

BEFORE THE CONDITIONAL USE HEARING OFFICER  
TOWNSHIP OF LOWER MERION  
MONTGOMERY COUNTY PENNSYLVANIA

CU Application #3836

**RECOMMENDATIONS FOR FINDINGS OF FACT,  
CONCLUSIONS OF LAW, DISCUSSION AND ORDER**

This conditional use application filed by Mill Creek Road, LP (“Applicant”) seeks to convert two Class I historic resources in a residential zoning district to multifamily use and construct a new multifamily building measuring 54.4-ft tall. A total of 33 residential units and 66 on-site parking spaces are proposed. The Applicant also requests approval to exceed impervious surface coverage and building area limits, and to reduce the required front, side and rear yard setbacks pursuant to Zoning Code §155-151.B(l)(f) and 155-152.C. Conditional Use Hearings were held on September 23<sup>rd</sup>, Oct. 24<sup>th</sup> and Oct. 31<sup>st</sup>, 2019 before the Conditional Use Hearing Officer pursuant to Code §155-141.2.A.5.

I. FINDINGS OF FACT

A. The Parties

1. The Applicant is Mill Creek Road Associates, LP (“Applicant”) by its senior property manager Kevin Kyle. The Applicant is affiliated with MLP Ventures and O’Neill Property Group. Mr. Kyle is an employee of MLP Ventures and authorized agent of the Applicant.

2. The Applicant is legally represented by Jonathan H. Spergel, Esq.; Shoshana (Suzanne Ilene) Shiller, Esq.; and Zachary J. Koslap, Esq. of the law firm Manko, Gold, Katcher & Fox, LLP.

B. The Property and Proposed Development

3. The Applicant is the owner of property known as 1400 Mill Creek Road, a single tract of ground approximately 2.6 acres or 113,256 square feet in size on Mill Creek Road, Gladwyne. (“Property”). The Property is located in Ward 2 of Lower Merion Township and is subject to the R-AA District Code 155-11 *et seq.* It is also subject to the Historic Resource Overlay District (“HROD”) 155-149 *et seq.*

4. The Property is bound on three sides by Rolling Hill Park, 103 acres of passive open space owned and maintained by the Township of Lower Merion, and by Mill Creek on the fourth side. The Property is accessed by a bridge spanning Mill Creek and connecting to Mill Creek Road. Rolling Hill Park contains four contributing resources and the entire park is a contributing site to the Mill Creek Historic District Boundary Increase. Directly across Mill Creek Road lies Mill Creek Valley Park, 88 acres of open passive open space owned and maintained by the Township of Lower Merion.

5. The Property is currently improved with three buildings. Two mill buildings are linked together by an elevated crosswalk, and a former worker’s cottage. The largest and most important structures are two linked buildings collectively referred to as the “Old Mill” a former grist and munitions mill dating back to the mid-1800s. The 19<sup>th</sup> century mill is referred to herein as “Mill Building One.” A second building constructed in the 1920s for shipping and storage is referred to as “Mill Building Two.” Both buildings were used in conjunction with mill operations are Class I Historic Resources listed on the Township’s Historic Resource Inventory. The former worker’s cottage is not a contributing resource.

6. Rolling Hill Park was the site of Rolling Hill Farms, the former estate of Walter C. Pew. It was purchased by Lower Merion Township in 1995 to be preserved as open space.

Rolling Hill Park contains four contributing historic resources, including a caretaker's house.  
(Ex. A-32 §7 at p. 5; N.T. 10/25/19)

C. Prior Applications for Zoning Relief and Land Development Approval

7. Multiple applications for zoning relief from the Zoning Hearing Board, land development and conditional use approval were previously filed by the Applicant or an affiliate between 2004-2019. The Applicant's proposed land development included adaptive reuse of Mill Building One and Mill Building Two as condominium units, as well as a new multifamily dwelling structure ("New Building" or "Building Three"). All conditional use applications filed between 2004 and 2018 requested incentive use and represented the New Building as compliant with the 35-foot height limitation in the RAA zoning district. The Board of Commissioners granted conditional use approval for 27 units in 2004; conditional use approval for 33 units in 2006; reconfirmation of approval in 2009 and reconfirmation of approval 2018.

8. In January 2019 the Applicant filed another conditional use application to reconfirm previously granted conditional use approval for incentive use in 2018. At a conditional use hearing conducted on April 11, 2019, the Applicant's attorney orally requested approval of 44.41-ft height of the New Building. The Applicant was requesting dimensional relief for height as well as reconfirmation of conditional use approval for incentive use. The Applicant's Engineer, Michael Bowker ("Bowker"), testified the proposed New Building was 44.41-feet tall and had been incorrectly measured in the past. (Ex. A-21). Bowker explained the zoning code changed how building height was measured in 2005, resulting in a taller building height calculation for the same proposed New Building. While the zoning code's definition of building height had changed in 2005, after the initial approval in 2004, subsequent conditional use applications filed in 2006; 2009, and 2018 did not state the height of the New Building

exceeded 35-feet. The Township's files contained no submissions from the Applicant or its experts stating the New Building was 44.41-feet tall prior to April 2019. Additionally, the Applicant had never requested dimensional relief for building height in a conditional use application. The Board of Commissioners denied reconfirmation of conditional use approval for incentive use in May 2019. The denial was not appealed.

D. Current Application for Conditional Use Approval

9. The Applicant submitted an Historic Resource Overlay District conditional use application dated June 4, 2019 stating conditional use relief is sought from zoning code §155-151.B.1.f (incentive use) and §155-152.C (dimensional relief). (Ex. A-1).

10. The Lower Merion Township Historical Commission reviewed the conditional use application on June 24, 2019 and recommended approval of reduction of front, side, and rear yard setbacks; increased building area and impervious surface limits and increased building height than permitted in the RAA District. (Ex. T-4). Historical Commission meeting minutes paraphrase comments from Consultant Frens:

the new building looks as if it were awaiting demolition of the historic resources in front of it and discussed how appropriate something of that scale would be in the valley in which it would be built. He said the tightness of the valley cannot be captured in the 3D model presented. He said that the height of the new building might not be perceived fully from the road but would dwarf the historic resources.

(Ex. T-4 at p. 8-9).

11. The Lower Merion Township Environmental Advisory Council ("EAC") reviewed the conditional use application on July 18, 2019 and made the following recommendations:

- a. Required Plantings including deer proof native evergreen shrubs;
- b. Stormwater Management including surface expression SMPs and add in retention areas in other places;

- c. Invasive Japanese Knotweed remediation along bridge abutments;
- d. Existing Dam on Mill Creek modifications to allow passage of fish;
- e. Green Roof on new building to manage stormwater and for screening purposes.

12. On Sept. 3, 2019, the Lower Merion Township Engineer (“Twp. Engineer”) reviewed the conditional use plan set and identified two major issues: traffic and stormwater. He recommended approval if those major issues are resolved and other engineering comments addressed by the Applicant. (Ex. T-2.b).

13. The Director of the Lower Merion Building and Planning Department, Christopher Leswing (“Leswing”), wrote a memo dated Sept. 6, 2019 to the Planning Commission reviewing the conditional use application. (Ex. T-2.a). Leswing’s memo attached an Historic Resource Inventory Study (“HRIS”) dated July 18, 2019 by Civic Visions written by architectural historian George C. Thomas (“Civic Visions”), stating the Mill Buildings “require significant reconstruction and repair.”<sup>1</sup> (Ex. A-34). Leswing did not recommend approval of the conditional use application because:

proposed construction negatively impacting both the historic resources and the Township open space due to the size of the proposed building which requires encroachments into Rolling Hill Park resulting in destruction of sensitive natural features.

(Ex. T-2. at p. 10).

14. The Lower Merion Planning Commission reviewed the conditional use application and unanimously voted not to recommend approval in Sept. 2019. (Ex. T-3). Meeting minutes reflect discussion about whether a New Building may be constructed pursuant to Code §155-151.B.1.f which permits “expansion” of Class 1 historic resources up to 50% under certain conditions. The Applicant proposes to expand the Mill Buildings with an underground garage

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<sup>1</sup> An earlier version of the same HRIS dated June 19, 2019 by Civic Visions stating the Mill Buildings “require significant demolition, reconstruction and repair” was not attached to Leswing’s memo. (Ex. T-8).]

extending from Mill Building One to the New Building. The Applicant argued the underground garage and New Building are permitted as expansions of the historic resources and cited three prior approvals. The Planning Commission disagreed that expansion of historic resources allows a multifamily New Building may be constructed in the RAA District, which does not allow multifamily buildings. Planning Commissioner Mathews submitted a legal brief arguing the conditional use application should be denied. Meeting minutes paraphrase public comment in opposition to the project from A.J. Kait, President of the Gladwyne Civic Association:

The proposed development is wildly out of character with Gladwyne in its entirety and particularly this site. He said the site is a forest and creek valley that is wild space and putting a five-story building in the middle of a nature preserve is concerning and out of character with the space.

(Ex. T-2). Similarly, Kathleen Abplanalp, the Director of Historic Preservation with the Lower Merion Conservancy commented:

We do not believe that the relief is essential to the preservation of the resource and that without the relief it would not be possible to maintain the resource. She said the mill has suffered extensive damage due to neglect and the present condition of the building is so poor that it requires removal of some portions of the building or an entire mill building. She stated that the present plan presents a greater risk to the mill than would exploring other options including finding an alternative use that might not be residential.

(Ex. T-2). Sara Schuh, a resident and member of the Environmental Advisory Commission also commented:

the building is out of character in terms of the scale. She echoed the comments made by the Gladwyne Civic Association. She said we must weigh the impact of development on greater good of the park used by the public.

(Ex. T-2).

15. Conditional Use hearings were held on Sept. 23<sup>rd</sup>, Oct. 24<sup>th</sup> and Oct. 31<sup>st</sup>, 2019.

16. Andrea Campisi (“Campisi”), Senior Planner in the Department of Building and

Planning, offered the following exhibits into evidence:

T-1 Affidavit of Publication;  
T-2.a Staff Memo dated 9-6-19 to Planning Commission;  
T-2.b Township Engineer's letter dated 9-3-19;  
T-3 Recommendations of Lower Merion Planning Commission;  
T-4 Recommendations of Lower Merion Historical Commission;  
T-5 Affidavit of Publication of CU hearing on 10-24-19;  
T-6 Legal brief from Planning Commissioner Timothy N. Mathews, Esq.;  
T-7 Photograph provided by Christopher Leswing;  
T-8 Township Iteration of Historic Resource Inventory Study dated 7-18-19<sup>2</sup>.

All of the exhibits offered on behalf of the Township were admitted into the record, with the exception of T-6 which was submitted as a legal brief outside the record.

17. The Township offered Donna Heller ("Heller"), Director of Parks and Recreation, as an expert witness at the Oct. 24, 2019 conditional use hearing. Heller's direct examination was conducted by Leswing. Heller testified that the proposed five story New Building sited five feet from Rolling Hill Park "would change the experience of the park. It's currently an open, natural setting with no sight obstructions to nature." (N.T. 10/24/19 p. 13). Rolling Hill Park is "an escape area where its natural lands. It's very hilly, very natural leading down to a stream (...) A place to escape the hustle and bustle." (N.T. 10/24/19 p. 13-14). A five foot setback between the New Building and Rolling Hill Park would impact the current experience. (N.T. 10/24/19 p. 17). In Heller's opinion, the proposed New Building would not conserve the natural setting and landscape given its proximity to the property line and height of the wall and does not meet the legislative intent of the Historic Resource Overlay District. (N.T. 10/24/19 p. 19-21). It would change the viewshed and the current experience of being in Rolling Hill Park which are defining characteristics of the natural setting. (N.T. 10/24/19 p. 21-22). A five story New Building would detrimentally affect the intrinsic value of being in nature in Rolling Hill Park. (N.T. 10/24/19 p.

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<sup>2</sup> A previous version of Historic Resource Impact Study dated 6-19-19 was submitted into the record by the Applicant as Ex. A-34.

22-23). On cross examination, Heller admitted the New Building's abutment would affect a small portion of Rolling Hill Park's trails and she does not have experience in historic preservation or landscape architecture. (N.T. 10/24/19 p. 24-25).

18. The Applicant offered the following exhibits into the record at the hearings:

- A-1 Conditional Use Application dated 6-4-19;
- A-2 Vesting Deed for 1400 Mill Creek Road;
- A-3 Conditional Use Site Plans and Elevations;
- A-4 Estimate Project Costs, Mill Creek Road Associates;
- A-5 Photos of Existing Conditions;
- A-6 Affidavit of Kevin Kyle;
- A-7 Lisa Thomas CV;
- A-8 Landscape Plans;
- A-9 Affidavit of Lisa Thomas;
- A-10 Michael Bowker CV;
- A-11 Façade Easement, 1400 Mill Creek Road;
- A-12 Email dated 10-12-18 from Township Solicitor regarding façade easement;
- A-13 Historical Commission Meeting Notes dated 6-24-19;
- A-14 Township Code Dimensional Requirement Chart;
- A-15 Applicable Township Code Provisions Chart;
- A-16 Zoning Hearing Board Opinion 2004;
- A-17 Conditional Use Opinion 2005;
- A-18 Conditional Use Opinion 2006;
- A-19 Conditional Use Opinion 2009;
- A-20 Conditional Use Opinion 2018;
- A-21 Conditional Use Opinion 2019 without exhibits;
- A-22 Building Height Rendering;
- A-23 Building Mass Concept Renderings
- A-24 Aqua PA Letter dated 4-3-19;
- A-25 Comprehensive Plan Selected Sections;
- A-26 Historic Preservation Best Practices;
- A-27 Affidavit of Michael Bowker;
- A-28 Frank Tavani CV;
- A-29 Traffic Impact Study dated 9-17-19;
- A-30 Affidavit of Frank Tavani;
- A-31 Robert Wise CV;
- A-32 Mill Creek Historic District Documents;
- A-33 Historic Resource Impact Study 2005;
- A-34 Historic Resource Impact Study 2019 dated 6-19-19<sup>3</sup> without all attachments<sup>4</sup>;

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<sup>3</sup> A subsequent version of the HRIS dated 7-18-19 was submitted into the record by the Township as Ex. T-8.

<sup>4</sup> The HRIS dated 6-19-19 states "additional and new information from Frederick Baumert, P.E. of Keast & Hood, attached below," but it was not attached to the HRIS submitted into the record. A letter dated 7-2-19 written by

A-35 Mill Creek Historical Studies & Architectural Vision Report 2005;  
A-36 Structural Conditions Report dated 7-2-19;  
A-37 Historic Resource Analysis RGA dated 9-20-19;  
A-38 Affidavit of Robert Wise;  
A-39 Charles Jefferson CV;  
A-40 Jefferson Werner Report 2019;  
A-41 Affidavit of Charles Jefferson;  
A-42 Michael Samuels CV;  
A-43 Feasibility Report, Clarion Samuels Associates dated 10-23-19;  
A-44 Steep Slope Report dated 10-22-19.

All exhibits offered by the Applicant were admitted into the record.

19. Kevin Kyle (“Kyle”) was the Applicant’s first witness at the conditional use hearing. He is the authorized agent of Mill Creek Associates, LP., the Applicant. Kyle is employed as a senior project manager by MLP Ventures, an affiliate of the Applicant, and in that capacity he has worked on over twenty land development projects. He “is not an expert in structural deterioration of historic buildings.” (N.T. 9/23/19 p. 59-60).

20. The Applicant acquired the property by deed in 2002 and has continuously owned it to date. Kyle described the proposed development and conditional use plan set (Ex. A-3). Kyle admitted the Applicant did not seek conditional use approval to modify the setbacks, building area and impervious surface requirements of the proposed New Building, in its January 2019 conditional use application. (N.T. 9/23/19 p. 34-35).

21. Kyle testified about the cost projections for development and construction under three different development scenarios:

- a. 33 units (New Building with three stories above parking) \$22,358,006.00;
- b. 13 units (historic resource Mill Buildings only) \$13,153,98.00
- c. 23 units (New Building with two stories above parking) \$20,373,964.00.

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Baumert from Keast & Hood cannot be the same document because it was written two weeks after the 6-19-19 HRIS.

(N.T. 9/23/19 p. 37-43; Ex. A-4). These “cost projections are based in part with bids collected for stabilization, renovation and construction work estimates, estimates from historic preservation developers, including Charlie Jefferson and appraisals of market conditions.” (N.T. p. 39).

22. Kyle admitted the Mill Buildings are currently in a “state of significant disrepair.” (N.T. 9/23/19 p. 44). He took photographs in May and June of 2019 depicting the exterior of the mills (Ex. A-5). He did not photograph the interior because the Mill Buildings are “dark and a little unsafe.” (N.T. 9/23/19 p. 48). Kyle explained “unsafe” means “just there’s a lot of deterioration going on with the floor and floor beams.” (N.T. 9/23/19 p. 49). On cross examination Andrea Campisi asked him to describe “significant disrepair.” (N.T. 9/23/19 p. 51). Kyle responded, “the buildings—the windows need repair, the roof needs repair, and there are areas of the floor that need to be repaired.” (N.T. 9/23/19 p. 52).

Q. Do you think there’s a danger to the public in accessing the property at present?

A. Yes, there can be. The current public access on the property is unsupervised. The condition of the mill buildings may present a safety risk to the public. (...) Unleashed dogs that enter the Mill Buildings could present a safety risk.

(N.T. 9/23/19 p. 56). Temporary fencing spans the bridge to restrict vehicular access onto the property. (N.T. 9/23/19 p. 61).

23. Kyle testified he is not an expert in deterioration of a historic building. “We’ve hired some experts to determine that and forward those conditions onto us.” He elaborated “we hired some consultants to do some work for us and they have determined the buildings are in disrepair.” Further, “a structural report will be entered as evidence.” (N.T. 9/23/19 p. 59-60).

24. Kyle testified that Bridlewild Trails members currently have access to the property, but no formal agreement is in place. If the conditional use application is approved, two

easements will be formalized. One easement for Bridlewild Trails members and another easement for members of the public to reach the trail in Rolling Hill Park. (N.T. 9/23/19 p.56-57).

25. Charles Jefferson (“Jefferson”) was accepted an expert witness in development, adaptive reuse and reuse of historic properties. (N.T. 9/23/19 p. 68). He was not offered as an expert structural engineer. (N.T. 9/23/19 p. 86). His educational degrees are BA in business and MA in finance, and he has “four plus years in Drexel University on electrical engineering.” (N.T. 9/23/19 p. 65). Jefferson has been a partner at Jefferson-Werner, LLC, a real estate development firm, since 2007. He has worked on twenty adaptive reuse projects for more than 25 years. (N.T. 9/23/19 p. 65). He has overseen the construction and rehabilitation and adaptive reuse of historic properties. His professional experience includes estimating the costs of building construction and evaluating the economic feasibility of historic structures to undergo adaptive reuse and renovation for development projects. (N.T. 9/23/19 p. 65-66). Jefferson testified as an expert real estate developer with experience in structural issues, but not as a structural engineer. (N.T. 9/23/19 p. 86-87 ).

26. Jefferson became involved in this project when he was asked to review the historic structures and opine as to the condition, to compile a cost estimate to stabilize the structures. (N.T. 9/23/19 p. 70). He visited the site on July 10, 2019 and took photographs. He wrote a report dated Sept. 18, 2019 documenting existing conditions and deterioration, providing a cost estimates to address deficiencies, and attaching photographs (N.T. 9/23/19 p. 70, 73)(Ex. A-40). No one helped Jefferson prepare his report. (N.T. 9/23/29 p. 72).

27. Jefferson described both mill buildings being in “poor condition” based on his visual inspection in July 2019. (N.T. 9/23/19 p. 75). With regard to Mill Building One he testified:

Mill Building One has quite a bit of deterioration on the interior. Primarily joist pockets, the trussing on the roof. There was a wall that abuts the creek on the lower level (..) that wall is about 15 degrees out of plumb. Without doing any destructive testing or further investigation, there’s something compromised about that situation there. (...) So from the lower level up it was pretty consistent in that joist pockets, which is the area in which the floor joist or roof rafter sits. In many instances had been deteriorated to the point where mortar failed. The timber or wood was wicking water to the point where it had started rotting. The second picture there actually shows one roof member where, and there’s several of these throughout, this is just a typical, where there had been shoring put in place to prevent a roof collapse. So over all I would describe Building One as being in poor condition.

(N.T. 9/23/19 p. 73-75; Ex. A-40). Mill Building Two is also in poor condition according to

Jefferson:

Building Two shares the same designation. (...) The perimeter wall corners exhibit mortar joint cracking throughout the north and west facades, typical of foundation movement. (...) You can see there are lines that go off at 45 degree from the corner of the window. (...) If you look at the rest of the façade, you’ll see additional lines like that. It’s an indication of a failure of the mortar joint more so something’s happening on the foundation. Whether it’s being undermined for some reason or not, but there’s a failure there.

(N.T. 9/23/19 p. 75-76; Ex. A-40). He described additional deterioration of Building Two:

The center of Building Two there’s a steel truss that runs from one side to the other. And you see where there’s inching of the top corners and the bottom cord where the column that supports (the steel truss) that clearly has dropped somehow. (...) You can see that gap at the top of the steel beam versus the gap at the bottom. It widens as it goes down which would indicate that center column is failing. (...) So clearly there’s a foundation issue in the center there. The lower picture there is just more of the failure of the perimeter walls and the foundation underneath them.”

(N.T. 9/23/19 p. 79).

28. To diagnose and correct these wall failures, Jefferson testified portions of Mill Building Two's foundation walls need to be rebuilt from the interior:

we would have to be able to get inside, get access underneath the floor and be able to determine what's happening there. Whether or not there's a failure of the foundation, a subsidence of whatever earth is underneath there. And then take the appropriate steps to rebuild the integrity of that corner. Whether it be through putting some type of structure inside to prevent the wall from deteriorating further or there's a multitude of ways to fix that. But that's what I mean by rebuild there. (...)

(N.T. 9/23/19 p. 76-77). Interior work to rebuild the foundation will not be visible outside or affect the building façade. (N.T. 9/23/19 p. 76-77). "Failure of the perimeter walls and foundation underneath them" is shown in a photo, according to Jefferson. (N.T. 9/23/19 p. 79).

29. Jefferson further testified none of the structural issues he observed in either Building One or Building Two would prohibit adaptive reuse rehabilitation of these structures. (N. T. 9/23/19 p. 78-79). Some of the twenty adaptive reuse projects Jefferson has completed involved structures in as bad or worse condition. (N.T. 9/23/19 79-80). Jefferson opined that the two Mill Buildings and connector bridge are physically able to be rehabilitated and adaptively reused. (N.T. 9/23/19 p. 88).

30. There is a difference between "historic restoration" and "adaptive reuse." Historic restoration is restoring a building to its original use, like a historic home occupied by a historic person. Adaptive reuse is taking an old building that's functionally obsolete and keep the shell of the building intact, the "primary historic fabric" but alter the interior spaces to adapt it to current modern day use. (N.T. 9/23/19 p. 77-78).

31. Jefferson estimated the costs of stabilizing and restoring the Mill Buildings to a "watertight envelope" including new roof, restored masonry, rebuilt foundation and windows, but not including the costs of converting the mill buildings into multifamily residential units.

(N.T. 9/23/19 p. 82-83). He arrived at his estimate by taking “historic costs” and bringing them forward, including inflation. (N.T. 9/23/19 p. 82) The cost of converting historic buildings for adaptive reuse is \$163 per square foot, significantly higher than the cost of a newly constructed framed shell multifamily building for \$20 per square foot. The Mill Buildings are not large enough to financially justify restoration/reuse alone, in Jefferson’s opinion. (N.T. 9/23/19 p. 92). Adding an additional building on the site would decrease the overall costs per square foot of the entire proposed development. (Ex. A-40; Ex. A-41 ¶22; *see generally* N.T. 9/23/19 p. 92-93).

32. Jefferson opined the two Mill Buildings and connecting bridge could be stabilized and restored for \$4.1 million as follows:

Mill Building One.....	\$2,199,085.30
Mill Building Two.....	\$728,008.04
Connecting Bridge.....	\$35,500.00
Architect & Engineer... 8%.....	\$296,259.33
Contractor.....10%.....	\$325,885.27
Contingency.....15%.....	\$537,710.69
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TOTAL.....	\$4,122,448.63

(N.T. 9/23/19 p. 80; 82; 88-89, Ex. A-40). A caveat for two line items: Contractor and Contingency were a “little higher than he would normally do” but Jefferson wanted to make sure his estimate was a “number that this work can be accomplished.” (N.T. 9/23/19 p. 82).

33. On cross examination, Andrea Campisi asked Jefferson about the cause of significant deterioration of the Mill Buildings. He described water pushing a wall forward, roof leaks causing water infiltration in the upper stories (Mill Building One). Jefferson testified settlement in corners was “tough to determine” (Mill Building Two). Overall, deterioration was caused by “old age, failure of foundation, and a multitude of reasons,” according to Jefferson. (N.T. 9/23/19 p. 91-92 ).

34. Michael Bowker, P.E. (“Bowker”) is a senior engineer and manager for Momenee Inc., where he been employed for approximately 25 years. He is a licensed Professional Engineer in the Commonwealth of Pennsylvania and has been appeared before the Lower Merion Township Board of Commissioners numerous times in connection with development projects. Bowker was accepted as an expert witness at the conditional use hearing.

35. Bowker has been involved in this project since 2002 including five or six conditional use applications for the proposed adaptive reuse and land development. (N.T. 9/23/19 p. 97). He testified to the proposed development’s overall design and opined that it complies with conditional use criteria in the Historic Resource Overlay District as well as general conditional use criteria. Bowker also testified about previous conditional use approvals and variances for similar adaptive reuse and land development project. (N.T. 9/23/19 p.135-139)(Ex. A-17, 18, 19, 20). Following a conditional use hearing on April 8, 2019, the hearing officer did not recommend conditional use approval. (N.T. 9/23/19 p, 140).

36. The proposed land development includes a garage underneath the footprint of Mill Building One expanded to extend underneath proposed New Building (Building Three) with some services, lobby areas, elevators underneath the footprint of Mill Building Two. (N.T. 9/23/19 p. 167-168; Ex. A-4 at p.6 “Lower Level Parking Plan”).

37. The height of the proposed New Building is 54.4 feet. (N.T. 9/23/19 p. 111). Bowker admitted he had testified the same building was 44.41 feet high in April 2019. (N.T. 9/23/19 p.133). He explained that Lower Merion changed its ordinance regarding building height in 2005 resulting in different height measurements of the same structure in 2018 and 2019. (N.T. 9/23/19 p.133-134).

38. Frank Tavani is the principal of R. Tavani and Associates, Inc. where he has worked for over 15 years. He is a licensed professional engineer in the Commonwealth of Pennsylvania. And a registered professional traffic operations engineer. Tavani testified to the proposed development's off-site traffic impacts and opined that the proposed development complies with conditional use criteria related to traffic impacts.

39. Robert Wise is a principal senior architectural historian of Richard Grubb & Associates, Inc, and has been employed in that capacity for four years. He has a Master of Science in historic preservation from the University of Pennsylvania and meets the Federal Standards for Architectural Historians established by the National Park Service (40 C.F.R. Part 61). He was accepted as an expert in historical architecture and preservation at the conditional use hearing.

40. Wise was retained by Lower Merion Township to complete the paperwork and research necessary to nominate the Mill Creek Boundary Increase District to the National Register in 1996. (N.T. 10/24/19 p. 34). He became involved in this Application in September 2019 because the George E. Thomas, an architectural historian employed by Civic Visions who prepared previous Historic Resources Impact Study ("HRIS") reports was unavailable to testify. (N.T. 10/24/19 p. 54-55). Wise relied George E. Thomas's HRIS dated January 20, 2004 and updated HRIS dated June 19, 2019 (Ex. A-34 & A-35,) as well as a Keast & Hood Structural Engineers' report dated July 2, 2019 by Frederick Baumert, PE (Ex. A-36) to prepare his own report dated September 20, 2019. (Ex. A-37). (N.T. 10/24/19 p. 48-52.) Wise's written report states he reviewed George E. Thomas's HRIS dated July 18, 2019. (Ex. T-8).

41. In his report and testimony, Wise described the historical significance of the mill buildings and proposed efforts to retain and rehabilitate historically significant features through

adaptive reuse. Regarding the exterior of the Mill Buildings after rehabilitation, Wise “deferred to the Historical Commission’s findings and recommendations that they would like to see refinement of the architectural component,” rather than offer an opinion. (N.T. 10/24/19 at p. 61 & 69). He notes “some features are at a point where they cannot be retained due to structural failure” (N.T. 10/24/19 p. 60; 103-104). He admitted Mill Building Two was recommended for demolition by a structural engineer.<sup>5</sup> (N.T. 10/24/19 p. 103-104). Nonetheless, Wise believes the proposed rehabilitation will not destroy the distinguishing qualities or characteristics of the building. (N.T. 10/24/19 p. 61.)

42. Wise admitted that there are no five-story buildings in the Mill Creek Historic District. (N.T. p. 87-88). When asked about massing, Wise conceded the proposed five-story building would be taller than the hill replacing the view of the hill seen from the street. (N.T. p. 93-95). He agreed the proposed five story New Building would interrupt the view of the historic buildings as seen from the trail in Rolling Hill Park. Wise also stated that the current view is “derelict mill buildings” with graffiti. (N.T. p. 96-98). He admitted it is possible to maintain the Mill Buildings without water infiltration deteriorating the them. (N.T. p.100). He agreed the proposed development would be a more active, intense use than the current mill buildings in passive open space. (N.T. 100-101).

43. Gregory Pritchard, Lower Merion Township’s Historic Preservation Planner (“Pritchard,”) asked Wise about the compatibility of massing, size and scale of the new building in relation to the mill buildings, with reference to Standard Nine of the Secretary of the Interior’s standards. (N.T. p. 108-110).

Q. “New additions, exterior alterations or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the

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<sup>5</sup> Demolition is not mentioned in Wise’s letter (Ex. A-37) or his affidavit (Ex. A-38).

massing, size, scale and architectural features to protect the historic integrity of the property and its environment.” So do you believe that, based on designs you’ve seen of the building, it would meet that standard?

A. I do, but again with additional work with the Historical Commission to create a façade that’s even more compatible with existing resources, per the recommendation of the Historical Commission.

(N.T. p. 109-110). Wise agreed that the Mill Creek Increase District includes Rolling Hill Park as a contributing property to the district. (N.T. p. 110; 114-115).

44. Lisa Thomas<sup>6</sup> is a principal of Glackin Thomas Panzak, Inc. where she has been employed for 26 years. She is a registered landscape architect in the Commonwealth of Pennsylvania and a certified planner from the American Institute of Certified Planners. She was accepted as an expert in historical architecture and preservation at the conditional use hearing.

45. Lisa Thomas prepared a landscaping plan for the proposed development which removes invasive plants and adds new landscaping to Rolling Hill Park. (N.T. p. 130-131) (Ex. A-8). She has not designed any changes or improvements to trails in Rolling Hill Park. (N.T. p. 137). Lisa Thomas relied on a geotechnical report dated Oct. 22, 2019 written by Allen W. Cadden, P.E. (Ex. A-44). The slope behind the proposed new building is highly disturbed and eroding due to surface water which could impact the stability of the trail. Constructing a new building will “create almost a retaining wall against where the trail is and where the soil is, you know, to stabilize it.” (N.T. p. 139-140). Setbacks aren’t a concern because the site is not urban and the proposed buildings will not create an “urban canyon.” (N.T. p. 141). Lisa Thomas opined the proposed development complies with conditional use criteria related to landscaping, and the lack of harm to the public interest if relief from setback requirements is granted.

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<sup>6</sup> Lisa Thomas is referred to by her full name to differentiate her from George E. Thomas, Civic Visions’ architectural engineer.

46. Michael Samuels (“Samuels”) is a principal of Clarion/Samuels Associates (“CSA”) and has 40 years of experience in real estate valuation and financial and market feasibility analysis. He has a Master of Science degree in Real Estate Appraisal and Investment Analysis from the University of Wisconsin. He is a Certified General Real Estate Appraiser in the Commonwealth of Pennsylvania. He was accepted as an expert in valuation and appraisal of real estate and property development.

47. Samuels testified to the real estate valuation of the proposed development and alternative design scenarios with fewer residential units. His scenarios contemplated:

1. 33 units in Mill Building One, Mill Building Two and New 4-story Building;
2. 13 units in Mill Building One and Mill Building Two;
3. 23 units in Mill Building One, Mill Building Two and New 2-story Building

(Ex. A-43, p. 3-4). Samuels’ discounted cash flow analysis calculated project values as follows:

Scenario 1. 33 units	\$749,754	feasible.
Scenario 2. 13 units	(\$5,393,171)	not feasible
Scenario 3. 23 units	(\$4,283,323)	not feasible

(Ex. A-42, p.13). He opined that it would not be economically feasible to preserve both Mill Buildings with fewer than 33 units in a new multifamily building. The project value of the proposed land development with 33 units is \$749,754.00. This figure includes \$4.1 million dollars in construction estimates to stabilize Mill Building One and Two.

48. Kathleen Abplanalp, Director of Historic Preservation at the Lower Merion Conservancy (“Conservancy”) and resident of Lower Merion Township commented that the Conservancy does not support this application. Abplanalp explained she lives in the caretaker’s cottage. She recently walked through the site and she is shocked by the “state of decline” of the buildings over the last fifteen years. (N.T. p. 77). The Conservancy previously supported the development on the site understanding the significance of the mill property, but the 55-foot

height of the proposed new building changed that or at least created uncertainty. (N.T. p. 78). Mill Building Two is also concerning because the engineering report states it is in such poor condition that it needs to be demolished. (N.T. p. 78, 80-81, 82). She described the trail as “a significant part and historic component of this property.” The trail has been there since at least the middle of the nineteenth century linking tenements with the mill. (N.T. p.78). Abplanalp urged that the proposed development needs greater thought before the trail is closed off to the greater public. (N.T. p. 79). Summarizing the Conservancy’s position on the proposed development, Abplanalp stated:

“Overall we would support development that is sensitive to that site. The entire impact on the site of this project is too intense. We believe that it leaves the site with less historic integrity than it has now, fully recognizing and understanding that if this building (Mill Building Two) does not get a use, its future is very, very uncertain. We recognize the gravity of coming out with this position, but in the end, our mission is to preserve and protect historic resources. We don’t feel this particular proposal is the best plan forward.

(N.T. p. 80).

#### Select Exhibits Admitted into the Record

49. National Register of Historic Places Registration Form for Mill Creek Historic District Boundary Increase dated July 1, 1996. Ex. A-32. It was researched and written by Robert Wise in 1996. (N.T. 10/24/19 at p. 34-36). “Lower Merion Township’s Mill Creek Historic District Boundary Increase is a wooded enclave composed of the Mill Creek Valley and surrounding hills. The boundary increase enlarges the size of the original Mill Creek Historic District (N.R. 1980) by 550 acres.” (Ex. A-32 § 7 at p. 1). “The mill complexes and other mill resources are the main focus of the boundary increase. They were dispersed along the length of Mill Creek.” (Ex. A-32 § 7 at p. 2). Noncontributing housing is an “intrusion” in the Mill Creek Historic District Boundary Increase. (Ex. A-32 § 7 at p. 6). In summary:

The most striking attribute of the area encompassed by the Mill Creek Historic District Boundary Increase is the degree to which the eighteenth and nineteenth century rural landscape remains intact. Today the boundary increase maintains its **historic integrity** through the retention of eighteenth and nineteenth mill structures and related buildings and the valley's largely unaltered natural viewshed.

(Ex. A-32 § 7 at p. 6).(emphasis added)

50. Civic Visions HRIS dated January 20, 2004 revised March 24, 2005 authored by architectural historian George E. Thomas, states the Mill Buildings were evaluated in August 2003 by the Kachele Group:

They found a mill building group that has not been maintained for many years and in generally in declining condition requiring “significant remedial work.”

(...)

- Roofing is significantly deteriorated with no eye to the future. Full roof replacement is required.
- Settlement has moved floors out of level and in the case of the two story mill building, has caused a gap between the steel columns and the spanning beams.
- Foundation settlement is significant in the new mill building.

(...)

It is clear from the (Kachele) report that unless something is done in the near future, the mill will begin to decline. This decline is addressed by rehabilitating the complex into a new use that preserves its essential architectural character while adapting it to a residential use that conforms to the surrounding district

(Ex. A-33 at p. 11).

51. Civic Visions HRIS dated June 19, 2019, authored by George E. Thomas, states:

Summary: The Historic Resource Impact Statement prepared by Civic Visions in January 2004 remains an accurate assessment of the significance of the complex and of the impact of the proposed site development on the historic mill property subject to the additional and new information from Frederick C. Baumert, P.E. of Keast & Hood, attached below.<sup>7</sup>

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<sup>7</sup> The “additional and new information from Frederick Baumert, P.E. of Keast & Hood, attached below” was not submitted at the conditional use hearing, however a subsequent letter dated July 2, 2019 was admitted into the record as Ex. A-36.

(Ex. A-34 at p. 2)(emphasis added). It states the project paused for fifteen years during which Philadelphia region has experienced some of the severest weather in its history, stressing the building systems and leading to flooding and site damage that have affected the complex. It concludes:

**Site Conditions based on observations late winter and spring 2019**

The nearly fifteen years of vacancy without heat and ventilation have caused significant damage to the mill complex.

(...)

While the historical fabric is largely unchanged, the physical condition of that fabric has deteriorated significantly in ways that are visibly obvious.

(...)

The result of these changes to the physical condition will of necessity require significant demolition, reconstruction and repair as explained in Mr. Baumert's report.

(Ex. A-34, p. 3-4)(emphasis added).

52. One month later, Civic Visions issued an HRIS dated July 18, 2019 authored by George E. Thomas stating:

**Site Conditions based on observations late winter and spring 2019**

Severe weather conditions throughout the last fifteen years have caused significant damage to the mill complex (...)

The result of these changes to the physical condition will of necessity require significant reconstruction and repair as explained by Mr. Baumert's report.

(Ex. T-8, p. 3-4) (emphasis added). No explanation is given for changing the cause of significant damage to the Mill Buildings from vacancy to severe weather conditions. Likewise, no reason given for omitting the word "demolition" in the later HRIS.

53. Keast & Hood Structural Engineers' letter dated July 2, 2019 ("Structural Engineer's letter") was admitted into the record at the conditional use hearings. (Ex. A-36.)

Frederick C. Baumert, P.E., describes the historic resources in a state of advanced neglect and deterioration due to long term vacancy:

In brief, it was found that the 15 years of vacancy have not been kind to the buildings. The lack of heat, the temporary sealing of the building with plywood and tarps, and the Creekside location have resulted in massive humidity that has attacked all the wood elements of the interior (floor girders, roofing trusses, roof sheathing and flooring) to the point that most of these elements are unsalvageable. Some timber beams have been supported with emergency shoring but further delay in rebuilding will result in failure of the structural elements that will likely pull over portions of the walls and make repairs impossible. A brief overview is presented in this letter and a longer report was previously presented to the Township.

(Ex. A-36, p. 34) (emphasis added). A longer report by Keast & Hood was not submitted at the conditional use hearing. Structural Engineer Baumert did not testify at the conditional use hearing.

54. The Structural Engineer's letter refers to Mill Building One as the "original portion of the mill building." It describes precipitation freely entering the building, causing "significant decay zones at critical stress locations" and "deplorable and probably unsalvageable condition" of additions.

The original portion of the mill building consists of thick fieldstone walls and timber framed floors and roof. (...) **The roofing and temporary tarp covers have failed, allowing rainwater and snow-melt to freely enter the building. The timber trusses and timber beams were drill tested in several locations and found to have significant decay zones at critical stress locations. These elements cannot be reliably re-used.** The stone walls are essentially intact, but the continuing water intrusion (indicated by the spalled stucco that intentionally serves as a weather barrier) is washing away the lime binder within the mud mortar, which will render the walls unstable in a few years. The creek has deeply eroded the mortar from the foundation walls on that side. The additions on the west and east sides of this building for the basement connector on the creek side and the remnants of the power house with its attendant chimney and workforce stair in the west are in **deplorable and probably unsalvageable condition**. It would be wiser to invest in the stabilization of the main walls than these later portions. The brisk two-story addition on the north is relatively newer and can be rehabilitated, although the roof sheathing and

some framing material needs to be replaced. If the mill building is to be saved, action must be taken soon to secure it against further water intrusion and begin the dehumidification process.

55. Mill Building Two is referred to as the “ancillary building” and “storage building”<sup>8</sup> by Baumert. He opines it is “unstable and ought to be demolished”:

The ancillary building to the south appears to have been constructed as a storage and shipping facility. Its construction is much less robust.(...) The foundations unfortunately were made relatively shallow which has led to undermining and settlement, with the result that portions of the exterior walls are severely distorted, fractured and in danger of collapse. Likewise, the interior column foundations have settled by varying amounts causing distortion of the second floor. It was reported to the Township that this **building is unstable and ought to be demolished.**

The degradation of both buildings appears to be accelerating. Immediate and thorough interventions will be necessary to save the mill. **The storage building has to be removed for safety.**

(Structural Engineer’s letter; Ex. A-36)(emphasis added).

56. Schnabel Engineering Steep Slope Evaluation dated October 22, 2019 written by Allen W. Cadden, P.E. (Ex. A-44). He performed a field visit to review existing conditions with a particular focus on the western portion of the 1400 Mill Creek Road, adjacent to Rolling Hill Park. His report includes the following geotechnical assessments:

There is clear evidence that water flowing over the surface has caused erosion of surface materials and left channels on the slope face.

The soils present are “made land” rather than natural “stony land, steep.”

This area is considered to be in a **marginally stable condition**. The instability of the slope surface poses and ongoing maintenance and **possible safety hazard** to users of the park trail above the slope, as well as to persons and property on the site itself.

The proposed development will include a structure excavated into this slope. Completion of this project will result in removal of much of the overburden soil material and vegetation, and construction of the structure excavated into the slope will **stabilize the slope.**

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<sup>8</sup> Confirmed by Applicant’s counsel in email dated 11-22-19.

Recommendations and designs have been provided for slope stabilization as well as underpinning and stabilization of retaining walls and structures for the site.

(Ex. A-44, p. 2)(emphasis added).

57. A.J. Kait, President of the Gladwyne Civic Association, wrote a memorandum dated September 8, 2019 to the Planning Commission stating the Civic is broadly in favor of residential development of the Property, “which through years of neglect has become an eyesore and potential hazard that does not reflect well on our community.” However, it does not support the project as currently submitted for three main reasons. The project is significantly out of character with Gladwyne in general and the building site in particular. “Specifically, the proposed new five-story structure is simply too high.” There are no other five-story residential structures in Gladwyne. “Not only would a five-story structure be out of character with the locale in general, there is the additional concern that this structure will adversely affect the aesthetics of views into and out of the park.” The Civic “strongly recommends that the height of this project be limited to three stories , in concert with existing structures on the property and the nature of the neighborhood.” The memo concludes the Civic “understands and applauds the opportunity to improve the state of the important historical buildings at Barker’s Mill, but it should not be done at the expense of Rolling Hill Park and the surrounding community. Consequently we recommend the height of all buildings at the site be limited to three stories at most.” (Ex. A-29 at p. 18-19).

#### APPLICABLE ORDINANCES

58. Demolish is defined by Code §155-4:

The destruction, dismantling or removal, whether deliberately or by neglect, of the exterior of a building, structure, object, or site listed on the Historic Resource Inventory, in whole or in significant part for any purpose, including additions, alterations, reconstruction and/or new construction. Demolition regulated by this

provision includes the removal, stripping, concealing or destruction of the facade, exterior surfaces, or any significant exterior architectural feature(s) and/or material(s), which contribute to the historic character of the resource. (Emphasis added).

59. “Expanded use” is defined by Code §155-4:

The “enlargement of the use of a property evidenced by any of the following: the construction of or addition to a building, a parking lot (...)

60. Code §155-4 defined “Height of Building” as follows in 2004:

A building’s vertical measurement from the mean level of the ground surrounding the building to a point midway between the highest and lowest points of the roof. Said height may be increased by parapets, but not in excess of three feet, and by chimneys, spires and similar projections and housings for equipment, provided that said housing for equipment shall not be in excess of 12 feet in height and provided that they shall not occupy more than 10% of the roof area. [Amended 10-21-1992 by Ord. No. 3300]

61. In 2005, Code’s definition of “Height of Building” was amended:

A building’s vertical measurement from the mean level of the ground surrounding the building or from a point 4 ½ feet above the lowest level of the ground surrounding the building, whichever is lower, to the highest point of the roof, subject to the following : [Amended 10-21-1992 by Ord. No. 3300; 5-19-2004 by Ord. No. 3710; 12-21-2005 by Ord. No. 3762]

62. “Lot” is defined by Code §155-4:

A parcel of land which is occupied or intended to be occupied by one principal building, except as specifically permitted in this chapter, together with any accessory buildings customarily incidental to such principal building(s) and such open spaces as are arranged or designed to be used in connection with such principal building(s), such open spaces to be not less than the minimum required by this chapter. The area of a lot shall be that portion of the lot or parcel of land lying within the property lines and between the rear property line and the nearest street line.

63. “Municipal Use” is defined by Code §155-4:

Any use conducted by the Township of Lower Merion, or any local agency of the Township, including but not limited to administrative offices, equipment or material storage, public parks, recreational centers, public sewage and/or water, collection, treatment, storage, transmission and/or distribution facilities,

stormwater management facilities, public parking facilities, public libraries, firehouses or any similar use owned or operated by the Township, or a local agency of the Township. (...)

64. Code §155-151 specifies the uses permitted on properties designated as a Class I

Historic Resource:

1. Provided that the guarantee referenced in § 155-153B(4) has first been submitted and approved, a property upon which a Class I Historic Resource is situated, excluding buildings and structures which do not contribute to the historic resource except as authorized under Subsection B(1)(g) below, which property obtains access from any street, may, in addition to the uses permitted in Subsection A above, be used for any one of the following uses, subject to obtaining a recommendation from either the Board of Historical Architectural Review or the Historical Commission, pursuant to Chapter 88, and obtaining conditional use approval from the Board of Commissioners:  
(...)

(f) A Class I building in a residential zoning district presently being put to a nonconforming, nonresidential use may be converted to a multifamily use, provided each dwelling unit shall have no fewer than 1,250 square feet of occupied area.

1. The area within the perimeter of the building measured at grade level may be expanded by up to 25% in conjunction with a conversion to a multifamily use, provided there exists between the multifamily use and the nearest adjacent permitted use at least 250 feet.
2. The area within the perimeter of the building measured at grade level may be expanded by up to 50% in conjunction with a conversion to a multifamily use, provided there exists between the multifamily use and the nearest adjacent permitted use at least 500 feet.

65. Code § 155-152 Bulk, Area and Setback requirements.

Provided that the guarantee referenced in § 155-153B(4) has first been submitted and approved, the requirements applicable to the underlying zoning district relating to building area, impervious surfaces and front, side and rear yard setbacks may be modified by up to 15% with respect to Class I and Class II Historic Resources, subject to obtaining a recommendation from either the Historical Commission or the Board of Historical Architectural Review, pursuant to Chapter 88, and to

obtaining conditional use approval from the Board of Commissioners. These modifications shall apply to the area of the lot as it existed on March 15, 2000.

- a. Where the requirements are modified pursuant to this section, the applicant must demonstrate to the satisfaction of the Board of Commissioners that the degree of relief is required to accommodate the reasonable development, use or enhancement of the historic resource.
- b. The additional building area and impervious surface coverages permitted by this section may each not exceed 50% of the building area of the historic resource(s) subjected to the § 155-153B(4) guarantee.
- c. Where the requested relief is determined by the Board of Commissioners to be essential to the preservation of the historic resource because without such relief it would not be physically or economically possible to maintain the historic resource, the Board of Commissioners may, by conditional use, reduce such requirements to a greater degree than permitted by this section to protect the historic resource.

54. Code §155-11 Use Regulations in the RAA district:

A building may be erected or used and a lot may be use or occupied for any of the following purposes:

- A. Single Family detached dwelling
- (...) H. Municipal building and municipal use.

55. Code §155-12 Area and Width Regulations in the RAA district

- A. Lot area and width. A lot area of not less than 90,000 square feet and a lot width of not less than 200 feet at the street line and extending from the street line to a point 25 feet beyond that point of the proposed building closest to the rear lot line shall be provided for every building hereafter erected or used for any use permitted in this district.
- B. Building area. Not more than 15% of the area of each lot may be occupied by buildings.
- C. Front yard. There shall be a front yard on each street on which the lot abuts, the depth of which shall be at least 50 feet.
- D. Side yards.  
(...)
2. Other buildings. For any building other than a single-family detached dwelling or a building accessory thereto, there shall be two side yards, one on each side of the principal building, neither of which shall be less than 25 feet wide.

- E. Rear yard. There shall be a rear yard, the depth of which shall be at least 25 feet.
- F. Impervious surfaces. Not more than 20% of the area of each lot may be covered with impervious surfaces.

67. Code §155-13 Height regulations in the RAA district.

The height of a single-family detached dwelling or building accessory thereto shall not exceed three stories in height or 35 feet, and the height of any other building may exceed 35 feet in accordance with the provisions of 155-137 hereof, but shall not exceed 65 feet.

68. Code §155-137 Building height requirements; exceptions.

A.2 Other buildings. The depth from the front, side, and rear yard setbacks shall be increased one foot or portion thereof by which the building exceeds 35 feet in height.

(...)

C. Reduction of building area and impervious surface coverage for buildings other than one and two family dwellings, in excess of 35 feet. The maximum building area and impervious surface coverage shall be decreased  $\frac{1}{4}$  of 1% of the lot area for each foot or portion thereof by which the building exceeds 35 feet in height.

69. Code §155-137 Specific requirements for conditional use approval.

A. Application procedures for conditional use approval.

- (1) Where the historic resource is located in a local historic district, the work of the Historical Commission under this subsection shall be performed by the Board of Historical Architectural Review.
- (2) An applicant seeking conditional use approval under the provisions of this article shall submit the appropriate application to the Director of Building and Planning in accordance with the provisions of § 155-141.2. The information to be provided shall include the following:
  - (a) Name and address of the record owner and applicant (if different).
  - (b) Site plan showing all buildings and structures on the property.
  - (c) Recent photographs of the historic resource.
  - (d) A detailed narrative description of the proposed use(s).
  - (e) Any physical changes proposed for the affected historic resource(s) and their surrounding landscape.

- (f) Any proposed modifications to otherwise applicable area, bulk and parking regulations.
- (3) The application shall be accompanied by an historic resource impact study where any land development or subdivision is proposed on:
  - (a) Any property that contains any Class I or Class II Historic Resource(s).
  - (b) Any contributing property within the boundaries of any National Register historic district or any local historic district or any historic neighborhood.
- (4) The Director of Building and Planning shall forward the complete application to either the Board of Historical Architectural Review or the Historical Commission and the Planning Commission in accordance with § 155-141.2. The Historical Commission (or the Board of Historical Architectural Review), at a regular or special meeting, shall review the application for conditional use and shall promptly forward its recommendations to the Director of Building and Planning for distribution to the Building and Planning Committee of the Board of Commissioners. In formulating its recommendations, the Historical Commission (or the Board of Historical Architectural Review) shall consider each of the criteria imposed by this section for the grant of conditional use approval.
- (5) The Building and Planning Committee and the Board of Commissioners shall act upon the application in accordance with the provisions of § 155-141.2. The Building and Planning Committee may refer the application to a hearing officer to conduct any hearings and make recommendations to the Committee.
- (6) Any conditional use granted under this subsection shall expire unless a building permit to perform the work for which the conditional use was sought, or an occupancy permit to allow such use, is issued within one year after the same shall have been granted.
- B. Criteria for the grant of conditional use approval. Where a use is permitted in an Historic Resource Overlay District by conditional use, that use shall not be granted unless the following requirements have been satisfied in addition to those set forth at § 155-141.2:
  - (1) The applicant shall have the burden of demonstrating that approval of the application will not jeopardize the preservation of the Historic Resource(s) contained on the property subject to application. To sustain this burden the applicant shall present evidence demonstrating the following:
    - (a) The exact location of the area in which the work is to be done.

- (b) The exterior changes to be made or the exterior character of the structure to be erected.
  - (c) A list of the surrounding structures with their general exterior characteristics.
  - (d) The effect of the proposed change upon the general historic and architectural nature of the property.
  - (e) The appropriateness of exterior architectural features of structures involved with the proposed work.
  - (f) The general design, arrangement, texture, material, scale, mass and color of any affected building, structure or site and the relation of such factors to similar features of other structures on the property.
  - (g) That rehabilitation work will not destroy the distinguishing qualities or character of the historic resource and its environment.
  - (h) In the event that replacement of contributing architectural features is necessary, the new material should, as closely as possible, match the material being replaced in kind. At a minimum, the composition, design, color, texture and other aesthetic qualities shall be sympathetic to and in character with the historic resource. In instances where original materials are either unavailable or their use economically infeasible, the Board may approve the use of materials which are aesthetically consistent with, even if not completely duplicative of, the character of the historic resource.
  - (i) Distinctive stylistic features or examples of skilled craftsmanship shall be preserved.
  - (j) Changes which may have taken place in the course of time are evidence of the history and development of the building, structure or site and its environment. These changes may have acquired significance in their own right, and this significance shall be recognized and respected.
  - (k) A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.
- (2) The most current version of the Secretary of the Interior's Standards for Rehabilitation of Historic Structures, as amended, shall be used as a guideline in carrying out any plans involving the rehabilitation, alteration or enlargement of historic resource(s).
  - (3) Where plans involving the rehabilitation, alteration or enlargement of historic resource(s) will result in all or portions of any such resource(s) remaining unoccupied, such unoccupied resources shall be securely sealed and barred off and the utilities turned off for safety, in a manner not

jeopardizing historical integrity, as per the most current construction techniques for historic structures.

- (4) A means to guarantee the permanent protection of the historical integrity of the subject resource(s), such as the establishment of conservation easement(s) or appropriate covenants in a form acceptable to the Township Solicitor, shall be provided.
- (5) The applicant shall have the burden of proving that the historical integrity of the resource has been provided for through the design of the building improvements as well as through implementation of buffering, landscaping, lighting, storage, access and traffic management, interior circulation, loading, parking, fencing, signage and all other land development features.
- (6) The applicant shall have the burden of proving that the grant of the application will not be destructive of the integrity of the historic resource or detrimentally affect the value of surrounding properties.
- (7) The applicant must comply with the parking requirements for the proposed use as set forth in this article. The Board of Commissioners may prohibit any additional parking between the right-of-way and the facade of the building if the Board finds such parking would negatively impact the historical integrity of the resource.
- (8) The applicant must comply with the requirements of this chapter with respect to signage. The Board of Commissioners may condition approval on a reduction in the size of the signage if it finds that the permitted signage will obstruct views required to assure the safety of the public or to retain the historic nature of the property.
- (9) The Board of Commissioners may attach conditions to achieve the objectives set forth in this section and to promote the public health, safety and welfare, which conditions may relate to any aspect of the proposed use of the property, including but not limited to buffering, parking, signage, traffic volume and flow, hours of operation, noise and odor emission.
- (10) Where the Board of Commissioners waives any requirement which thereby increases the rate or volume of stormwater generated on the property, the additional rate and/or volume of runoff caused by such waiver shall be controlled for the one-hundred-year storm.

70. The Applicant must also comply with general standards for conditional use approval found in Code §155-141.2:

- B. The Board of Commissioners may grant approval of a listed conditional use under any district, provided that the following standards and criteria

are complied with by the Applicant for the conditional use. The burden of proving compliance is with such standards and criteria shall be on the Applicant.

- (1) The Applicant shall establish by credible evidence that the use or other subject of consideration for approval complies with the community development objectives as stated in Article I of this chapter and the declaration of legislative intent that may appear at the beginning of the applicable district under which approval is sought.
- (2) The Applicant shall establish by credible evidence compliance with conditions for the grant of conditional uses enumerated in that section which gives the Applicant the right to seek a conditional use.
- (3) The Applicant shall establish by credible evidence that the proposed use or other subject of consideration for approval shall preserve the character of the neighborhood.
- (4) The Applicant shall establish by credible evidence that the proposed use or other subject of consideration for approval shall be properly serviced by all existing public service systems. The peak traffic generated by the subject of approval shall be accommodated in a safe and efficient manner or improvements made in order to effect the same.
- (5) The Applicant shall establish by credible evidence that the proposed use or other subject of consideration for approval is properly designed with regard to internal circulation, parking, buffering and all other elements of proper land planning.
- (6) The Applicant shall provide sufficient plans, studies, or other data to demonstrate compliance with the regulations as may be the subject of consideration for a conditional use approval.
- (7) The Board of Commissioners shall impose such conditions as are advisable with the purpose and intent of this chapter, which may include without limitation, planting and buffers, harmonious design of buildings, protection of watercourses, environmental amenities, and the elimination of noxious, offensive or hazardous elements.

71. Code §155-141 Purpose; community development objectives

- A. This chapter is enacted for the following purposes:
  1. To protect and promote the safety, health and morals.
  2. To accomplish coordinated development of this Township and adjacent municipalities.
  3. To provide for the general welfare by guiding and protecting amenity, convenience, and future governmental, economic, practical, social and cultural facilities, development, growth, as well as the improvement of governmental processes and functions.
  4. To guide uses of land and structures and the type and location of streets, public grounds, and other facilities.

5. To permit this Township and adjacent municipalities to minimize such problems as may presently exist or as may be foreseen.
- B. Furthermore, this chapter is designed and intended:
  1. To promote, protect and facilitate one or more of the following: the public health, safety, morals, general welfare coordinated and practical community development, proper density of population, the provisions of adequate light and air, police protection, vehicle parking and loading space, transportation, water, sewerage, schools, public grounds, and other public requirements, as well as
  2. To prevent one or more of the following: overcrowding of land, blight, danger, and congestion in travel and transportation, and loss of health, life or property from fire, flood, panic, or other dangers.
- C. This chapter and all amendments thereto have been made in accordance with an overall program and with consideration for the character of the Township and its various parts and the suitability of the various parts for particular uses and structures.

72. Code §155-149 Legislative intent. Historic Resource Overlay District.

It is hereby declared as a matter of public policy that the preservation and protection of buildings, structures, and sites of historic, architectural, cultural, archeological, educational and aesthetic merit are public necessities and are in the interests of the health, prosperity, and welfare of the people of Lower Merion Township. To that end, a separate zoning district is hereby created to overlay all other zoning districts in the Township. The provisions of this article, coupled with the provisions of Chapter 88 are intended to:

- A. Promote the general welfare by protecting the integrity of the historic resources of Lower Merion Township;
- B. Establish a clear and public process by which proposed land use changes affecting historic resources can be reviewed;
- C. Discourage the unnecessary demolition of historic resources;
- D. Provide incentives for the continued use of historic resources and to facilitate their appropriate reuse;
- E. Encourage the conservation of historic settings and landscapes;
- F. Promote the retention of historical integrity in the context of proposed land use and/or structural changes;
- G. Identify historic resources in the community and to create a Historic Resource Inventory, to the end that the portion of such resources available to the public view might be preserved.

## II. CONCLUSIONS OF LAW

### Conditional Use Requests

69. Class 1 historic resources in a residential district presently being put to a nonconforming nonresidential use may be converted to a multifamily use provided each dwelling unit shall have no fewer than 1,250 square feet of occupied area and the area within the perimeter of the building measured at grade level may be expanded by up to 50% in conjunction with a conversion to a multifamily use, provided there exists between the multifamily use and the nearest adjacent permitted use at least 500 feet, pursuant to Code §155-151.B.1.f.2.

70. Use Regulations in the RAA district state “a building may be erected or used and a lot may be use or occupied for any of the following purposes: Single family home (...). Code §155-11

71. “Lot” is defined by Code §155-4 as a “parcel of land which is occupied or intended to be occupied by one principal building, except as specifically permitted in this chapter, together with any accessory buildings customarily incidental to such principal building(s) and such open spaces as are arranged or designed to be used in connection with such principal building(s), such open spaces to be not less than the minimum required by this chapter. The area of a lot shall be that portion of the lot or parcel of land lying within the property lines and between the rear property line and the nearest street line.” (emphasis added).

72. “Expanded Use” is defined by Code §155-4 as the “enlargement of the use of a property evidenced by any of the following: the construction of or addition to a building, a parking lot (...)”

73. The Applicant has not complied with Code §155-151.B.1.f.2. The proposed development would convert the nonconforming historic Mill Buildings to multifamily use with each dwelling unit having at least 1,250 sq. ft., and build a multifamily New Building on the

same lot. A garage underneath Mill Building One would be expanded underground to the New Building with some services, lobbies and elevators underneath Mill Building Two.

74. Only one principal building is permitted on a lot pursuant to Code §155-4. The Mill Buildings are pre-existing principal buildings on the same lot. A New Building for multifamily use would be another principal building, rather than accessory building. As a third principal building, the proposed New Building is not permitted on the lot by the plain language of Code §155-151.B.1.f.2 read in conjunction with Code §155-4.

75. The proposed New Building is not a Class I building being converted to multifamily use as required by Code §155-151.B.1.f.2.

76. The Applicant's proposed construction of a multifamily New Building is not an expanded use of the historic resources being converted to multifamily use pursuant to Code §155-151.B.1.f.2 read in conjunction with Code §155-4.

77. The Applicant not has complied with Code §155-151.B.1.f .2 because less than 250 feet exists between the proposed multifamily use and the nearest adjacent permitted use, Rolling Hill Park. Lower Merion Township owns Rolling Hill Park which is a permitted use as a "municipal use and municipal building" in the RAA Residence District by Code §155-11(H). Rolling Hill Park contains a municipal building, an historic caretaker's cottage as well as other structures.

78. Code §155-152.C permits the Board of Commissioners to modify the building area, impervious surface, and setback requirements of the underlying zoning district to an extent greater than 50% if the requested relief is essential to the preservation of the historic resource because without such relief it would not be physically or economically possible to maintain the historic resource.

79. The Applicant has not complied with Code §155-152.C because it has not shown conditional use relief is essential to the preservation of the Mill Building One because without such relief it would not be economically possible to maintain the historic resource. An individual estimate of construction costs to adaptively reuse Mill Building One has not been supplied. Three valuation scenarios contemplating both Mill Buildings were testified to by Kevin Kyle, the Applicant's authorized agent and fact witness, and Michael Samuels, the Applicant's expert in valuation and appraisal of real estate. They did not, however, provide valuation scenarios contemplating Mill Building One as the sole historic resource. Without such feasibility analysis, there is insufficient evidence to show it is not economically possible to maintain the sole remaining historic resource, Mill Building One, without conditional use relief. The Applicant did provide an individual estimate for stabilizing Mill Building One for \$2,199,085.30, but this figure only restores the structure to a watertight envelope. (Ex. A-40).

80. The Applicant has not complied with Code §155-152.C with regard to Mill Building Two because it is not physically or economically possible to maintain the historic resource under any circumstances. Mill Building Two is unstable and ought to be demolished to protect the public welfare according to Keast & Hood's structural engineer's letter dated July 2, 2019. (Ex. A-36). Keast & Hood's findings were corroborated by witnesses who testified at the conditional use hearing and are not hearsay. Expert architectural historian Robert Wise relied on Keast & Hood's letter and Civic Visions' HRIS. Keast & Hood's structural engineering opinions about Mill Building Two are competent, probative, highly persuasive evidence. Testimony, affidavits and reports from Applicant's expert real estate developer Charles Jefferson and architectural historian Robert Wise about the current structural integrity of the Mill Building Two are not competent or probative because they are not structural engineers qualified to make a

determination about the structural integrity. Similarly, Jefferson's and Wise's opinions that Mill Building Two may be reconstructed and repaired without affecting the exterior façade are not convincing because demolition has been recommended by a structural engineer. Jefferson's and Wise's opinions about reconstructing Mill Building Two are less probative and accorded less weight than Keast & Hood's letter recommending demolition of Building Two. Wise's and Jefferson's expert opinions about Mill Building Two being suitable for adaptive reuse are not credible.

81. Code § 155-151.D.1-7 pertains to uses permitted in Code 155-151.B.f. and applies to any historic resource converted to residential use. Applicant's expert engineer, Michael Bowker, provided testimony demonstrating compliance with Code § 155-151.D.1-7

RAA Residence District Dimensional Standards and Relief

82. Code §155-13 states the height of any single family detached dwelling or a building accessory thereto shall not exceed three stories in height or 35 feet, and the height of any other building may exceed 35 feet in height in accordance with the provisions of Code §155-137 hereof, but shall not exceed 65 feet in height.

83. The proposed 54.4-ft tall New Building is permitted, pursuant to Code §155-13, if it complies with Code §155-137.

84. Code §155-137.A.2 provides conditional exceptions to building height requirements applicable to multifamily dwellings. The depth of the front, side and rear yard setbacks shall be increased one foot for each foot or portion thereof by which the building exceeds 35 feet in height.

85. The proposed New Multifamily Building is 54.4 feet in height, but setbacks, building area and impervious surface requirements are not modified pursuant to Code §155-137,

therefore the proposed New Multifamily Building does not comply with Code §155-13. The Applicant seeks conditional use relief for building height pursuant to Code §155-152.C. Conditional use relief should be denied because the Applicant has not made the necessary prerequisite showing of economic or physical infeasibility.

86. Lot area and width of properties in the RAA residence district are provided in Code §155-12. A lot area of not less than 90,000 square feet and a lot width of not less than 200 feet at the street line and extending from the street line to a point 25 feet beyond that point of the proposed building closest to the rear line shall be provided for every building hereafter erected of used for any use permitted in this district.

87. The proposed development complies with Code §155-12.A. The net lot area required by Code is 90,000 s.f. and the proposed development is 84,402 s.f., which is a legal, pre-existing nonconformity. The lot width is 539.4 ft which exceeds the 200 ft minimum requirement. (Ex A-3, p. 28).

88. Code §155-12.B states not more than 15% of the lot may be occupied by buildings. Code §155-137.C pertains to reduction of building area and impervious surface coverage for buildings, other than one- and two-family dwellings, in excess of 35 feet. The maximum building area and impervious surface coverage shall be decreased 1/4 of 1% of the lot area for each foot or portion thereof by which the building exceeds 35 feet in height.

89. The proposed development does not comply with Code §155-12.B or §155-137.C. The existing building area is 24.3% due to legal, preexisting nonconformity. The allowable building area is modified to 19.3% of the lot because of the 54.4 foot height of the New Multifamily Building. The proposed building area is 36.2% of the lot. The Applicant requests conditional use relief from the building area requirement. (Ex. A-27, ¶¶63-64). Conditional use

relief should be denied because the Applicant has not made the necessary prerequisite showing of economic or physical infeasibility pursuant to Code §155-152.C.

90. Code §155-12.C states the minimum front yard setback shall be 50-feet.

91. The proposed development complies with Code §155-12.C, because the 36-ft existing front yard setback of the Mill Buildings is a legal, pre-existing nonconformity. The proposed front yard setback of the New Multifamily Building is 131.6 feet in compliance with code. (Ex. A-27, ¶¶59-60).

92. Code §155-12.D.2 states there shall be two side yards, one on each side of the principal building neither of which shall be less than 25 feet wide.

93. The proposed development does not comply with Code §155-12.D.2. The existing side yard setbacks of the Mill Buildings are 49.8 feet, which is a legal pre-existing nonconformity. The proposed side yard setback of the New Building is 25 feet. It does not comply with code because the proposed building height is 54.4 feet requiring minimum side yard setbacks of 45 feet. Notably, the Zoning Hearing Board previously denied a variance for relief from side yard setbacks pursuant to 155-12(D) in 2004. The Applicant has requested conditional use relief from the side yard setback requirement applicable to the New Building, pursuant to Code §155-152.C. Conditional use relief should be denied because the Applicant has not made the necessary prerequisite showing of economic or physical infeasibility.

94. Code §155-12.E states there shall be a rear yard with a depth of at least 25 feet.

95. The proposed development does not comply with Code §155-12.E. The existing rear yard setback of the Mill Buildings is 5.9-feet, a legal pre-existing nonconformity. The proposed rear yard setback for the New Building is 4.6-feet. The minimum rear yard setback for the New Building is 45 feet because the structure is 54.4 feet in height, pursuant to Code §155-

137.C. (Ex. A-27 at para. 61-62). Although the proposed development was granted a variance from the rear yard setback in 2004, in part because an existing dwelling is setback 4.5 feet from the rear property line, that variance has expired. The Applicant requests conditional use relief from the rear-yard setback requirement for the New Building pursuant to Code §155-152.C. Conditional use relief should be denied because the Applicant has not made the necessary prerequisite showing of economic or physical infeasibility.

96. Code §155-12.F states not more than 20% of the area of each lot may be covered by impervious surfaces.

97. The proposed development does not comply with Code §155-12.F. Maximum allowable impervious surface coverage is 50.8% because the proposed New Building is 54.4 feet in height. Proposed impervious surface coverage is 60.1% of the site. (Ex. A-27 ¶ 63, 65.) The Applicant requests conditional use relief from applicable impervious surface limits. Conditional use relief should be denied because the Applicant has not made the necessary prerequisite showing of economic or physical infeasibility pursuant to Code §155-152.C..

#### Historic Resource Overlay District Codes

98. Specific requirements for grant of conditional use approval are provided in Code §155-153.B. Where a use is permitted in an Historic Resource Overlay District by conditional use, that use shall not be granted unless the following requirements are satisfied, in addition to those set forth in §155-141.2.

99. Code §155-153.B.1 states the Applicant shall have the burden of demonstrating that approval of the application will not jeopardize the preservation of the Historic Resources contained on the property subject to the application. To sustain this burden, the Applicant shall present evidence demonstrating requirements of subsections (a) through (k).

100. The Applicant has provided the exact location of the area in which the work will be done, pursuant to Code §155-153.B.1.a.

101. The Applicant has not provided complete information about the exterior changes to be made or the exterior character of the structure to be erected, pursuant to Code §155-153.B.1.b. Architectural Historian Wise did not fully explain what exterior changes are anticipated. Specifically his report noted “some exterior treatments will impact the façade of the historic buildings,” but he does not explain what the impacts will be or how the exterior will be affected. Moreover, he states the Applicant will work closely with the Historical Commission to refine the proposed exterior treatments as the project advances through land development. A promise that the Applicant will refine exterior treatments in the future is not a sufficient description of the exterior changes.

102. The Applicant has provided a list of the surrounding structures with their general exterior characteristics, pursuant to Code §155-153.B.1.c, through the testimony, affidavit and report of Robert Wise. He described the structures and their general exterior characteristics that surround the proposed development. (Ex. A-38 §43). Specifically, the ruins of the former mill workers’ housing exist offsite within Rolling Hill Park. A former caretaker’s house along with stone ruins are also located near the site. The Historic Resource Impact Study provides a list of historic resources in the broader area. (Ex. A-33).

69. The proposed change upon the general historic and architectural nature of the property, pursuant to Code §155-153.B.1.d., resulted in differing opinions from the Lower Merion Conservancy’s Director of Historic Preservation, Kathleen Abplanalp, and Architectural Historian Robert Wise. Abplanalp testified the Conservancy supported this project for years, but

recently learning the proposed height of the New Building negated the Conservancy's previous support. (N.T. 10/31/19 p. 78). She stated the impact on the site of this project is too intense, leaving the site with less historic integrity that it has now. (N.T. 10/31/19 p. 80). Wise agreed that the New Building will have a moderate impact on the general historic and architectural nature of the site, but urged it is more than justified given the alternative of continued deterioration and eventual collapse of the Mill Buildings. (Ex. A-37 at p. 8). The worst case scenario has already come to pass and Mill Building Two ought to be demolished for public safety reasons. In 1996, Wise prepared the registration form to list the Mill Creek Historical District Boundary Increase on the National Register of Historic Places, submitted as Ex A-32. It states, "the most striking thing attribute of the area encompassed by the Mill Creek Historic District Boundary Increase is the degree to which the eighteenth and nineteenth century rural landscape remains intact." It credits the historic integrity of the boundary increase to the Mill Creek Valley's "largely unaltered natural viewshed," as well as the historic resources. The Hearing Officer accepts Abplanalp's testimony that proposed 55-foot height of New Building will have a negative impact on the general historic and architectural nature of the site as substantial evidence, especially given her professional knowledge as the Director of Historic Preservation for the Lower Merion Conservancy. Wise's suggestion to accept the trade-off of a 55-foot high New Building to save both historic resources is partially moot and less persuasive. Ultimately, the registration for the Mill Creek Historical District Boundary Increase prepared by Wise in 1996 is compelling evidence that the proposed 5-story New Building will negatively alter the historic integrity of the Property and boundary increase.

70. The Applicant has not sufficiently provided for the appropriateness of exterior architectural features involved with the proposed work, pursuant to Code §155-153.B.1.e.

Robert Wise testified that the appropriateness of exterior architectural features will be determined later in the land development process. He does not give a precise opinion on this topic but rather promises to do so in the future, which is not sufficient.

71. The Applicant has not provided the general design, arrangement, texture, material, scale, mass and color of any affected building, structure or site and the relation of such factors to similar features of other structures on the property, pursuant to Code §155-153.B.1.f. Robert Wise's report admits the New Building will impact the historic resources. (Ex. A-37 at p. 3). Persuasive testimony from Donna Heller and Kathleen Abplanalp established the proposed 55-foot New Building will overwhelm the two to three story Mill Buildings. The entire project is too intense for the site, changes the viewshed and natural open space environment. A.J. Kait, President of the Gladwyne Civic Association, wrote a memorandum making similar points.

72. With respect to Mill Building One, the Applicant has not provided evidence that rehabilitation work will not destroy the distinguishing qualities or character of the historic resources and its environment, pursuant to Code §155-153.B.1.g, where significant reconstruction is proposed. Robert Wise testified exterior architectural refinements will be determined later in the land development process. He does not give a precise opinion on this topic but rather promises to do so in the future, which is not sufficient.

73. With respect to Mill Building Two, the Applicant has not provided competent evidence that rehabilitation work will not destroy the distinguishing qualities or character of the historic resources and its environment, pursuant to Code §155-153.B.1.g. Keast & Hood Structural Engineer's letter states the ancillary storage building (Mill Building Two) is "severely distorted, fractured and in danger of collapse" and "ought to be demolished" for safety reasons. (Ex. A-36 at p. 2.) Contrary opinions from Charles Jefferson and Robert Wise that Mill Building

Two may be “reconstructed and repaired” are not derived from expertise in structural engineering and therefore lack competency. Jefferson’s opinion as an expert real estate developer and Wise’s opinions as an architectural historian cannot be reconciled with findings in Keast & Hood’s letter. Greater evidentiary weight is accorded to Keast & Hood’s letter than to Jefferson’s and Wise’s opinions. Moreover, given the impossibility of reconstructing and repairing a building which must be demolished, Jefferson’s and Wise’s opinions are not credible.

74. The Applicant has provided evidence that in the event replacement of contributing architectural features is necessary, new material shall closely match the material being replaced in kind, pursuant to Code §155-153.B.1.h, with respect to Mill Building One through the testimony, affidavit and report of Robert Wise.

75. With respect to Mill Building Two, the Applicant has not provided evidence that in the event replacement of contributing architectural features is necessary, new material shall closely match the material being replaced in kind, pursuant to Code §155-153.B.1.h. Keast & Hood’s letter dated July 2, 2019 states, “this building is unstable and ought to be demolished soon” and the “storage building has to be removed for safety.” Given that Mill Building Two must be demolished, more information about what will replace it is necessary and promises to work out those details in the future are not sufficient.

76. The Applicant has demonstrated that distinctive stylistic features or examples of skilled craftsmanship shall be preserved with respect to Mill Building One, pursuant to Code §155-153.B.1.i, through the testimony, affidavit and report of Robert Wise.

77. The Applicant has not demonstrated that distinctive stylistic features or examples of skilled craftsmanship shall be preserved with respect to Mill Building Two, pursuant to Code §155-153.B.1.i. Keast & Hood’s letter dated July 2, 2019 states the ancillary storage building

a.k.a. Mill Building Two is “severely distorted, fractured and in danger of collapse” and “ought to be demolished soon” and “has to be removed for safety reasons.” (Ex. A-36 at p. 2.) Contrary expert opinions from Charles Jefferson and Robert Wise that Mill Building Two’s distinctive stylistic features may be preserved cannot be reconciled with Structural Engineer Keast & Hood’s letter urging demolition. As a result, Keast & Hood’s letter is accorded great evidentiary weight and Jefferson’s and Wise’s opinion have less weight. Moreover, Jefferson’s and Wise’s opinions are not credible.

78. The Applicant has not demonstrated that changes which may have taken place in the course of time are evidence of the history and development of the building, structure or site and its environment. These changes may have acquired significance in their own right, and this significance shall be recognized and respected pursuant to Code §155-153.B.1.j. The Applicant has not met this requirement with because tenement buildings which once were erected on or near the site no longer exist. These changes have acquired significance in their own right and the Mill Buildings’ current relationship to the site. Massing on the site and views to and from the Mill Buildings have changed over the course of time without nearby tenement buildings. Constructing a five-story residential New Building would not recognize and respect these changes to the site or the Mill Buildings’ current relationship to the site.

79. The Applicant has not sufficiently demonstrated the property shall be placed in a new use that requires minimal change to the defining characteristics of the building, its site and environment, pursuant to Code §155-153.B.1.k. Persuasive testimony described changes to defining characteristics of the site as a result of a 54.4-foot tall new multifamily building. Director of Parks and Recreation Donna Heller specifically points to the proximity of the proposed new building five feet from the property line and height of the proposed retaining wall

changing the historic setting and landscape. (N.T. 10/24/19 p. 20-22). Director of Architectural Preservations at the Lower Merion Conservancy, Kathleen Abplanalp, testified the new use will leave the site with less historic integrity than it has now. (N.T. p. 80). The Gladwyne Civic Association's memorandum states "not only would a five-story building be out of character with the locale in general, there is additional concern that this structure would adversely affect views into and out of the park." (Ex. A-29 at p. 18). The Applicant's architectural historian Robert Wise admitted the New Building would interrupt the view of the historic resources from the trail in Rolling Hill Park. (N.T. p. 96). He also agreed open passive space on the site would be changed to a more intense use. (N.T. p. 100-101). As a result of all of this persuasive testimony taken together, the Applicant has not sufficiently demonstrated the property shall be placed in a new use that requires minimal change to the defining characteristics of the building, its site and environment, pursuant to Code §155-153.B.1.k.

80. The most current version of the Secretary of the Interior's Standards for Rehabilitation of Historic Structures, as amended, will be used as a guideline in carrying out plans involving the rehabilitation, alteration or enlargement of historic resources, pursuant to Code §155-153.B.2 according to sworn testimony by architectural historian Robert Wise.

81. With reference to Code §155-153.B.3, Robert Wise testified that project will not result in the Mill Buildings remaining unoccupied.

82. A means to guarantee the permanent protection of the historical integrity of the historic resource, such as a conservation easement or appropriate covenants in a form acceptable to the Township Solicitor, shall be provided by the Applicant, pursuant to Code §155-153.B.4.

The Applicant has proposed covenants to the Township Solicitor as documented in email

correspondence. Ex. A-12. This email correspondence occurred in 2018 before the Applicant applied for dimensional relief by conditional use.

83. The Applicant has not sufficiently demonstrated that the historical integrity of the resource has been provided for through the design of building improvements as well as through implementation of buffering, landscaping, lighting, storage, access and traffic management, interior circulation, loading parking, fencing, signage and all other land development features, pursuant to Code §155-153.B.5. Mill Building Two must be demolished for safety reasons, therefore its historical integrity cannot be provided for through design of building improvements and all other land development features. Keast & Hood's letter dated July 2, 2019 is persuasive evidence and contrary opinions from expert real estate developer Charles Jefferson, architectural historian Robert Wise, and landscape architect Lisa Thomas carry less evidentiary weight. Risks posed by the slope described in the geotechnical study, (Ex. A-44) are not as compelling as the structural deterioration and need for demolition of Mill Building Two to protect public safety. It is recommended that the public trail on the slope in Rolling Hill Park be closed off until remediated if, in the judgment of the Township Engineer and the Director of Parks and Recreation, it is warranted to protect the public safety.

84. The Applicant has not proven that grant of the application will not be destructive to the integrity of the historic resources or detrimentally affect the value of surrounding properties, pursuant to Code §155-153.B.6. The registration for the Mill Creek Historical District Boundary Increase prepared by Robert Wise in 1996 is compelling evidence that the proposed 5-story New Building will negatively alter the historic integrity of the Property and detrimentally affect the boundary increase. Kathleen Abplanalp persuasively testified that the entire impact of the proposed development on the site is too intense and leaves the site with less historic integrity

than it currently possesses. Donna Heller, Director of Parks and Recreation, testified the intrinsic value of open space and the natural environment in adjacent Rolling Hill Park if would be detrimentally affected by a five-story New Building. The Gladwyne Civic Association's memorandum states "not only would a five-story building be out of character with the locale in general, there is additional concern that this structure would adversely affect views into and out of the park." (Ex. A-29 at p. 18). This testimony and evidence, taken together, substantially demonstrates grant of the application would be destructive to the integrity of the historic resources and outweighs testimony and evidence to the contrary provided by the Applicant's expert witnesses. The Objectors' testimony is not speculative and Abplanalp's testimony carries great weight as the Director of Historic Preservation with the Lower Merion Conservancy.

85. The Applicant has shown the proposed land development will comply with parking requirements for the proposed use, pursuant to Code §155-153.B.7, through the testimony, affidavit and report of traffic engineer Frank Tavani, P.E.

86. The Applicant has shown the proposed land development will comply with requirements for signage, pursuant to Code §155-153.B.8, pursuant to testimony affidavit and report of Michael Bowker, P.E.

87. The Board of Commissioners may attach conditions to achieve objectives set forth in this section and to promote the public health, safety and welfare, which conditions may relate to any aspect of the proposed use of the property, including but not limited to buffering, parking, signage, traffic volume and flow, hours of operation, noise and odor emission, pursuant to Code §155-153.B.9.

88. Where the Board of Commissioners waives any requirement which thereby increases the rate or volume of stormwater on the property, the additional rate and/or volume of

runoff caused by such waiver shall be controlled for the one-hundred-year-storm, pursuant to Code §155-153.B.10.

Conditional Use Application Standards

89. The Applicant shall establish by credible evidence that the use or other subject of consideration for approval complies with the community development objectives as stated in Article I of this chapter and the declaration of legislative intent that may appear at the beginning of the applicable district under which approval is sought, pursuant to Code §155-141.2.B.1.

90. In this conditional use application, the Applicant has not shown that the proposed five-story multifamily use complies with the community development objectives and declaration of legislative intent, as required by Code §155-141.2.B.1. One community development standard, found in Code §155-1.A.3, is to provide for the general welfare by guiding and protecting amenity, convenience and future governmental, economic, practical , social and cultural facilities, development and growth, as well as the improvement of government processes and functions. Donna Heller, Director of Parks and Recreation testified the placement of the proposed five-story building five feet from the property line will change the experience of being in Rolling Hill Park because its currently an open natural setting with no sight obstructions to nature leading downhill to Mill Creek. (N.T. p. 11-13). A five story building at the bottom of the hill would change the natural setting and obstruct the view of historic resources and Mill Creek. Public comment and written memorandum by the President of Gladwyne Civic Association agrees with Heller's view, (Ex. A-29; T-4,) as does multiple public comments and testimony at the conditional use hearing by the Director of Historic Preservation of the Lower Merion Conservancy, Kathleen Abplanalp, (Ex. T-4; N.T. 77-80). Testimony, affidavits and reports of the Applicant's architectural historian Robert Wise and engineer Michael Bowker are accorded

less evidentiary weight on this point in the assessment of the Hearing Officer. Wise admitted in his testimony that the proposed five-story building would interrupt the view of the historic resources from the trail in Rolling Hill Park. (N.T. p. 96).

91. The Applicant shall establish by credible evidence compliance with conditions for the grant of conditional uses enumerated in that section which gives the Applicant the right to seek a conditional use, pursuant to Code §155-141.2.B.2.

92. Here, the Applicant has not established compliance with conditions for grant of conditional use to construct a new, five-story, multifamily building in the RAA residence district, as required by Code §155-141.2.B.2.

93. The Applicant shall establish by credible evidence that the proposed use or other subject of consideration for approval shall preserve the character of the neighborhood pursuant to Code §155-141.2.B.3.

94. Testimony adduced at three conditional use hearings does not establish the proposed development shall preserve the character of the neighborhood. Surrounding properties are Rolling Hill Park and Mill Creek Valley Park. Both parks are natural, passive open space owned by Lower Merion Township. 1400 Mill Creek Road lies between the two parks, adjacent to the creek and contains two-story historic Mill Buildings. Nothing obstructs the view. There are no five story buildings currently in existence in the RAA residence district and a new, five-story multifamily building would obstruct views of the historic resources and natural open space, changing the character of the neighborhood. Objectors' testimony about how the proposed use will change the character of the Mill Creek Valley from Donna Heller, Kathleen Abplanalp, A.J. Kait and Sara Schuh, together with recommendations for denial from the Director of Building and Planning Christopher Leswing and the Lower Merion Planning Commission, are highly

persuasive and credible. The Objectors have sufficiently demonstrated that a five-story building in this idyllic, natural, open space would create an adverse impact not normally generated by the type of use proposed. The Applicant's expert architectural historian Robert Wise admitted there are no other five story residences in Gladwyne. Ultimately, the registration for the Mill Creek Historical District Boundary Increase prepared by Wise in 1996 is compelling evidence that the proposed 5-story New Building will not preserve the character of the neighborhood. Testimony to the contrary, that proposed development shall preserve the character of the neighborhood, by the Applicant's expert witnesses was not as persuasive.

95. The Applicant shall establish by credible evidence that the proposed use or other subject of consideration for approval shall be properly serviced by all existing public service systems. The peak traffic generated by the subject of approval shall be accommodated in a safe and efficient manner or improvements made in order to effect the same, pursuant to Code §155-141.2.B.4.

96. The Applicant has demonstrated that the proposed use shall be properly serviced by all existing public service systems. The peak traffic generated by the subject of approval shall be accommodated in a safe and efficient manner or improvements made in order to effect the same, pursuant to Code §155-141.2.B.4. See testimony, affidavits and expert reports of Frank Tavani, P.E., PTOE and Michael Bowker, P.E.

97. The Applicant shall establish by credible evidence that the proposed use or other subject of consideration for approval is properly designed with regard to internal circulation, parking, buffering and all other elements of proper land planning, pursuant to Code §155-141.2.B.5.

98. The Applicant has not established that the proposed use is properly designed with regard to proper land planning. Donna Heller opined the five foot setback between the proposed New Building and a public park would have a negative impact on Rolling Hill Park in her experience as Director of Parks and Recreation. She described another municipal property in Bala Cynwyd which gave an easement to an adjacent property under development. The easement caused water infiltration into a gymnasium, created issues with retaining walls, sediment building up on tennis courts and hard surfaced areas which have yet to be returned to its proper, acceptable public use space. Heller's first-hand experience with another municipal property's easement for a land development project is relevant and probative evidence in this application. The close proximity of the proposed New Building to Rolling Hill park will affect public trails during construction and does not allow for buffering and proper land planning.

99. The Applicant shall provide sufficient plans, studies, or other data to demonstrate compliance with the regulations as may be the subject of consideration for a conditional use approval pursuant to Code §155-141.2.B.6.

100. In this matter, the Applicant has not provided all versions of the Keast & Hood's structural engineering report to demonstrate compliance with regulations as required by Code §155-141.2.B.6. An earlier version of Keast & Hood's structural engineering report is referenced in Frederick Baumert's letter dated July 2, 2019. (Ex. A-36). Moreover, Civic Vision's HRIS dated June 19, 2019 references Keast & Hood's structural engineering report, which must have been written prior to that date. (Ex. A-34). Clearly the Applicant has not complied with Code §155-141.2.B.6., when it has not supplied all reports of its own structural engineer in connection with its conditional use application.

101. The Board of Commissioners shall impose such conditions as are advisable with the purpose and intent of this chapter, which may include without limitation, planting and buffers, harmonious design of buildings, protection of watercourses, environmental amenities, and the elimination of noxious, offensive or hazardous elements pursuant to Code §155-141.2.B.7.

102. The law is well settled that municipalities of the Commonwealth possess only those powers expressly granted to them by the General Assembly. In re Appeal of Maibach, LLC, [26 A.3d 1213](#) (Pa. Cmwlth. 2011). Section 909.1(b)(3) of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, added by the Act of December 21, 1988, P.L. 1329, 53 P.S. §10909.1, grants a municipality's governing body authority to render final adjudications on applications for conditional uses.

103. A conditional use is one to which the applicant is entitled provided that the specific standards of the zoning ordinance are met. In re Thompson, [896 A.2d 659](#) (Pa. Cmwlth. 2006), appeal denied, 591 Pa. 669, 916 A.2d 636 (2007). An applicant seeking a conditional use must show compliance with the express standards of the zoning ordinance that relate to the specific conditional use. Id. If the applicant demonstrates compliance with the zoning ordinance, the governing body must grant the application unless objectors introduce sufficient evidence that the proposed use will have a detrimental effect on the public health, safety, and welfare. Id.

104. The standard for the granting of dimensional variances set forth in *Hertzberg* is applicable to conditional uses. Talkish v. Zoning Hearing Board, 738 A.2d 50, 52-53 (Pa. Cmmw. Ct. 1999).

105. Local agencies are not bound by technical rules of evidence when conducting hearings. 2 Pa.C.S. § 554. They may consider "all relevant evidence of reasonably probative

value." *Id.* The need for such flexibility in matters of evidentiary admissibility is heightened in conditional use hearings conducted by local municipalities, which have the paramount duty to protect their residents from harm to their persons and property, due to the fact that such land uses present the possibility that the property rights of neighboring landowners will be affected. Luke v. Cataldi, [593 Pa. 461](#), [932 A.2d 45, 54](#) (2007).

106. The Board is the sole judge of the credibility of witnesses and the weight to be afforded their testimony. Thus, it is the Board's function to weigh the evidence before it. If the record contains substantial evidence, this Court is bound by the Board's findings that result from the resolution of credibility and conflicting testimony. Oxford Corp. v. Zoning Hearing Bd. of the Borough of Oxford, [34 A.3d 286, 295](#) n. 9 (Pa.Cmwlt.2011); Markwest Liberty Midstream & Res., LLC v. Cecil Twp. Zoning Hearing Bd., 102 A.3d 549, 555 (Pa. Cmmw. Ct. 2014).

### III. DISCUSSION

107. The Applicant seeks to adaptively reuse industrial Mill Buildings by converting them into residential uses pursuant to the Historic Resources Overlay District, Code §155-153.B. A conditional use application for adaptive reuse is predicated upon the historic resources' exterior retaining sufficient historic integrity to justify approving a change in use. Historic integrity of the exterior façade may be associated with structural integrity of the building. Here, significant exterior deterioration is related to structural failure of the Mill Buildings according to expert opinion evidence. The Applicant has the burden of demonstrating approval will not jeopardize the preservation of the Mill Buildings, pursuant to Code §155-153.B. It must also show its proposed use meets the specific objective criteria in the zoning ordinances. As explained herein, the Applicant has not met its burden.

108. It is technically infeasible to preserve the historic integrity of Mill Building Two because it must be demolished to protect the public. The Applicant's structural engineer, Keast & Hood, opined that Mill Building Two is "unstable and ought to be demolished soon" because it "has to be removed for safety." (Ex. A-36). He did not testify at the conditional use hearing, but several other witnesses sufficiently corroborated the structural engineer's findings of extensive deterioration, including descriptions of structural failure of the perimeter walls, in their own testimony, reports and affidavits. (Robert Wise: Ex. A-37 at p. 2; Ex. A-38 ¶22; N.T. 10/24/19 at p. 45, 103-104; Charles Jefferson: Ex. A-40, Ex. A-41¶¶ 9-11, N.T. 9/23/19 at p. 73-79; Kevin Kyle: N.T. at p. 44, 49, 51-2; Kathleen Abplanalp: N.T. 10/31/19 at p. 77-78). None of these expert and lay witnesses are structural engineers competent to opine on structural integrity of historic buildings, therefore Keast & Hood's opinion is uncontroverted. Expert architectural historian Robert Wise testified he relied on Keast & Hood's letter to form his own opinions. As such, the structural engineer's findings and opinions are not hearsay and are competent evidence. Lake Adventure Cmty. Ass'n, Inc. v. Dingman Twp. Zoning Hearing Bd., 79 A.3d 708, 714 n.4 (Pa. Cmwlth. 2013)(hearsay must be sufficiently corroborated by other evidence in order to be considered competent evidence.)

109. Adaptive reuse of Mill Building Two is not possible when uncontroverted expert opinion about lack of structural integrity will prevent rehabilitation. Wise's architectural historian opinion that Mill Building Two may be adaptively reused conflicts with Keast & Hood's letter stating it must be demolished to protect the public. Wise's opinion carries less probative weight because he is not a structural engineer competent to opine on structural conditions. Moreover, Wise's opinions about historic integrity and structural integrity are cherry picked from Keast & Hood's letter and Civic Visions' HRIS dated June 2019, without affirming

their ultimate conclusions. This contradiction is resolved by accepting Keast & Hood's and Civic Visions' 2019 opinions and rejecting Wise's opinion. The competent evidence viewed in totality shows Mill Building Two cannot be adaptively reused because it must be demolished.

110. The exterior, or historic fabric, of the Mill Buildings cannot be rehabilitated without "substantial reconstruction" according to Keast & Hood's letter and Civic Visions' HRIS dated June 2019. "Demolition" of historic resources includes "substantial reconstruction" pursuant to Code §155-4. Since the Mill Buildings' exteriors require substantial reconstruction, it would have the same effect as demolishing the historic resources. The Applicant has not met its burden of showing conditional use approval will not jeopardize the historic resources, pursuant to Code §155-153.B.

111. It should be noted that there are two Historic Resource Impact Studies by Civic Visions dated one month apart stating different reasons for extensive structural deterioration of the Mill Buildings and prescribing slightly different remedies, without any explanation of these changes in the latter report. (Ex. A-34 dated June 2019 and Ex. T-8 dated June 2019). Civic Visions' architectural historian did not testify at the conditional use hearing. The Applicant's architectural historian who did testify, Robert Wise, relied on Civic Visions HRIS reports as well as Keast & Hood's letter to form his own opinions. (N.T. 10/24/19 at p. 46-51). Wise opined conditional use approval will not jeopardize the historic resources, but his opinion is contradicted by substantial evidence in the record and, therefore, carries less weight.

112. With regard to historic integrity of the exterior of the Mill Buildings, Wise finds "justification for the project and its specific architectural components in Civic Works' Historic Resource Impact Studies written in 2004 and July 2019. (Ex. A-37 at p. 1 & 2). The later report states the historical fabric is "significantly deteriorated" and overall recommends "substantial

reconstruction ” of the Mill Buildings. Rather than justify the project, Civic Visions’ HRIS recommendations are the functional equivalent of demolition of historic resources. Wise’s report admits “architectural treatments will impact the façade of the historic buildings,” without specifically describing on the extent of such impact. (Ex. A-37 at p. 3).

113. When specifically asked about the exterior of the Mill Buildings after rehabilitation at the conditional use hearing, Wise “deferred to the Historical Commission’s findings and recommendations that they would like to see refinement of the architectural component.” (N.T. 10/24/19 at p. 61 & 69). The Historical Commission recommended approval in June 2019 without the benefit of current information about the Mill Buildings’ current condition in the structural engineer’s letter dated July 2, 2019, two weeks after the Historical Commission met. Wise’s deference to recommendations made by the Historical Commission under such circumstances is misplaced. The Historical Commission’s recommendations for this project carry little evidentiary weight because it was not fully informed about current structural conditions before rendering a decision in June.

114. Wise’s affidavit repeatedly states, “exterior architectural refinements will be made in the land development approval stage.” (Ex. A-38 ¶ 51, 53, 59& 68). An applicant for special exception or conditional use must demonstrate that his proposed use meets the applicable requirements of the zoning ordinance **when** the application is submitted. In re Thompson, 896 A.2d 659, 680 (Pa. Cmmw. Ct. 2006) *citing* 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. *Supra*, Edgmont Township. Since Wise does not describe

how rehabilitation work will affect the exterior facades with a reasonable degree of specificity, and instead promises it will be determined later in land development, the Applicant has not presented sufficient evidence that the rehabilitation work will not destroy the distinguishing qualities or character of the Mill Buildings; that the new use requires minimal change to the defining characteristics of the historic buildings; or that the historical integrity of the Mill Buildings have been provided through the design of building improvements, as required by Code §155-153.B.

115. A local governing body hearing a conditional use application is free to reject even uncontradicted testimony if it finds it lacking in credibility, including testimony offered by an expert witness. Taliaferro v. Darby Twp. Zoning Hearing Bd., 873 A.2d 807 (Pa. Cmwlth. 2005). Here, Wise's opinions about the exterior historic fabric of the Mill Buildings and feasibility for adaptive reuse contradict the structural engineer's letter and Civic Work's HRIS reports from 2019, and therefore have less probative weight. Likewise, Charles Jefferson's opinion that Mill Building Two may be rehabilitated from the interior without affecting the exterior façade conflicts with the structural engineer's findings. Jefferson's opinion is not competent evidence since he is not a structural engineer and carries less probative weight. Jefferson testified the cause of Mill Building Two's structural failure of perimeter walls has yet to be determined. (N.T. 9/23/19 at p. 76). He did not admit the Applicant's structural engineer recently recommended demolition of the structure , therefore Jefferson's testimony lacks credibility.

116. The Applicant is not entitled to build the proposed New Building on the same lot as the Mill Buildings. "Lot" is defined in Code §155-4:

A parcel of land which is occupied or intended to be occupied by one principal building, except as specifically permitted in this chapter, together with any accessory buildings customarily incidental to such principal building(s) and such open spaces as are arranged or designed to be used in

connection with such principal building(s), such open spaces to be not less than the minimum required by this chapter. The area of a lot shall be that portion of the lot or parcel of land lying within the property lines and between the rear property line and the nearest street line.

The Applicant proposes three principal buildings on the lot: Mill Building One, Mill Building Two and the New Building. The Mill Buildings are pre-existing principal buildings on the same lot. A New Building for multifamily use would be another principal building, rather than accessory building. As a third principal building, the proposed New Building is not permitted on the lot by the plain language of Code §155-4.

117. Use regulations for the RAA district permit one building on one lot:

A building may be erected or used and a lot may be used or occupied for any of the following purposes and no other (...)

Code §155-11. The ordinance refers to building and lot in the singular; “a building” and “a lot” (emphasis added). The proposed New Building is not permitted on the same lot as the pre-existing Mill Buildings by the plain and unambiguous meaning of the RAA district’s use regulations. Moreover, multifamily use is not expressly permitted in the RAA district. The Supreme Court of Pennsylvania recently overruled the Commonwealth Court and reaffirmed “uses not expressly permitted in a zoning ordinance are excluded by implication.” Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Bd., 207 A.3d 886, 902 (Pa. 2019)( “this excluded-unless-expressly-included standard, combined with *Miller* 's "functional analysis," is the only workable standard.”) Here, a multifamily building is not expressly included in the list of permissible uses in the RAA district, therefore it is not permitted.

117. The Historic Resource Overlay District permits:

[a] Class I building in a residential zoning district presently being put to a nonconforming, nonresidential use may be converted to multifamily use, provided each dwelling unit has no fewer than 1,250 square feet of occupied area,

Code §155-151.f. The proposed New Building is not a conversion of an existing building to multifamily. Rather, the Applicant proposes a newly constructed, detached, multifamily building which is not permitted by Code §155-151.f.

118. Conversions of Class I historic resources to multifamily use may be expanded in limited circumstances pursuant to HROD:

The Area within the perimeter of the building measured at grade level may be expanded by up to 25% in conjunction with a conversion to multifamily use, provided there exists between the multifamily use and the nearest adjacent permitted use at least 250 feet.

Code §155-151.B.1.f. Here, there is less than 250 feet between the proposed multifamily New Building and the nearest adjacent permitted use. Rolling Hill Park owned by Lower Merion Township is the nearest adjacent permitted use. Rolling Hill Park is a municipal use and contains a municipal building, the historic caretaker's cottage, therefore it is a "permitted use." The proposed New Building may not be constructed as an expansion, pursuant to Code §155-151.B.1.f., because the nearest permitted use, Rolling Hill Park, is less than 250 feet away.

118. "Expanded use" is defined by Code as follows:

[t]he "enlargement of the use of a property evidenced by any of the following: the construction of or addition to a building, a parking lot (...)

Code §155-4. Although this section of Code states the construction of a building is an enlargement of the use, when read in conjunction with Code's definition of "lot," permitting one principal building on a lot together with accessory buildings, the plain meaning is clear. An accessory building may be constructed through enlargement of use of a property containing a principal building. An interpretation permitting a principal building to be expanded with another principal building on the same lot would be an absurd result subverting the entire zoning code. A court ascertaining the intent of the drafters of an ordinance, should presume they did not intend a

result which is absurd, unreasonable or impossible of execution. Northampton Area Sch. Dist. v. Zoning Hearing Bd. of the Twp. of Lehigh, 64 A.3d 1152, 1157-58 (Pa. Cmmw. Ct. 2013); Rudolph v. Zoning Hearing Board of College Township, 80 Pa.Cmwlt. 28, 470 A.2d 1104 (1984).

123. The Applicant argues Lower Merion Township is collaterally estopped from denying conditional use approval for the New Building because it was previously approved several times. Collateral estoppel applies if:

- (1) the issue previously decided is identical to the one presented in the latter case;
- (2) there was a final judgment on the merits;
- (3) the party against whom the plea is asserted was a party, or in privity with a party, in the prior case;
- (4) there was a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment.

Kalimootoo v. Middle Smithfield Twp., No. 125 C.D. 2019, at \*14 (Pa. Cmmw. Ct. Nov. 12, 2019) *citing* Fowler v. City of Bethlehem Zoning Hearing Bd., [187 A.3d 287](#) (Pa. Cmwlt. 2018). Here, there is no collateral estoppel because the issue previously decided was not identical to the one presented in this conditional use application. The Applicant requested only incentive use relief for the New Building in previous conditional use applications, was not forthcoming about the actual height of the New Building from 2004 to April 2019. In June 2019, Applicant has requested dimensional relief for side yard and rear yard setbacks, building area and impervious surface coverage for the first time in this application. Previous applications for conditional use approval represented the New Building to be code compliant with 35 feet or four stories in height. Each time the Applicant revealed an increase in the height of the proposed building, in April 2019 (44.41-ft) and June 2019 (54.4-ft), the Applicant's engineer has testified the increase was due to a change in Lower Merion's definition of building height in 2005. These

material changes in the height of the New Building in 2019 are not satisfactorily explained by a change in Code's definition of building height in 2005. Previous conditional use approvals would not have been granted if the actual 55.4-ft height of the New Building was known. There was not a full and fair opportunity to litigate the issue in previous conditional use applications because the actual 55.4-ft building height was not provided by the Applicant. It would be inequitable to collaterally estop the Township when new issues are raised for the first time in this application.

119. The proposed New Building's setbacks, building area and impervious must be increased to compensate for building height greater than 35 feet in the RAA district, pursuant to Code §155-137. The Applicant, instead, requests reductions of rear yard and side yard setbacks, together with increased building area and impervious surface coverage because it is essential to the preservation of the historic resources and without such relief it would not be not economically possible to maintain the Mill Buildings, pursuant to Code §155-152.C. This section of Code does not allow relief from use requirements. Thus, Code §155-152.C cannot authorize multifamily buildings in the RAA building where they are not permitted. Further, Code §155-152.C only allows modification of the "requirements applicable to the underlying zoning district." It does not allow relief from the requirements of HROD itself. Thus, Code §155-152.C does not provide a mechanism to allow relief from HROD 155-151.B.1.f which prohibits expansion if the nearest adjacent permitted use is within 250 feet, *see supra*.

120. The evidence does not support Applicant's claim that it is not economically feasible to maintain the historic resources without relief from setbacks, lot area and impervious surface requirements. Charles Jefferson opined \$4.1 million is necessary to stabilize the Mill Buildings and return them to "watertight envelopes." Senior project manager Kevin Kyle used Jefferson's stabilization costs to calculate project costs under different scenarios. Kyle testified

that project is feasible with a 33-unit New Building and project costs of \$22,358,006.00, but a 23-unit New Building with project costs of \$20,373,964 is not economically feasible. (Ex. A-4). Michael Samuels incorporated Kyle's estimated project costs into his own report on economic feasibility, which included estimated soft costs, such as projected conveyance costs, sales and marketing costs and site acquisition costs. (Ex. A-43). Samuels opined the project is financially feasible only with a 33-unit New Building. Kyle's project costs and Samuels' economic feasibility analysis rests upon \$4.1 million to stabilize the Mill Buildings.. If the historic resources had not been allowed to significantly deteriorate under the Applicant's ownership, all project costs and financial feasibility analysis would be lower. (Ex. A-4). The underlying basis of project costs calculated by Kyle and economic feasibility of the proposed development opined by Samuels is expenses arising from self-created harm.

121. Whether an applicant is seeking a use or a dimensional variance, the Applicant must, at a minimum, demonstrate that an unnecessary hardship will result if a variance is denied and that the proposed use will not be contrary to the public interest. Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh, 554 Pa. at 257, 721 A.2d at 47. Hertzberg standards for relief are applicable to conditional uses. Talkish v. Zoning Hearing Board, 738 A.2d 50, 52-53 (Pa. Cmmw. Ct. 1999). The owner of property cannot create a hardship and then request a variance to remedy same. Appeal of Grace Building Co., Inc., 38 Pa Cmwlt. 178, 392 A.2d 888 (1978). Deteriorated conditions on land caused by longstanding neglect are self-inflicted hardship. Arter v. Philadelphia Zoning 916 A.2d 1222, 1228 (Pa.Cmwlt.2007) (a use variance to build a funeral home and crematorium on the grounds of an existing cemetery was denied where the evidence demonstrated that the hardship created by the deteriorated condition of the property was due to decades of neglect and not because the current use was

financially impractical). Here, the Mill Buildings have lacked proper roofing and heat for fifteen years, allowing water infiltration to cause structural damage and significant deterioration of the historic fabric. The Applicant's architectural historian, Wise, testified it was possible to maintain a building without water infiltration eroding and deteriorating them. (N.T. 10/24/19 at p.100). The "deplorable" current condition of the Mill Buildings is self-inflicted harm caused by Applicant's longstanding neglect and does not show unnecessary hardship. Likewise, the \$4.1 million dollars needed to stabilize the Mill Buildings is self-created harm and does not justify granting dimensional relief predicated up economic infeasibility to maintain the historic resources without such relief.

122. The economic argument for dimensional relief, pursuant to Code §155-152.C, is further weakened when Mill Building Two is taken out of the equation. The amount to stabilize and repair Mill Building Two, \$728,008.04, is moot. Likewise, proportionate shares of "soft costs including Architectural and Engineering fees; contractor fees and contingency fees totaling \$1,159,855.29 are also irrelevant when Mill Building Two must be demolished to protect public safety. (*see*, Ex. A-40 at p. 3). The Applicant has not provided cost projections or economic feasibility analysis contemplating Mill Building One in isolation from Mill Building Two. Lacking specific cost projections for Mill Building One only, the Applicant has failed to show it is not financially feasible to save the historic resource without relief from bulk, area and mass requirements to construct a 33 unit, five-story New Building.

123. Objectors have shown substantial evidence that the proposed use will substantially affect the health, safety and welfare of the community. Taken together, the Objectors have demonstrated a high probability that the proposed five-story building will cause adverse impact not normally generated by the type of use proposed and in ways not normally

associated with the proposed use. The proposed five-story New Building will tower above the two-story historic resources, changing the entire site according to Parks and Recreation Commissioner Heller and Historical Commissioner Frens's comments in meeting minutes. The scale of the New Building in Mill Creek Valley if the historic resources were demolished concerned Historical Commissioner Frens. (Ex. A-13 p. 9-10). A.J. Kait, President of the Gladwyne Civic Association aptly described the effects of this application on the Mill Creek valley:

The proposed development is wildly out of character with Gladwyne in its entirety and particularly this site. He said the site is a forest and creek valley that is wild space and putting a five-story building in the middle of a nature preserve is concerning and out of character with the space.

(Ex. T-2). Similarly, Kathleen Abplanalp, the Director of Historic Preservation with the Lower Merion Conservancy stated the height of the building will impact the open space in the area. Sara Schuh, a resident, member of the Environmental Advisory Commission and registered landscape architect also commented the building is out of character in terms of the scale. (Ex. T-2.) The Objector's relevant and probative evidence demonstrated the current proposal for a five-story New Building is not sensitive to the site or the surrounding neighborhood. It will change the site in ways not normally associated with five-story residential buildings because of the proposed site is in the Mill Creek Historic District.

124. The Objectors' testimony and exhibits were corroborated by the registration form for the Mill Creek Boundary Increase authored by Robert Wise in 1996. It states the boundary increase maintains its historic integrity "through retention of historic mill structures and the valley's largely unaltered natural viewshed." Moreover, noncontributing houses lightly scattered along the slopes of the Mill Creek ravine are labelled "intrusions" in the landscape, although mitigated by use of natural materials. (Ex. A-32 at p. 6.) Today, Wise opines that saving the Mill

Buildings while impacting the natural landscape and viewshed is an acceptable trade-off, and approval of a 55.4 ft. high New Building should be permitted. Wise's current opinions and Lisa Thomas's opinion as a landscape architect about lack of substantial adverse impact on the health, safety and welfare of the community carries less weight than the Objector's persuasive evidence and Wise's own 1996 opinion about the Mill Creek Boundary Increase.

125. The Board of Commissioners is presented with dire circumstances in this conditional use application: approval of a land development project involving adaptive reuse of both historic Mill Buildings and a five-story New Building sited five feet from Rolling Hill Park in the Mill Valley Historic District or denial at risk of complete loss the historic Mill Buildings. Given that Mill Building Two has already deteriorated to the point that demolition is recommended for safety reasons, the Board of Commissioners need not make that difficult decision. Demolition of Mill Building Two would be a huge loss to the industrial history of Lower Merion Township. At the same time, it is an opportunity to reimagine adaptive reuse of Mill Building One in ways that are more sensitive to the site and surrounding Mill Creek Valley Boundary Increase, more compliant with Code and better able to meet the legislative intent of the HROD. The pending Application does not comply with Code in numerous ways and should be denied. As a result of the foregoing, the Applicant's request for conditional use approval is not recommended by the Conditional Use Hearing Officer to the Board of Commissioners.

#### IV. Order

Conditional Use approval for dimensional relief is not recommended by the Conditional Use Hearing Officer