

Brief Re: Hawthorne Conditional Use Application - July 27, 2023

Meredith E. Montgomery, Trustee, Joan Montgomery Irrevocable Grantor Trust, on behalf of David M. Montgomery, Melissa M. Toye, Mitchell S. Montgomery, and Anneliese M. Taylor

Introduction

This brief addresses JSPA Realty LLC's Application for a Conditional Use Permit for a Master Development under Paradise Township, PA Zoning Ordinances. The writer has attempted to comport this document to the requirements for briefs adopted at the June 2023 meeting of the Paradise Township Board of Supervisors; however, the writer is not an attorney and is not represented by an attorney in this matter.

Consequently, this document may not meet customary standards for legal briefs and citations.

Summary of overall position

I support redevelopment of the former Hawthorne Inn & Cottages property as the Hawthorne Resort Mount Pocono. For reasons including those described herein, I do not support redevelopment of the former Wiscasset Golf Course area as a commercial office park/shopping center.

Issues Addressed

- Issue I. Resort Overlay District
- Issue II. Master Development
- Issue III. Traffic Impact Analysis
- Issue IV. Disturbance of Steep Slopes
- Issue V. Reliability of Applicant Witness Testimony
- Issue VI. Reliability of Applicant Tract Perimeter Lines

Issue I. Resort Overlay District

The purposes of the Resort Development Overlay District are provided in the Paradise Township Zoning Ordinances at (Chapter 160, Article XII, Section 160-71(B))

Issue I. Proposed Findings of Fact

1. Regarding “integrated development”, Mr. Varaly testified, “There’s no definition that you could rely on to come up with any standard that’s fixed that you would be able to use.” Where a term is undefined, Mr. Varaly would normally use “Webster’s dictionary,” which defines integrated as “something with various parts or aspects linked or coordinated.” Transcript page 675 May 23, 2023. Emphasis added.
2. Regarding the propose plan, Mr. Varaly testified, “Well, it’s integrated because of the location being the proximity. They border each other.

And it's integrated in the sense that if a person chooses, they could drive from one use to the other use by vehicle, but as presented in previous plans, there are pathways where you could walk. So there's both vehicular and pedestrian access to connect both of the uses ..."

3. Regarding the resort portion and the commercial portion, Mr. Varaly testified, "...they are coordinated in the sense that the development plan for the conditional use was provided for both particular areas, not just one. And they coordinate their design and layout based on that."
4. Mr. Houle provided a "legal" definition of integrated from the Merriam Webster online edition: "to form, coordinate, or blend into a functioning or unified whole"; and stated that he had not found the words linked or coordinated among the definitions he reviewed.

Houle exhibit 1 and Transcript June 8, 2023.

Issue I. Conclusions of Law

1. "Except as defined in this code..., all words shall carry the customary meaning." (160-52 Definitions)
2. The words "customary" and "integrated" are not defined in Township Zoning ordinances. (160-52 Definitions)

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3. A zoning hearing board is the entity responsible for the interpretation and application of its zoning ordinance, and its interpretation of its own ordinance is entitled to great deference from a reviewing court. *Smith v. Zoning Hearing Bd. of Huntingdon Borough*, 734 A.2d 55 (Pa.Cmwlth.1999). The basis for the judicial deference is the knowledge and expertise a zoning hearing board possesses to interpret the ordinance it is charged with administering. *Id.*
4. The Pennsylvania Municipalities Planning Code provides: In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction. 53 P.S. § 10603.1 (emphasis added). Thus, where doubt exists, the language of a zoning ordinance should be interpreted in favor of the landowner and against any implied extension of restrictions on the use of one's property. Of particular import here, “[h]owever, this rule of construction is inapplicable where ... the words of the zoning ordinance are clear and free from any

ambiguity.” Isaacs v. Wilkes–Barre City Zoning Hearing Bd., 148 Pa.Cmwlth. 578, 612 A.2d 559, 561 (1992); see also City of Hope v. Sadsbury Twp. Zoning Hearing Bd., 890 A.2d 1137 (Pa.Cmwlth.2006); Risker v. Smith Twp. Zoning Hearing Bd., 886 A.2d 727 (Pa.Cmwlth.2005), pet. for allowance of appeal denied, 588 Pa. 766, 903 A.2d 1235 (2006).

5. Like statutes, the primary objective of interpreting ordinances is to determine the intent of the legislative body that enacted the ordinance. See Bailey v. Zoning Bd. of Adjustment of City of Phila., 569 Pa. 147, 801 A.2d 492 (2002). Where the words in an ordinance are free from all ambiguity, the letter of the ordinance may not be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921; see also 1 Pa.C.S. § 1903 (words and phrases in a statute shall be construed in accordance with their common and accepted usage). An ambiguity exists when language is subject to two or more reasonable interpretations and not merely because two conflicting interpretations may be suggested. New Castle County v. Hartford Accident & Indem. Co., 970 F.2d 1267 (3d Cir.1992). Emphasis added.
6. “[W]here a court needs to define an undefined term, it may consult definitions in statutes, regulations[,] or the dictionary for

guidance, although such definitions are not controlling.” Adams Outdoor Advert., LP v. Zoning Hearing Bd. of Smithfield Twp., 909 A.2d 469, 484 (Pa. Cmwlth. 2006).

7. Tribunals confronted with interpreting undefined terms in an ordinance are guided to construe words and phrases in a sensible manner, utilize the rules of grammar and apply their common and approved usage, and give undefined terms their plain, ordinary meaning. *Diocese of Altoona–Johnstown v. Zoning Hearing Bd. of Borough of State College*, 899 A.2d 399 (Pa.Cmwlth.2006).
8. Whole-Text Canon: The text must be construed as a whole. Scalia and Garner.
9. Regarding the use of Dictionaries, Scalia and Garner: “A comparative weighting of dictionaries is often necessary. The primary principles to remember in using dictionaries are these:
 - A dictionary definition states the core meanings of a term. It cannot delineate the periphery.
 - Because common words typically have more than one meaning, you must use the context in which a given word appears to determine its aptest, most likely sense.

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- You must consult the prefatory material to understand the principles on which the dictionary has been assembled. The ordering of senses provides a classic example. Although many people assume that the first sense listed in a dictionary is the “main” sense, that is often quite untrue. Some dictionaries list senses from oldest in the language (putting obsolete or archaic senses first) to newest. Others list them according to current frequency. Using a dictionary knowledgeably requires a close reading of the principles discussed at the outset” Scalia and Garner, Appendix A.
 - See also appended excerpts on statutory construction and use of dictionaries from Scalia and Garner’s Reading Law: The Interpretation of Legal Texts, Antonin Scalia, Bryan A. Garner, Thomsom West, 2012.

Issue I. Discussion

The text of the ordinance unambiguously means that uses under a resort overlay district are intended to be blended into inseparable components and not merely adjacent projects by the same developer.

Issue I. Conclusion

Proposed application for conditional use for a commercial shopping area does not comport with the purpose or intent of the Resort Overlay District and should be denied.

Issue II. Master Development

Are other municipal approvals required to support the argument that the property is contiguous by way of a connection through a separate municipality?

Issue II. Proposed Findings of Fact

1. The zoning authority has established minimum requirements applicable to the township
2. No evidence has been presented to indicate that Paradise Township has entered into a Joint Municipalities Zoning Ordinance Agreement

Issue II. Conclusions of Law

1. “A statute presumptively has no extraterritorial application (*statuta suo clauduntur territorio, nec ultra territorium disponunt*).” Scalia and Garner

2. Paradise Township Comprehensive Plan adopted February 2015,

Relationship of the Plan to Adjacent Municipalities' and County

Planning Efforts page 3-12

- a. The future land use plans and zoning ordinances of the portions of these municipalities adjacent to Paradise Township were considered in the development of [the Paradise Township] Comprehensive Plan.
- b. The Multi-Municipal Comprehensive Plan for Hamilton Township, Stroud Township, Pocono Township and Stroudsburg Borough (June 2005) proposed future land uses in Pocono Township. Emphasis added.
- c. The proposed future land uses for Mount Pocono Borough and Coolbaugh Township were identified in the Regional Comprehensive Plan for Coolbaugh Township, Borough of Mount Pocono, Tobyhanna Township and Tunkhannock Township (June 2005). Emphasis added.

Issue II. Discussion

The PA Municipalities Planning Code allows for multi-municipal planning and joint zoning boards, and such activities exist within parts

of Monroe County. Although Paradise Township considered the County and other townships plans in developing its own comprehensive plan and associated zoning ordinances, Paradise Township has not entered into such a multi-municipality agreement. Thus, following Scalia and Garner, the array of minimum and maximum requirements described in Paradise Township zoning ordinances (including but not limited to, the minimum contiguous acres for a Master Development plan) relate to property located solely within Paradise Township, and not combinations of property within and across township lines.

Issue II. Conclusion/Conditions

Only acreage within Paradise Township can be used to satisfy the requirement of a minimum of 60 contiguous acres established in the Paradise Township zoning ordinances. Paradise Township site use minimum and maximum thresholds would similarly be based only on property in Paradise Township. Proposed application for conditional use for a commercial shopping area does not comport with the purpose or intent of the Resort Overlay District and should be denied.

Issue III. Vehicular Traffic

Issue III. Proposed Findings of Fact

1. “Based on a review of the Pennsylvania Transportation Improvement Program (TIP), there are no programmed roadway improvements in the study area.” Applicant Exhibit 21 HCA Traffic Impact Assessment, Page 4.
2. Applicant witness testimony regarding the conclusion of his Traffic Assessment Report for the PA611/Wiscasset Road/Strickland’s Road intersection: “It is concluded that the site-generated traffic can be safely and acceptably accommodated at this intersection with no improvements required.” Horner Direct page 564, emphasis added.
3. Applicant witness testimony regarding the conclusion of his Traffic Impact Assessment Report for the PA611/Trinity Hill Road/Meadowside Road intersection: “It is concluded that the site-generated traffic can be safely and acceptably accommodated at this intersection with the understanding that the final design configuration and traffic control is subject to the review and approval of PennDOT. Mr. Horner continues, “So, what that is saying is there is an access configuration and an intersection configuration

that we feel comfortable with that will safely and acceptably accommodate the traffic. Horner Direct page 563. Emphasis added.

4. Applicant traffic exhibits indicate a degradation of service (B to C and C to D) at the PA611 and Wiscasset Road intersection that is attributed to the proposed project, even with the proposed installation of a roundabout at PA611 and Trinity Hill/Meadowside Roads. Applicant Exhibit 31 Traffic Impact Assessment Figures 21 and 22.
5. Applicant traffic exhibits do not consistently identify nor include approximate costs of physical improvements necessary to mitigate degradations in LOS attributable to the project. Applicant 31 Traffic Impact Assessment.
6. To the best of my knowledge and belief, Applicant responses to comments provided by James A. Milot dated May 15, 2023 have not been provided to the parties. Exhibit labeled 20230515_hawthornetiareview1.

Issue III. Conclusions of Law

1. One of Paradise Township's community development objectives is "to lessen traffic congestion on public roads and highways." 160-2(A)

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2. Conditional use shall not jeopardize the public health, safety, welfare, quality of life, or convenience of Township residents and shall be designed and constructed such that vehicular traffic does not create undue congestion or hazards prejudicial to the general area. Chapter 160, Article III, Section 160-10(7).
 3. All streets and/or intersections showing a level of service D or below shall be considered deficient and a health and safety concern and will be considered when granting use approval. 160.20(O) Emphasis added.
 4. "Traffic analyses shall be completed for the existing conditions and opening day/build-out year and horizon year, both without and with development. Analyses may consider proposed roadway improvements only if said improvements have committed funding. 160.20(N.)(1) Emphasis added.
 5. The [traffic] study shall also identify the improvements necessary to mitigate any Levels of Service degradations attributable to the project. All physical improvements shall be shown in sketches and accompanied by approximate cost estimates. 160.20(O)
 6. When state government determines that an intended use of private property conflicts with legitimate public purposes, there can be no

doubt concerning the power of the government to prohibit the private use. *Machipongo Land & Coal Co. v. Com.*, 569 Pa. 3, 9, 799 A.2d 751, 754 (2002) *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124–125, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Machipongo Land and Coal Co., Inc. v. Commonwealth*, 544 Pa. 271, 676 A.2d 199, 202 (1996). Indeed, “[l]ong ago it was recognized that ‘all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.’ ” *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491–492, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (quoting *Mugler v. Kansas*, 123 U.S. 623, 665, 8 S.Ct. 273, 31 L.Ed. 205 (1887)). *Machipongo Land & Coal Co. v. Com.*, 569 Pa. 3, 9, 799 A.2d 751, 754 (2002)

Issue III. Discussion

Legitimate public purpose is determined by the zoning ordinances. The

Applicant Traffic Impact Analysis:

1. Indicates at the PA 611/Wiscasset Road intersection an unmitigated and deficient, health and safety concern post build out level of service attributable to the project, and

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2. Incorrectly considers unfunded improvements (roundabout) in assessing traffic impacts
 3. Fails to address required elements of the zoning ordinances regarding cost estimates associated with improvements necessary to mitigate Levels of Service degradations associated with the project.

Issue III. Conclusion

Based upon the Traffic exhibits and testimony provided, the conditional use application for Master Development of a shopping area should be denied. If conditional use is approved, and potential mitigations at Wiscasset Road and other study areas not yet reported are not supported by PennDOT, the shopping area should be scaled back to reduce traffic impacts to acceptable levels.

Issue IV. Disturbance of Steep Slopes

Issue IV. Proposed Findings of Fact

1. Applicant Conditional Use Plan shows that (a) the proposed 87,000 sf commercial building, (b) the proposed commercial access to PA 611, and (c) a portion of the strip of land extending from Rock Ridge Road to the proposed commercial area, involve earth disturbance on

slopes of 25% or greater. Applicant Exhibit 20

conditional_use_plans_lastrevised_11.23.2022 Page 8

2. Applicant witness Gable testified regarding the slope of the strip of land extending from Rock Ridge Road to the proposed commercial area:
 - a. "Certain sections approach 25 percent slope." Transcript page 232, Gable cross by Houle
 - b. "It varies from a moderate slope of 4 to 5 percent to upwards of 30%." Transcript page 327, Gable cross by Jones
 - c. "The walking path will certainly be for advanced walkers. It won't be ADA compliant. My hope is to utilize cross -step back type grading with the walking paths so we don't have to do formal steps." Transcript page 328, Gable cross by Jones
3. Applicant witness Gable testified regarding the use of a Ditch Witch to trench utility lines: "... you make a very narrow ditch typically 4 inches in width down generally between 12 and 18 inches. You backfill sand around it." Transcript page 316, Gable cross by Jones

Issue IV. Conclusions of Law

1. Paradise Township defines site disturbance as "Any activity which involves removal of vegetation or which causes land on a given site

to be exposed to the danger of erosion, including clearing, grading, filling, plowing and other types of earthmoving”, and earth disturbance as “A construction or other human activity which disturbs the surface of land including, but not limited to, clearing and grubbing, grading, excavations, embankments, agricultural plowing or tilling, timber harvesting activities, road maintenance activities, mineral extraction and the moving, depositing, stockpiling, or storing of soil, rock or earth materials.” Chapter 1-16

2. “Any site disturbance on slopes exceeding 15% shall be minimized.”

160-21 (C)(b)(7)(a)

3. “Site disturbance shall not be allowed on slopes exceeding 25%”

[except in circumstances not applicable in the present case]. 160-21

(C)(b)(7)(b).

4. The words "should" and "may" are permissive; the words "shall" and

"will" are mandatory and directive. 160-51(I)

Issue IV. Discussion

Applicant exhibits and testimony indicate an intention to engage in expressly prohibited site disturbance in areas of greater than 25% slopes.

Issue IV. Conclusion

As submitted, the conditional use application for Master Development of a commercial area should be denied. If approved, plans should be revised to eliminate site disturbance on steep slopes, in accordance with applicable ordinances.

Issue V. Reliability of Applicant Testimony

Issue V. Proposed Findings of Fact

1. Responding to Mr. Felicetti regarding Mr. Varaly's experience "where there was a resort and a commercial component", Mr. Varaly stated, "this is the first time I testified for – at a conditional hearing for a resort."
2. Regarding the provisions of the Township Comprehensive Plan vis a vis the proposed project, Mr. Varaly testified that "It's certainly a very much integrated development with the shopping center alongside the casino." Transcript page 673, May 23, 2023 Emphasis added.
3. Mr. Varaly testified, "I said it was integrated with the proposed casino development." Transcript page 682, May 23, 2023. Varaly cross by Wolf. Emphasis added.

4. Regarding the link between the resort and the commercial area, Mr.

Varaly stated, “And it’s very clear that the two, that the shopping area is integrated with the casino. Mr. Prevoznik corrected Mr. Varaly,

then Mr. Karpowich stated, “the casino is across the street.” Mr.

Varaly continued, “That’s what I was saying, already in the

neighborhood.” Transcript page 697, May 23, 2023, Varaly cross by Meyer. Emphasis added.

5. Mr. Varaly opined that the commercial development and the resort need not be commercially dependent on one another. Transcript page 686, May 23, 2023 in response to Mr. Gonze.

6. Regarding continued operation of the commercial area if the resort failed, Mr. Varaly opined that the question is not relevant because the regulations provide for a resort and for a commercial area.

Transcript page 699, Varaly cross by Houle.

Issue V. Conclusions of Law

1. Not less than one-half of the development area of the [Master Development] tract shall be dedicated to resort use(s). 160-12A(43.B)(f)

Issue V. Discussion

- Applicant witness was seemingly unaware of the ordinance requirement at 160-12A(43.B)(f).
- Applicant witness repeatedly confused the commercial area of the proposed Hawthorne development with a different Master Development project for the Mount Airy Casino and Resort, submitted by Mt. Airy 1 LLC and initially approved by Paradise Township, in 2005. In that Master Development, as currently built, the Hotel, Casino, Restaurants and Shopping are all co-located at one central location; in contrast, the proposed Hawthorne resort and commercial areas are separated from one another by a quarter mile. Further, testimony that the casino is “across the street” or “already in the neighborhood” is misleading.

Issue V. Conclusion

The record should be clarified regarding the “casino” and its location.

Issue VI. Accuracy of Applicant ExhibitsIssue VI. Proposed Findings of Fact

1. “All dimensions, elevations, locations, and conditions, shall be verified by the contractor prior to construction, and the Owner and LVL Engineering Group shall be notified of any discrepancies with

the information shown in the drawings.” Applicant Exhibit 20,
Conditional Use Plans Last Revised 11.23.2022, Sheet 1

2. Applicant plans indicate that the bearing line of the tract perimeter boundary with parcels 11.7.1.34-2 (238 Rock Ridge Road) and 11.7.1.34-4 (229 Rock Ridge Road) along the eastern border of upper Rock Ridge Road is South 26 degrees 27 minutes 00 seconds East. Applicant Exhibit 20, Conditional Use Plans Last Revised 11.23.2022, Sheet 2

3. [Subject to approval of petition to reopen evidentiary record]

Issue VI. Conclusions of Law

Paradise Township Zoning Ordinance defines Tract Perimeter Setback as a “Natural or landscaped buffer area required along the perimeter of a tract proposed for a conservation subdivision or a master development plan abutting a residential area.” 1-16 Defined Terms

Issue VI. Discussion

Accurate tract perimeters are essential to establish the location of required setbacks and buffers designed to protect adjacent residential areas. Applicant has identified an internal process for addressing discrepancies between plans and actual site conditions. However, no process has been identified to inform the Township or adjacent

residential property owners of such discrepancies, or involve them in resolution in order to realize the protections afforded by zoning requirements for tract boundaries and associated buffers and set backs. [Additional point subject to approval of petition to reopen evidentiary record.]

Issue VI. Conclusion/Conditions

If Conditional use is granted, Paradise Township should (1) require applicant to notify the Township and property owners of property line discrepancies between applicant plans and recorded instruments and (2) the township should establish a monitored process by which such discrepancies are resolved.

Overall Conclusion

Based on the foregoing, I respectfully request that the Board deny conditional use of the proposed commercial office/shopping area. If the Board approves the Application, I respectfully request that the Board impose the conditions suggested above.

Respectfully,

Meredith E. Montgomery

Meredith Montgomery, Trustee

Joan Montgomery Irrevocable Grantor Trust

Appendix

Selected Quotes from Scalia and Garner's Reading Law: The Interpretation of Legal Texts, Antonin Scalia, Bryan A. Garner, Thomsom West, 2012, herein, Scalia and Garner.

Fundamental Principles of Statutory Construction (partial list)

- “Interpretation Principle: Every application of a text to a particular circumstances entails interpretation.”
- “Supremacy-of-Text Principle: The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.”
- “Ordinary-Meaning Canon: Words are to be understood in their ordinary, everyday meanings – unless the context indicates that they bear a technical sense. The ordinary-meaning rule is the most fundamental semantic rule of interpretations.”
- “Fixed-Meaning Canon: Words must be given the meaning they had when the text was adopted.”
- “Omitted-Case Canon: Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered.”

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- “General-Terms Canon: General terms are to be given their general meaning (*generalia verba sunt generaliter intelligenda*).”
 - “Negative-Implication Canons: The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)”
 - “Mandatory/Permissive Canon: Mandatory words impose a duty; permissive words grant discretion.”
 - “Conjunctive/Disjunctive Canon: *And* joins a conjunctive list, *or* a disjunctive list – but with negatives, plurals, and various specific wordings there are nuances.”
 - “Subordinating/Superordinating Canon: Subordinating language (signaled by *subject to*) or superordinating language (signaled by *notwithstanding* or *despite*) merely shows which provision prevails in the event of a clash – but does not necessarily denote a clash of provisions.”
 - “Presumption of Nonexclusive “Include”: The verb *to include* introduces examples, not an exhaustive list.”
 - “Punctuation Canon: Punctuation is a permissible indicator of meaning.”
 - “Whole-Text Canon: The text must be construed as a whole.”

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- “Presumption of Consistent Usage: A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.”
 - “If possible, every word and every provision is to be given effect (*vera cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”
 - “Harmonious-Reading Canon: The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.”
 - “General-Specific Canon: If there is a conflict between a general provision and a specific provision, the specific provision prevails (*generalia specialibus non derogant*).”
 - “Irreconcilability Canon: If a text contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect.”
 - “Associated-Words Canon: Associated words bear on one another’s meaning (*noscitur a sociis*).”
 - “Prefatory-Materials Canon: A preamble, purpose clause, or recital is a permissible indicator of meaning.”

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- “Title-and-Headings Canon: The title and headings are permissible indicators of meaning.”
 - “ Interpretive-Direction Canon: Definition sections and interpretation clauses are to be carefully followed.”

Addendum Submitted Subject to
Approval of Petition to Reopen Evidentiary Record
Regarding Issue VI, Reliability of Tract Perimeter Lines

Issue VI Proposed Findings of Fact 3.

Text to be added: Documents recorded in 1957, Map Book 8 Page 71 prepared by Leo Achterman, P.E., and its associated deed of conveyance, Vol. 232 page 673, indicate that the bearing line for the western tract perimeter boundary of parcels 11.7.1.34-2 (238 Rock Ridge Road) and 11.7.1.34-4 (229 Rock Ridge Road) is South 17 degrees 23 minutes 35 seconds East.

Issue VI Discussion

Text to be added: A comparison of the referenced exhibits indicates a difference of about nine (9) degrees between the recorded bearing line and applicant's drawing of the same tract boundary line. Other discrepancies may exist.