

<p>IN Re:</p> <p>DAVID C. BERSTEIN 216 CHURCH ROAD ELKINS PARK, PA 19027,</p> <p style="text-align: center;">APPELLANT,</p> <p style="text-align: center;">VS</p> <p>TOWNSHIP OF CHELTENHAM BOARD OF COMMISSIONERS 8230 OLD YORK ROAD ELKINS PARK, PA 19027,</p> <p style="text-align: center;">APPELLEE</p>	<p>COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PA</p> <p>NO. _____</p> <p>IN RE: APPEAL OF TOWNSHIP OF CHELTENHAM BOARD OF COMMISSIONERS RESOLUTION 08- 22</p>
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**NOTICE OF APPEAL**

Pursuant to Montgomery County Civil Rule 14, 53 P.S. §§101 *et seq.*, and 53 P.S. §§11001-A *et seq.*, David C. Bernstein (“Mr. Bernstein“), by and through his undersigned counsel, hereby appeals Resolution 08-22 (“Resolution”) of the Township of Cheltenham Board of Commissioners (“Board”), dated April 20, 2022, granting Preliminary Land Development Approval of a land development application submitted by 222 Church Road, LLC (“Developer”), pertaining to real property located at 222 East Church Road, Elkins Park, Pennsylvania 19027

(“Property”). A copy of the Resolution is attached hereto as Exhibit A. In support of this Notice of Appeal, Mr. Bernstein respectfully avers as follows:

**Factual Background**

**The Parties and the Property**

1. Mr. Bernstein owns real property and a residence located at 216 East Church Road, Elkins Park, PA 19027 (“Mr. Bernstein’s Property”).
2. Mr. Bernstein’s Property adjoins the Property that is the subject of this Appeal.
3. Mr. Bernstein’s Property and the Property are located within the Township of Cheltenham (“Township”).
4. The Board has a mailing address of 8230 Old York Road, Elkins Park, PA 19027.
5. The Developer has a mailing address of 509 Cedarhill Road, Far Rockaway, NY 11691.
6. The Developer owns the Property.
7. The Property, approximately 5.05-acres, consists of a single-family home once owned by Mr. Bernstein and several acres of wooded and sloped land located uphill of Tookany Creek.
8. The small strip of real property located between the Property and Tookany Creek consists of several tax parcels owned by the Township (collectively, the “Township Property”).
9. The Township Property contains wetlands which have been delineated as such by the U.S. Army Corps of Engineers.
10. Some or all of the Township Property is located within a floodplain.

## The Land Development Application and Resolution

11. On October 29, 2021, the Developer submitted a land development application, identified as Application CTDA No. 21-06 (“Application”), proposing to construct eight (8) single-family homes and a cul-de-sac on the undeveloped portion Property (with the existing single-family home remaining in place), with a sewer lateral crossing through the Township Property (“Proposed Development”).

12. The details of the Proposed Development are set forth on a set of drawings and plans (“Plans”), with accompanying notes, prepared by a consultant of the Developer, Robert E. Blue Consulting Engineers, P.C. (“Robert E. Blue”).

13. The Plans include a Record Plan, Subdivision Plan, Existing Features Plan, Aerial Plan, Grading Plan, Utility Plan, Landscape Plan, Pre-Development Drainage Area Plan, Post-Development Drainage Area Plan, Erosion and Sedimentation Control Plan, and a Fire Truck Circulation Plan.

14. In addition to the Plans, Robert E. Blue, on behalf of the Developer, prepared several narrative documents in support of the Application, including, without limit, a Post-Construction Stormwater Management Report, an Erosion & Sedimentation Pollution Control Report, and several letters responding to comments raised by Township representatives and consultants. The Application, Plans, and supporting documents are hereinafter collectively referred to as the “Application Materials.”

15. On January 20, 2022, the Developer, through its counsel Christen G. Pionzio of Hamburg, Rubin, Mullin, Maxwell & Lupin, P.C., provided the Board an extension of time to act on the Application, extending the Board’s deadline to act to March 31, 2022.

16. On February 28, 2022, the Developer provided the Board a second extension of time to act on the Application, extending the Board's deadline to act to April 30, 2022.

17. On March 4, 2022, Robert E. Blue, on behalf of the Developer, requested a waiver of § 260-15.C of the Township's Subdivision and Land Development Ordinance ("SALDO"), which is a provision that requires the Existing Features Plan to document certain features located within a 200' radius from the Property boundary, such as drainage or water courses, wetlands, riparian buffers, and flood plains.

18. The Developer's Application Materials were updated and revised by the Developer and Robert E. Blue at various points between the date the Application was first submitted through the date the Board issued its Resolution ("Application Period").

19. On April 20, 2022, the Board issued the Resolution, granting Preliminary Approval of the Application.

20. The Resolution contains several conditions with which the Board states the Developer must comply to obtain Final Approval of the Application.

#### Notice of Objections/Deficiencies

21. Mr. Bernstein and several other Township residents raised numerous objections to and deficiencies regarding the Proposed Development and Application Materials during the Application Period. These objections and deficiencies were set forth in various letters, emails, telephone calls, and other communications to the Board, and verbally during public meetings held by the Board and other Township committees. All of the meetings held by the Board and other Township committees during the Applications Period were held remotely via the videoconferencing software program known as Zoom.

22. The Board acknowledged receipt of numerous communications identifying objections and deficiencies related to the Application, but determined that many of the objections and deficiencies did not need to be addressed by the Developer before Preliminary Approval of the Application was granted, or at all.

### **Specific Objections**

#### **Objection Related to Lack of Easement for Sewer Lateral**

23. The Application is deficient because it includes a note of an “Existing Sewer Easement” that ostensibly provides the Developer with the right to construct a sewer lateral across the Township Property to a sanitary sewer line running along the North side of Tookany Creek, but it does not identify, describe or establish the existence of the purported easement. Based on a review of property records on file with the Montgomery County Recorder of Deeds, no such easement exists.

#### **Objection to Waiver Granted by the Board**

24. The Board improperly granted a waiver of § 260-15.C of the SALDO, related to documenting certain features located within 200’ of the Property boundary, because literal compliance with the requirement would not be unreasonable or cause undue hardship to the Developer, and granting the requested waiver was contrary to the public interest and the purpose and intent of the SALDO. Granting the waiver was not in the public interest or consistent with the purpose and intent of the SALDO because off-site areas within 200 feet of the Proposed Development contain valuable streams and wetlands which could be impacted by the Proposed Development and which the Township has an interest in protecting.

#### **Objections Related to Vegetation Removal**

25. The Application fails show or establish that vegetation removal is minimized; that no more desirable layouts are possible; and that no alternative clearing or grading plan would reduce the loss of mature trees, tree masses and woodlands, all of which are required under § 260-34.A of the SALDO. To the extent compliance with these requirements was not required to obtain Preliminary Approval because it was made a condition of the Developer obtaining Final Approval of the Application, that decision was improper, because complying with these requirements could cause the entire Proposed Development to be re-configured.

26. The Application failed to: (i) inventory and provide sufficient information regarding all existing trees that are 3" DBH (diameter at breast height) or greater; (ii) identify all trees that are to be removed and preserved; (iii) provide an accurate calculation of required replacement trees; and (iv) demonstrate that all removed trees greater than 3" DBH will be replaced and/or accounted for in accordance with the SALDO. *See* §§ 260-15.C(7)(a) and (b), 260-34.A-D, 260-48 and 260-49 of the SALDO. To the extent compliance with these requirements was not required to obtain Preliminary Approval because it was made a condition of the Developer obtaining Final Approval of the Application, that decision was improper because complying with these requirements could cause the entire Proposed Development to be re-configured.

27. The Application fails to satisfy the requirement at § 260-31 of the SALDO for 50% Woodlands preservation. In its comment letter dated December 10, 2021, the Montgomery County Planning Commission stated that the Applicant needed a waiver of this Township requirement. The Applicant did not request a waiver of this requirement and the Board did not grant a waiver.

#### Objections Related to Stormwater Management

28. The Application does not comply with the Pennsylvania's Stormwater Best Management Practices Manual ("BMP Manual") to the maximum extent practicable, which is required under §§ 290-18.D, 290-18.H(3), and 290-18.M of the Stormwater Management Ordinance ("SMO"), because:

a. The primary stormwater management facility ("Facility") proposed by the Applicant is identified interchangeably as a "Rain Garden" and a "Retention Basin," which are two different types of features with two different sets of criteria under the BMP Manual.

b. The Facility proposed to handle storm runoff is perched close to a steep slope heading down towards Tookany Creek such that the spillway, when activated, would cause flooding and erosion of sensitive areas below including wetlands, floodplains, and stream banks. A much larger Facility would be required to satisfy the requirements of the BMP Manual and to control flooding and erosion. To the extent a final design of the Facility was not required to obtain Preliminary Approval because designing the Facility was made a condition of the Developer obtaining Final Approval of the Application, that decision was improper, because expanding and re-designing the Facility could cause the entire Proposed Development to be re-configured.

c. The stormwater calculations provided in the Application assume that a 100-year frequency storm will be infiltrated into the Facility; however, this is unrealistic. The Facility's soil will quickly become saturated and not function for rate control for storms equal to or over 5-years in frequency.

d. Additional information needs to be provided to allow the data used for the drainage area breakdowns and Hydrology Studio calculations to be evaluated for reliability and accuracy.

e. The stormwater management plans assume, without any analysis, that the existing gutter system associated with Church Road is sufficient to prevent stormwater from flowing downhill across Church Road onto the Property comprising the Proposed Development. This assumption is inconsistent with the decades of experience of the nearby residents, who report that stormwater regularly flows onto the land of the Proposed Development in that manner. If off-site stormwater will be flowing onto the Proposed Development, as the residents report, the stormwater calculations must take this into account.

29. The stormwater runoff from the Proposed Development will cause stream bank erosion in violation of the requirements of § 290-22.A(1) of the SMO.

30. The Board's Resolution violates a covenant in a Deed for one of the parcels located within the Township Property, recorded at Deed Book 3558, page 62, et seq., which states "Grantee, its Successor and Assigns, shall at all times hereafter maintain the northern and northwestern banks of the Tookany Creek as the same is now situate upon the premises conveyed hereby and upon the remaining lands of Grantors to as to prevent any erosion thereof."

#### Objections to Public Comment Process

31. The Township did not allow for reasonable public comment during the April 6, 2022, Public Works Committee meeting or during the April 20, 2022, Board meeting as it is required to do under 65 Pa.C.S. § 710.1(a). The Board could have, and should have, held a



public hearing regarding the Application given the volume of public comments. Public Hearings were requested by Mr. Bernstein before both meetings.

Objections to Certain Conditions in Resolution

32. Paragraph 6 of the Resolution is an improper condition because it postpones, without reason, the Developer entering into a Land Development and Financial Security Agreement with Cheltenham Township and posting financial security.

33. Paragraph 8 of the Resolution is an improper condition because it postpones, without reason, the Developer executing a declaration to reserve easements in favor of the Township so that the stormwater facilities may be maintained by the Township and defers solely to the Township Solicitor as the approving entity, rather than as counselor to the Township to make its own determination.

WHEREFORE, Appellant, Mr. Bernstein, requests that this Honorable Court reverse the Board's grant of Preliminary Land Development Approval and vacate Resolution 08-22, and grant such other relief as shall be just and proper.

Respectfully submitted,

Dated: May 17, 2022

s/Paul M. Schmidt, Esq.  
Principal – Post & Schell, PC  
Four Penn Center, 13th Floor  
1600 John F. Kennedy Blvd.  
Philadelphia, PA 19103-2808  
215-587-1000 Main  
pschmidt@PostSchell.com

s/Mason Avrigian, Jr., Esq.  
Principal – Post & Schell, PC  
Four Penn Center, 13th Floor  
1600 John F. Kennedy Blvd.  
Philadelphia, PA 19103-2808  
215-587-1000 Main

mavrigian@PostSchell.com

*Counsel for David C. Bernstein*