

**PARADISE TOWNSHIP BOARD OF SUPERVISORS
MONROE COUNTY PENNSYLVANIA**

In Re: JSPA REALTY, LLC :
Conditional Use Application :
For Hawthorne Resort :
:

**BRIEF BY BRODHEAD WATERSHED ASSOCIATION RELATED TO CONDITIONAL
USE APPLICATION AND SUGGESTED CONDITIONS**

I. PROPOSED FINDINGS OF FACT

1. The Brodhead Watershed Association (BWA) through its Director, Dr. Alex Jackson made a public statement on behalf of BWA at the January 30th meeting, 2023. This public statement was entered into the record for Conditional Use Hearing.
The solicitation for public statements: Page 118 of the January 30th Public Hearing Transcript.
2. On February 23rd 2023, BWA obtained Party Status, by a motion, a second, and a 3-0 vote by the Board of Supervisors, over an objection by the Applicant. *Pp. 148, Feb 23rd Public hearing transcript.*
3. Dr. Jackson of BWA made public statement on behalf of the organization:
“So, [the Applicant] is seeking a non-discharge alternative, and generally speaking our organization [BWA] is in support of a non-discharge alternative”.
Pp.124, January 30th Hearing Transcript.

Dr. Jackson continued: "...I believe that the supervisors should ask what the size of the largest installation of this type of septic system in the commonwealth in an EV watershed exists currently. Are there any precedent [sewage disposal] systems in EV watersheds throughout the commonwealth that could compare to this. *Pp. 124-125, January 30th Hearing Transcript.*

Dr. Jackson continued:

"The project will require significant aquifer [groundwater] removals and BWA would be concerned if there was any out of basin [out of subwatershed] transfers. So if they're [the Applicant] pulling ground water from one drainage basin [Subwatershed] like Swiftwater [Creek] andOr shunting of it to another one [subwatershed] and you limit water quantity and during bottleneck periods, during droughts and things like that if you pull enough groundwater out you could, you know theoretically run these streams dry and that would be catastrophic to their ecosystem." *Pp. 125, January 30th Hearing Transcript.*

4. The Applicant's expert witness Brian Oram was sworn in as expert witness on March 9th 2023, and subsequently testified and described the significance of the lot(s) in which the Applicant's project is proposed, and described the watershed(s)/subwatersheds:

"The bulk of the project is located in the headwaters of Indian run and the upper portions of the Swiftwater creek that then merge and flow and form Forest Hills Run, Paradise creek, Brodhead creek as they move down into the Delaware. The significance of that is the classifications of the streams, especially Indian run and

Swiftwater run are classified as EV streams and migratory fishery.” *Pp.349 on March 9th 2023 Hearing Transcript*

5. Brian Oram testified:

“Exactly. Right. So back to that concept of a living filter. So, we use the water, we put it back into the watershed upgradient of us, treat it to recharge the watershed so we don’t end up like the southeastern part of PA where they’ve pumped out---they’ve put so much development in, pulled so much groundwater out that they’ve depleted their stream flows and now during the summer those streams are dry. This [drip irrigation sewage method] prevents that”. *Pp. 370, from March 9th, 2023 transcript.*

6. Brian Orum testified on the proposed Drip Irrigation Sewage Method :

“The wastewater management system is designed to pull water out of the ground, put water back into the ground using a land-based wastewater disposal system which is the preferred method in the EV watershed very similar to the living filter system approach out at Penn State” *Pp. 351 of March 9th Hearing transcript.*

7. Applicant’s own expert Brian Oram testified that the practice of “ground water mining” would be a problem:

“...Are we planning to pull out, one more water than that [than being returned]? If we are, it’s called ground water mining. That would be a problem. We’re not planning to do that.” *Pp. 352. March 9th Public hearing transcript*

Oram testified that the Applicant is not planning a consumptive use for water/sewage hookup that would occur if the Applicant were to connect to a public water/sewage system:

“...We’re not planning consumptive use, were planning a use where we take the

water use it and put it back into the system. So its available for to maintain base flow of the stream downgradient” *pp. 352, March 9th Transcript.*

The Applicant’s expert Brian Oram’s testimony is that drip irrigation is “by far the preferred” method of Sewage Treatment for the Use:

“Of all the options that might be available for the project, the use of a forested drip irrigation approach is by far the preferred method. It allows me to maintain existing vegetation. It allows me to not cut down the trees to any significant extent....And provides us not only enough water to meet the project demand but in fact I believe during times of the year...” *P. 363 March 9th hearing transcript*

8. Oram was questioned on Sewage Capacity – Direct (by Applicant’s Attorney):

Q. The total drip irrigation capacity for the system ranged, I believe you said between 45,000 gallons per day and 60?

A. The peak capacity is about 74,000 [gallons of sewage]

Q. And provides reserve capacity ranging around 5600 gallons [of sewage] per day [In the winter]. [35,000 gallons of sewage per day in the summer]

pp.368-369 March 9th hearing transcript.

9. On February 23rd, Michael Gable is sworn in as expert witness on behalf of the

Applicant. In this hearing, the ECOFLO document, and NETAFIM document are entered into the record as Applicant #17 and Applicant #18 exhibits.

10. Gable testified that the non-discharge alternative [drip irrigation sewage method] is in fact, the “highly preferred” sewage treatment system by the Applicant:

“Very convenient and highly desirable to have on lot sewage disposal as opposed to

stream discharge. This is an exceptional value watershed so on lot disposal and drip irrigation systems is one of the preferred systems that can be implemented for sewage disposal.” *Pp.169 Feb 23rd hearing.*

11. Gable testifies he’s been on site 25 times, and overseen over 15 different types of tests, some he’s witnessed personally and others he’s read the follow up-reports, demonstrating the level of effort and confidence the applicant has the system will be sufficient for the Use. *Pp. 193, Feb 23rd public hearing.*
12. On March 9th Mr. Gable agreed with the below statement on drip irrigation: “Best in terms of what’s best for your [Applicant] clients situation or best for how to handle the sewage at the peak rates that you [Mr Gable] testified at the last hearing”.
Pp. 290, March 9th hearing.
13. Through testimony by Dr. Jackson, it was revealed that the Applicant does not have or believe they need a backup option for the proposed Drip irrigation system, as evidenced by the line of questioning by Dr. Jackson: “...if the proposed system of drip irrigation is not in compliance with the PA DEP permitting requirements or if you’re not in compliance with the sewage enforcement officer DEP percolation tests....etc.etc.. “ “Do you have another backup option that does not connect to the central sewer system of Pocono township?” *Pp.294 March 9th hearing transcript.*
Mr. Gable: “No that’s why we’ve spent a considerable amount of time doing some 73 test pits on the site to make sure it’s a viable option before we move to this stage of the game and which Brian Oram will testify later” *Pp. 294 March 9th hearing transcript.*
14. Mr. Gable indicated: “The drip irrigation system was the only system practically available to us. “ *Pp. 222 February 23rd Hearing transcript*

15. Mr. Gable testified “They’re very small modular systems. Each units capacity is generally two thousand gallons a day or so, so there will be multiple units spread throughout the development.” *Pp.221, Feb 23rd hearing*. Mr. Gable testifies that the largest system he designed in Chester County is not actually operational; the only operational unit he has experience designing is his own personal home. “The one in Chester county is not in operation, but the one I had at my own home obviously was because I was using it.” *Pp.221 Feb 23rd Hearing transcript*.

16. Mr. Gable testified in response to cross examination by Mr. Johnson, that Mr. Gable is not aware of this particular equipment, or treatment train “multiple assemblies” [exhibits 17 and 18] within 400 feet of an exceptional value watershed, “...any of these multiple assemblies being employed within 400 feet of an exceptional value watershed” *Pp. 221, Feb 23rd Hearing transcript*.

17. Thursday March 9th 2023 Cross examination of Gable by Dr. Jackson:

Q. “In Mr. Gables previous testimony you cited that your only experience with an operational sewage facility and the type of equipment and treatment train that your client is proposing for this project was on your own residential property.” *Pp.287-288 March 9th Transcript*. A. “That is correct”

18. Page. 378. Cross Examination of Applicant’s expert Brian Oram by Ms. Jones of PennFuture reveals that the treatment train and technology [Exhibits #17 and #18] proposed by the Applicant has not been approved before in the Commonwealth of Pennsylvania:

Q. “To your knowledge has the PA DEP Approved a drip irrigation system like this before?”

A. Yes bear creek charter school in Pike county at a grocery store; they were two of my projects. And then were working on the same application for Pike county jail and other areas. *Pp.393 March 9th hearing.*

Q. ...and that includes the treatment train ECOFLO coca filter and everything that's being designed?

A. " the specific use of that approach. No. "

Q. "...so to your knowledge the entire wastewater sewer treatment system that's being proposed here has not been approved by PA DEP in another location."

Pp. 394 March 9th hearing.

A. Oram testifies that this conceptual "approach" has been approved, but the specific equipment and such a treatment train as proposed (Exhibits 17 & 18) has not been done like this before in Pennsylvania, not at this scale, nor in an EV watershed. *Pp. 394, March 9th hearing.*

19. Continued questioning of Oram by Abby Jones (Penn Future) on the speed at which water re-enters the hydrological system, the lag effect of groundwater so to speak:

Q. "How quick is discharge back into the system."

A. "My guess is about 5 to 10 years." Answer by Brian Oram

Pp. 400-401. March 9th hearing.

II. CONCLUSIONS OF LAW

1. Section 603(c) (2) of the MPC authorizes a governing body to allow or deny a conditional use application following a hearing and recommendations by the planning agency.
2. Section 909.1(b) (3) of the MPC gives exclusive power to the governing body to render a

final adjudication on an application for conditional use. The MPC describes the decision made by the governing body on a conditional use application as an adjudication. In considering the conditional use application, the governing body is acting as a quasi-judicial body and cannot advocate a particular position.

3. In allowing a conditional use, the governing body may attach such reasonable conditions and safeguards, other than those related to off-site transportation or road improvements, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance; 603 C(2)

4. An ordinance may call for developers to provide detail in their applications even if the proposal is at a relatively early stage where full specifications are not yet required. In Elizabethtown/Mount Joy Associates, L.P. v. Mount Joy Township Zoning Hearing Board, 934 A.2d 759 (Pa. Cmwlth. 2007), the ordinance required applicants to submit detailed plans for exterior lighting that could impact neighboring areas

5. The Board of Supervisors has been tasked with protecting residents' health, safety, and welfare interests from harmful impacts due to development, and even in the relatively limited context of conditional use proceedings, Mushroom Hill, LLC v. Swatara Township Board : of Commissioners, Commonwealth Court. No. 178 C.D. 2021

6. In addition to the Board's duty to protect the interests of local residents, deference is also due to local zoning authorities' expertise in and knowledge of local conditions. See Luke v. Cataldi 932 A.2d at 54; Tidd v. Lower Saucon Twp. Zoning Hearing Bd., 118 A.3d 1, 9 (Pa. Cmwlth. 2015).

7. Paradise Township ordinance mandates a permanent conservation easement to protect

greenway lands. See Chapter 160-21-C). A conservation easement is far superior to a deed restriction (now proposed by the Applicant here), which has been accepted at law for many years, including since the passage of the Pennsylvania Conservation and Preservation Easements Act in 2001 (32 P.S. sections 5051-5059). The Board can take judicial notice of the many benefits of a conservation easement over a deed restriction as noted by WeConservePA in their 2021 publication “Deed Restrictions Versus Conservation Easements” (available for the review of the Supervisors). Further and importantly, the local ordinance requires a conservation easement, not a deed restriction and must be complied with; See *Luke v. Cataldi* 932 A.2d at 54.

8. The Board of Supervisors is the fact – finder and decision maker with respect to enforcement of its ordinances when considering an application for Conditional Use. The first level appeal is to the Court of Common Pleas. The second level appeal is to the Commonwealth Court. Both of those courts have in general set a policy of deferring to the findings of the township board when interpreting their own ordinance, unless it is found that the Board committed legal error or abuse of discretion. See *Metro, Inc. V. Z.H.B. of Susquehanna Township*, 453 A.2d 29 (PA. Commw. Ct. 1982).

III. DISCUSSION

The Paradise Township Board of Supervisors should feel free to deny the application if they feel the Applicant has not complied with law, and/or free to impose whatever and as many conditions as it feels necessary to protect the residents of the township, as both of those results have been upheld in Pa law: See: *Glendon Energy Co. v. Bor. Of Glendon*, 656 A.2d 150 (Pa. Commw. Ct. 1995), *Stroudsburg Mun. Water Auth v. Versatile Investment Projects, Inc.* 480 A. 2d 352 (Pa. Commw. Ct. 1984). The Board of Supervisors as per the MPC 603 C(2), may set reasonable conditions on the use to ensure the health safety and welfare of the

community.

The level of detail in this Conditional use hearing by the Applicant is not atypical, or an undue burden on the Applicant. A high level of detail in the Conditional Use (CU) phase is consistent with precedence set in existing case law, for example: Elizabethtown/Mount Joy Associates, L.P. v. Mount Joy Township Zoning Hearing Board, 934 A.2d 759 (Pa. Cmwlth.)

Here, the Applicant's expert witness Mr. Oram has testified that that the lot(s) are significant due to the exceptional value (EV) sub-watersheds they contain with respect to the proposed Use(s). Oram testified in concurrence and agreement and expressed his concerns over the concept of "water mining" in Paradise township, which is consistent with Brodhead Watershed Association's public statements, and cited above.

Oram testified that the proposed drip irrigation sewage treatment system would help Paradise Township avoid a situation like "Southeastern part of PA, where they've "pumped out" or "pulled" so much groundwater out, that they've depleted their stream flows and now during the summer those streams are dry". BWA expressed very similar concerns in their public statement, especially referencing concerns over possible public water/sewer hookup resultant [out of subwatershed basin transfer via hookup to a public water/sewage system].

Applicant witnesses Oram and Gable both testified, in concurrence with BWA's position, that a proposed non- discharge alternative [for example, drip irrigation or another on lot approach to sewage treatment] is the highly preferred option for this use considering the significance of the EV sub-watershed. Oram re-affirmed the Applicant's position, that they are not seeking a consumptive use [public water/sewage system hook up with out of subwatershed basin transfer].

Oram specifically testified that the Applicant already has carried out an alternatives analysis, including 73 test pits, and 31 hydroconductivity tests, and the lot(s) have a proven capacity of 74,000 gallons, which leaves enough reserve sewage capacity during all seasons. Gable testified here that there is no need to connect to a Public System.

Oram testified that the lot(s) would provide enough water/sewage capacity for the Use(s), with over 5,000 gallons a day extra of reserve capacity in the winter, and 35,000 gallons of day extra reserve capacity in the summer.

Unfortunately, the evidentiary record indicates that the Applicant's Engineer lacks the experience designing the proposed sewage "treatment train" of Ecoflo and Netafim Bioline drip dispersal applications at this size, and scale for a facility in operation. Oram testifies in reference to the specific Exhibit #17 and Exhibit #18 equipment and such a treatment train as proposed has not been done like this in Pennsylvania, not at this scale, nor in an EV watershed before.

The Board of Supervisors can set any number of conditions to ensure this Use is designed in such a fashion that it ensures beyond any possible reasonable doubt, the protection of the health safety and welfare of the residents. The board should set as a condition that the resort be approved to use a non-discharge alternative.

BWA's brief incorporates the issues raised by the Township solicitor in his "guidance document" handed out on June 22, 2023, namely the issues related to minimum contiguous acreage (60 acres), integration of resort and commercial uses of the proposed development, etc. We have included some proposed conditions in our Conclusion below based on these concerns.

As a reminder, the Township is mandated to render a written decision or make written findings within 45 days of the last hearing, otherwise it is a deemed approval in favor of the Applicant. See 53 Pa. Stat. section 10913.2

IV. CONCLUSIONS

Denial

Firstly, one reasonable conclusion would be for the Board of Supervisors to deny the conditional use application in its current iteration. The application can be denied because the Applicant has *failed* to do the following:

a. Show that the proposed development is on “60 contiguous acres” as required by Chapter 160, Article III, section 160-12 (43.B), especially considering that the Applicant’s land goes through another municipality and the Applicant has shown no precedent in Pa that this would meet the definition of “contiguous”. As such the Applicant does not have enough land to meet the requirement of law.

b. Show that the master development tract has road frontage along and direct access to a road or highway controlled by PennDOT (Chapter 160, Art. III, Section 160-12 (43.B(e))). The Applicant has not shown that the proposed roundabout will be approved and if it is not, that they can meet this condition. Alternatively, if Approval of CU application is granted, ***this should be a condition.***

c. Show that the master development plan for resort and commercial development (which portion is almost totally unplanned by the Applicant as of time of hearings) on two separate parcels is “integrated development” as required by Chapter 160, Art. XII, section 160-71(B)(2),

which lists the purposes of the Resort Development Overlay District in Paradise Township.

d. Show that the traffic dangers of increased U-Turn traffic will not present a hazard to residents of Paradise Township and those driving through the Township if the Roundabout is not approved. Thus the Applicant has not complied with the requirement of Chapter 160, Art. III, section 160-10(7) at this time.

e. Answer *all* of the concerns of the Paradise Township Engineer (Hanover Engineering) in his letter dated Jan. 9, 2023 to the Supervisors about this Conditional Use Application, which answers should have been in writing by the Applicant to the Board of Supervisors, otherwise application should be denied.

f. Show compliance with Township ordinance on Greenway Lands (Chapter 160-21 -C) which requires a permanent (recorded) conservation easement. The Applicant has proposed a deed restriction which is not the same as a conservation easement in Pa as the easement can be enforced more easily than a deed restriction. The conservation easement was written into local ordinance for a reason (to protect residents and natural resources) and compliance with it should be required or application denied.

Conditional Approval

Alternatively, if the Board of Supervisors does not agree with the points above and finds the Application should be approved, it should attach reasonable conditions as allowed by law to protect the health, safety and welfare of the residents of Paradise Township, including their right to clean and abundant natural resources.

First, the proposed sewage treatment train drip irrigation treatment train system

(ECOFLO document, and NETAFIM document exhibits #17 and #18) at this size/scale in an Exceptional value (EV) watershed has not been approved for operation before in the Commonwealth of Pennsylvania. The applicant testified that they do not have experience designing this treatment train that has become operational at this scale in an EV watershed. The proposed treatment train sewage system would contains numerous very small modular systems, which introduces many points of complexity, and error - well beyond the operational design experience of the applicant's engineer. Thereby warranting a 3rd party analysis, beyond the basic PA DEP permitting requirements.

Therefore, BWA proposes a reasonable condition on the proposed project to require that the Applicant at their cost, have a 3rd party independent engineering analysis (separate from the township's SEO and PA DEP) of the full design of the proposed sewage "treatment train" and technologies utilized for the proposed Use(s). This 3rd party independent engineer to be acceptable to both the Board of Supervisors and the Brodhead Watershed Association (BWA).

Second, BWA requests a condition of approval that the applicant shall not enter into any central/public sewage agreement with the Brodhead Creek Regional Authority (BCRA) for any sewage/central water capacity below which they have herewith testified the land is capable of handling for the proposed use(s).

This condition would require the applicant to utilize the on-site capacity for the proposed Sewage Drip irrigation system the Applicant has specifically sought Conditional Use Approval for. As such, any future hookups to the BCRA system would only be allowed to provide the applicant with assistance of sewage capacity beyond the gallons/day the Applicant has testified here in the Conditional Use Hearing. BWA asserts here, based on the evidentiary record and testimony by the

Applicant's expert witness, that there's sufficient evidence and testimony for feasibility and the Applicant has already conducted an alternatives analysis confirming the viability of the non-discharge alternative. So such a condition would not be unreasonable or restrictive, in fact, sufficient excess capacity exists in the evidentiary Record so no hardship would be placed upon the applicant in applying such a condition.

Third, the Board of Supervisors should mandate a condition that at the cost of the Applicant, allow onto their property, an agency or consultant (agreeable to both the Paradise Township Board of Supervisors and BWA) to obtain water quality macroinvertebrate samples, and surface water grab sample analyses, based on the most recent guidance of the PA DEP, of the receiving exceptional value (EV) waters of Indian Run and of Swiftwater Creek. These samplings shall occur twice annually, in the Spring and Fall. The results sent via USPS in writing to both the Board of Supervisors, and BWA.

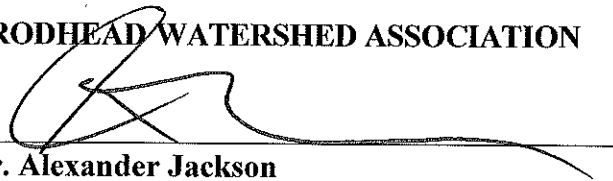
Fourth, Answer *all* of the concerns of the Paradise Township Engineer (Hanover Engineering) in his letter dated Jan. 9, 2023 to the Supervisors about this Conditional Use Application, which answers should have been in writing by the Applicant to the Board of Supervisors, otherwise the Conditional use (CU) should be denied.

Fifth, show compliance with Township ordinance on Greenway Lands (Chapter 160-21 - C) which requires a permanent (recorded) conservation easement. The Applicant has proposed a deed restriction which is not the same as a conservation easement in Pa as the easement can be enforced more easily than a deed restriction. The conservation easement was written into local ordinance for a reason (to protect residents and natural resources) and compliance with it should be required or application denied.

Respectfully Submitted by,

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Date:

7/28/23