to produce certain witnesses for testimony. *See, Jones v. Hamilton Township Zoning Hearing Board*, 65 A.3d 476 (Pa.Cmwlt. 2013) (table).

### **III. CONCLUSIONS OF LAW**

1. The hearings on the Application was properly noticed, advertised, and held in accordance with the MPC.

2. The Applicant has standing to submit the Application.

3. Due process was afforded to all parties to these proceedings.

4. The Board found the testimony of the Project’s opponents/objectors and all public comment to be credible.



5. All objections that were reserved during the hearings are hereby overruled, and the evidence admitted, submitted to the appropriate weight as reflected in this Decision.

6. The law recognizes that the Applicant has the burden to establish a *prima facie* case of compliance with the specific objective ordinance requirements in support of a conditional use application.

7. The Project proposes 3 warehouse distribution buildings. As such, it is a permitted use by conditional use approval in the C-G Zoning District. Ordinance §295-28(H) (Table).

8. “[A] conditional use is one specifically recognized by the legislature as consistent with the zoning plan.” *Aldridge v. Jackson Twp.*, 983 A.2d 247, 253 (Pa.Cmwlt. 2009). “As such, it is presumed the particular type of use does not, of itself, adversely affect public interest.” *Id.*

9. “In addressing an application for a conditional use, a local governing body must employ a shifting burden of persuasion:

a. First, the applicant must persuade the local governing body that its proposed use is a type permitted by conditional use and the proposed use complies with the requirements in the ordinance for such a conditional use.

b. Once [the applicant] does so, a presumption arises [that] the proposed use is consistent with the general welfare.

c. The burden then shifts to objectors to rebut the presumption by proving, to a high degree of probability, the proposed use will adversely affect the public welfare in a way not normally expected from the type of use.” *Aldridge*, 983 A.2d at 253.

10. An applicant for conditional use must demonstrate that the proposed use meets the applicable requirements of the zoning ordinance *when* the application is submitted. *Edgmont Township v. Springton Lake Montessori School, Inc.*, 154 Pa.Cmwlt. 76, 622 A.2d 418

(1993); *Appeal of Baird*, 113 Pa.Cmwlt. 637, 537 A.2d 976 (1988), *petition for allowance of appeal denied*, 521 Pa. 613, 557 A.2d 344 (1989). A promise to comply or conditions compelling future compliance cannot cure an otherwise noncompliant application. *Edgmont Township*.

11. The Applicant has the burden of proving compliance with the conditional use requirements. *In re Thompson*, 896 A.2d, 569, 670 (Pa.Cmwlt. 2006). An applicant is required to show at the time of the hearing that it met the requirements of the ordinance. *Baird*, 537 A.2d at 978. An applicant cannot merely promise to come into compliance at some future date. *Thompson*.

12. The Board has it within its fact-finding power in making conditional use determinations to make determinations regarding the credibility of witnesses. *See, In re Dolington Land Group*, 576 Pa. 519, 839 A.2d 1021, 1026 (2003).

13. The conditional use Application of MH, as filed, and with the testimony and exhibits provided at the hearing, did not establish that the Project meets the objective standards for a warehouse set forth in Ordinance §295-94.1, nor the buffer yard requirements for all uses set forth in Ordinance §295-123.

14. The Board concludes that the Application, testimony of the Applicant's witnesses, and the exhibits entered at the hearings, do not demonstrate that the proposed use is eligible to be permitted by conditional use pursuant to the Zoning Ordinance.

15. The Application, exhibits and testimony entered at the hearings was insufficient and did not provide information required by Ordinance §295-94.1. (sections reprinted in italics below for convenience) as follows:

*B. The applicant shall provide a detailed description of the proposed use in each of the following topics:*

(1)

*The nature of the on-site activities and operations, the types of materials stored, the frequency of distribution and restocking, the duration period of storage of materials, and the methods for disposal of any surplus or damaged materials. In addition, the applicant shall furnish evidence that the disposal of materials will be accomplished in a manner that complies with state and federal regulations.*

The Application did not provide information regarding the types of materials to be stored aside from “consumer products.” The Applicant provided only general information regarding the frequency of distribution and restocking and the duration of storage of materials. The Applicant provided no information regarding the methods for disposal of any surplus or damaged materials.

(2)

*The general scale of the operation, in terms of its market area, specific floor space requirements for each activity, and the total number of employees on each shift.*

The Application did not provide information regarding the general scale of operations aside from the size of the proposed warehouses. No information was provided regarding the market area nor specific floor space requirements for each activity. The Application provided only a statement that “Buildings of this size typically have +/- 100 maximum employees on site at any one time.”

Exhibit A-3, p. 2.

(3)

*Any environmental impacts that are likely to be generated (e.g., odor, noise, smoke, dust, litter, glare, vibration, electrical disturbance, wastewater, stormwater, solid waste, etc.) and specific measures employed to mitigate or eliminate any negative impacts.*

The Application did not provide adequate information regarding environmental impacts that are likely to be generated (e.g., odor, noise, smoke, dust, litter, glare, vibration, electrical disturbance, wastewater, stormwater, solid waste, etc.) beyond the general statement that “No adverse environmental impacts are anticipated. Regarding noise specifically, the Applicant proposed to

restrict truck traffic away from the residents to the south to reduce any noise impact. Exhibit A-3, p. 2.

(4)

*Site planning. The application shall include proper site layout, internal circulation, parking, buffering, and all other elements of proper design as specified in this chapter.*

The Application did not include sufficient Buffer Yards at Buildings C and D as required by Ordinance §295-123.D. See, Exhibit A-8, pp. C2.1 and C2.2.

(5)

*Neighborhood. The proposed use shall not substantially change the character of any surrounding residential neighborhood after considering any proposed conditions upon approval, such as limits upon hours of operation; safety.*

The Application did not adequately prove that the Project would not substantially change the character of the surrounding neighborhood. In fact, the evidence presented proved the opposite. There were no conditions of approval that would correct this deficiency in the Application, including a limit on the hours of operation of the Project. The screening proposed by the Applicant was woefully insufficient to adequately protect adjacent and neighboring residential areas from the impact of the proposed industrial use. The Project would clearly jeopardize safety in the immediate area, including traffic in the area of Route 322, Chambers Hill and Penhar Roads.

(6)

*The proposed use shall not create a significant hazard to the public health and safety, such as fire, toxic or explosive hazards.*

The Application was vague and ambiguous in its response, stating only that “[t]oxic or hazardous materials are not anticipated to be stored or processed in any great quantity.” Exhibit A-3, p. 2. No guarantees or assurances were given that the proposed use would not create a significant hazard to the public health and safety from toxic or explosive hazards as a result of the goods

stored at the Project. The Applicant appears to be attempting to preserve its right to store toxic or explosive hazardous materials within the Project, and it has not adequately explained to the Board how it will safely accommodate such risks.

(7)

*The proposed use shall be suitable for the site, considering the disturbance of steep slopes, mature woodland, wetlands, floodplains, springs and other important natural features.*

The Application failed to provide sufficient information that the proposed use was suitable for the site considering the disturbance of steep slopes, mature woodlands, wetlands, floodplains, springs and other important natural features. No information was provided by the Applicant regarding the known karst geology of the site and the surrounding area and the construction and blasting hazards that may result from the Project. No information was provided regarding existing steep slopes, mature woodlands or wetlands and how they would be accommodated in the Project site. Other considerations regarding site suitability, including the Projects proximity to an existing elementary school, impacts on nearby home foundations and on-site residential septic facilities, impacts on pedestrians, impacts on air quality and traffic volume on existing roadways, were not considered or at least not presented to the Board by the Applicant with any meaningful response to this requirement of the Ordinance.

(8)

*Hours of operation.*

Beyond a general statement that “I would expect 24-hour operations in these buildings,” the Applicant provided no specifics on the proposed hours of operation for the Project. N.T. 34.

16. Pursuant to Ordinance §295-19.C., the Board shall determine whether the proposed conditional use would meet the applicable requirements of the Ordinance. The same standards

shall apply to a conditional use as are listed in §295-18.C. for a special exception use. The Application, exhibits and testimony entered at the hearings was insufficient and did not provide information required by Ordinance §295-18.C. (sections reprinted in italics below for convenience) as follows:

C.

*Consideration of special exception applications. When special exceptions are allowed by this chapter, the Zoning Hearing Board shall hear and decide requests for such special exceptions in accordance with standards established by this chapter, including the following:*

(1)

*Compliance with this chapter. The applicant shall establish by credible evidence that the application complies with all applicable requirements of this chapter. The applicant shall provide the Board with sufficient plans, studies or other data to demonstrate this compliance.*

The Application did not provide the information required by Ordinance §295-94.1. and other sections as set forth above. Specifically, the Application did not provide information regarding the types of materials to be stored aside from “consumer products.” The Applicant provided only general information regarding the frequency of distribution and restocking and the duration of storage of materials. The Applicant provided no information regarding the methods for disposal of any surplus or damaged materials.

(2)

*Compliance with other laws. The approval may be conditioned upon the applicant later showing proof of compliance with other specific applicable Township, Pennsylvania and federal laws, regulations and permits. Required permits or other proof of compliance may be required to be presented to the Township prior to the issuance of any zoning permit, building permit, certification of occupancy and/or recording of an approved plan.*

The Applicant did not provide the required information at the time of application or during the hearings on the Application.

(3)

*Traffic. The applicant shall establish that the traffic from the proposed use will be accommodated in a safe and efficient manner that will minimize hazards and congestion after considering any improvements proposed to be made by the applicant as a condition on approval.*

The Application failed to establish that the traffic from the proposed use will be accommodated in a safe and efficient manner that would minimize hazards and congestion, even after considering any improvements proposed to be made by the Applicant. Beyond minor roadway improvements at the entrance to the Project, the Applicant made no offers of highway or other improvements to reduce traffic hazards or congestion. In fact, evidence presented by opponents to the Project presented overwhelming evidence to support their claim that the Project will increase traffic hazards and congestion in the Project area and surrounding roads.

(4)

*Site planning. The application shall include proper site layout, internal circulation, parking, buffering, and all other elements of proper design as specified in this chapter.*

The Application did not include sufficient Buffer Yards at Buildings C and D as required by Ordinance §295-123.D. See, Exhibit A-8, pp. C2.1 and C2.2.

(5)

*Neighborhood. The proposed use shall not substantially change the character of any surrounding residential neighborhood after considering any proposed conditions upon approval, such as limits upon hours of operation.*

The Application did not adequately prove that the Project would not substantially change the character of the surrounding neighborhood. In fact, the evidence presented proved the opposite. There were no conditions of approval that would correct this deficiency in the Application, including a limit on the hours of operation of the Project. The screening proposed by the Applicant

was woefully insufficient to adequately protect adjacent and neighboring residential areas from the impact of the proposed industrial use. The Project would clearly jeopardize safety in the immediate area, including traffic in the area of Route 322, Chambers Hill and Penhar Roads. The Applicant made no effort to limit the hours of operation to something less than a 24/7 operation.

(6)

*Safety. The proposed use shall not create a significant hazard to the public health and safety, such as fire, toxic or explosive hazards.*

The Application was vague and ambiguous in its response, stating only that “[t]oxic or hazardous materials are not anticipated to be stored or processed in any great quantity.” Exhibit A-3, p. 2. No guarantees or assurances were given that the proposed use would not create a significant hazard to the public health and safety from toxic or explosive hazards as a result of the goods stored at the Project. The Applicant appears to be attempting to preserve its right to store toxic or explosive hazardous materials within the Project, and it has not adequately explained to the Board how it will safely accommodate such risks.

(7)

*Natural features. The proposed use shall be suitable for the site, considering the disturbance of steep slopes, mature woodland, wetlands, floodplains, springs and other important natural features.*

The Application failed to provide sufficient information that the proposed use was suitable for the site considering the disturbance of steep slopes, mature woodlands, wetlands, floodplains, springs and other important natural features. No information was provided by the Applicant regarding the known karst geology of the site and the surrounding area and the construction and blasting hazards that may result from the Project. No information was provided regarding existing steep slopes, mature woodlands or wetlands and how they would be accommodated in the Project site. Other considerations regarding site suitability, including the Projects proximity



to an existing elementary school, impacts on nearby home foundations and on-site residential septic facilities, impacts on pedestrians, impacts on air quality and traffic volume on existing roadways, were not considered or at least not presented to the Board by the Applicant with any meaningful response to this requirement of the Ordinance.

17. As stated above, a conditional use application that satisfies objective standards of the Zoning Ordinance must be granted unless the opponents present sufficient evidence that the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community. *Greaton Props.; In re Cutler Group, Inc.*

18. The Board finds that the evidence presented at the hearings by the party opponents/objectors is credible and demonstrates a high degree of probability that the proposed use will cause a substantial harm that is not normally associated with a typical warehouse use.

By reason of all the foregoing, and consistent with the Board's unanimous passage of Commissioner/Vice-President Boudier's motion "After hearing all of the testimony, reviewing the exhibits, and reading the transcripts, I move we reject the application as incomplete, missing information, and not meeting all of the tests in the conditions required by the zoning ordinance," the Board finds that the Application is inconsistent with the terms and conditions of the Ordinance and we, therefore, enter the following:



**EXHIBIT 1**

**LIST OF PARTIES TO CONDITIONAL USE HEARING**

MUSHROOM HILL L.L.C.  
POSSIBLE PARTIES TO CONDITIONAL USE HEARING

GEORGE NEIKENS,  
6650 CHAMBERS HILL ROAD,  
HBG, PA 17111

REPRESENTED BY ERIC EPSTEIN,  
4100 HILLSDALE DRIVE  
HARRISBURG, PA. 17112

RENEE NEIKENS  
6590 CHAMBERS HILL ROAD  
HARRISBURG, PA 17111

(REPRESENTED BY ERIC EPSTEIN)

ROSE BROWN  
5600 PLAINVIEW DRIVE  
HARRISBURG, PA 17111

(REPRESENTED BY ERIC EPSTEIN)

ZOE LOFTUS  
5631 PLAINVIEW DRIVE  
HARRISBURG, PA 17111

DEBRA NOLES  
6080 HOCKER DRIVE  
HARRISBURG, PA 17111

BRIAN FALESHOCK  
966 LARK DRIVE  
HARRISBURG, PA 17111 (CENTRAL DAUPHIN SCHOOL BOARD)

DENNIS AND TERRI MATIO  
5991 HOCKER DRIVE  
HARRISBURG, PA 17111

ROBERT HELM  
5621 PLAINVIEW ROAD  
HARRISBURG, PA 17111

MEGHAN O'NEILL  
5870 BELL ROAD  
HARRISBURG, PA 17111

TERRY & DEB BARBER  
5010 HOCKER DRIVE  
HARRISBURG, PA 17111

KIM HARTENSTEIN  
6011 HOCKER DRIVE  
HARRISBURG, PA 17111

THOMAS AND LISA GARLIC  
6050 HOCKER DRIVE  
HARRISBURG, PA 17111

MIKE SUNDERLAND  
6145 FRIAR ROAD  
HARRISBURG, PA 17111

LISA NEITER  
6140 HOCKER DRIVE  
HARRISBURG, PA 17111

MICHAEL TUCKEY  
5875 GENSEMER LANE  
HARRISBURG, PA 17111

MARLENA SEGUIN  
6081 HOCKER DRIVE  
HARRISBURG PA 17111

KELLY JONES  
6170 HOCKER DRIVE  
HARRISBURG, PA 17111

MARY ANN JONES  
6170 HOCKER DRIVE  
HARRISBURG, PA 17111

BOB GOUCHER  
6051 HOCKER DRIVE  
HARRISBURG, PA 17111

WILLIAM & KIM HERB  
451 RUPP HILL ROAD  
HARRISBURG, PA 17111

JEFFREY A. WILLIAMS  
5630 PLAIN VIEW ROAD  
HARRISBURG, PA 17111

CHAD MARTIN  
6120 PARSON DRIVE  
HARRISBURG, PA 17111

ATTORNEY ANDY RALSTON (REPRESENTING FEESER FOODS.)  
WHITE AND WILLIAMS  
3701 CORPORATE PARKWAY, SUITE 300  
CENTER VALLEY PA 18034-8233

GINA FLEISHER  
S. 60TH STREET  
HARRISBURG, PA 17111

PAUL NELSON  
CHAMBERS HILL ROAD  
HARRISBURG PA 17111

BRIAN COONS  
6000 BELL ROAD  
HARRISBURG, PA 17111

ROBERT A. HOPSTETTER  
6111 CHAMBERS HILL ROAD  
HARRISBURG, PA 17111

BILL BRAGONIER  
CHAMBERS HILL ROAD  
HARRISBURG, PA 17111

SUSAN WAGNER  
SOUTH 82ND STREET  
HARRISBURG, PA 17111

LISA NEILL  
5071 CHAMBERS HILL ROAD  
HARRISBURG, PA 17111

THERESA COLGATE  
RUTHERFORD, PA

MICHAEL J. GILBERTHORP  
CHAMBERS HILL ROAD  
HARRISBURG, PA 17111

LEE BARKUS  
CATS HILL DRIVE  
HOFFMAN HEIGHTS  
HARRISBURG, PA 17111

MIKE EBENSTON  
TEAL DRIVE AND CHAMBERS HILL ROAD  
HARRISBURG, PA 17111

ROBERT TRAUTLEIN  
CHAMBERS HILL ROAD  
HARRISBURG, PA 17111

ANNA McDONALD  
750 CHAUCER DRIVE  
HARRISBURG, PA 17111

COLLEEN NEWFIELD  
6246 MANOR HILL CIRCLE  
HARRISBURG, PA 17111

ANDY MOYER  
590 MARGATE ROAD  
HARRISBURG, PA 17111

SUSAN GEORGE  
6250 HOCKER DRIVE  
HARRISBURG, PA 17111