

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

CU Application #3634C

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

This conditional use application filed by 1400 Mill Creek Associates, LP (“Applicant”) seeks to reconfirm previously granted permission to convert a Class I historic resource in a residential zoning district to multifamily use and construct a new multifamily building, as well as increase building area up to 15%. Conditional use approval to convert a Class I historic resource in a residential zoning district to multi-family use was originally granted in 2005. It was reconfirmed in 2006, together with additional conditional use approval to construct a new multifamily building. Conditional use approval for a substantially similar project was reconfirmed, together with additional conditional use relief for building area, by the Board of Commissioners in 2009. The Board of Commissioners reconfirmed conditional use approval on May 16, 2018.

A Conditional Use Hearing was held on April 8, 2019 before the Conditional Use Hearing Officer pursuant to Code §155-141.2.A.5. The Applicant has filed a further application to extend the date on which the final Plan is to be recorded and the date it is required to file for a building permit to construct the project for an additional year, to on or before May 16, 2020. In addition, the Applicant requested clarification regarding the calculation of building height for Building #3 (the new structure to be constructed to the rear of the Property as viewed from Mill Creek Road,) and confirmation that the structure as proposed and reviewed, pursuant to the prior conditional use approvals, was approved with the height above mean grade as calculated under

current zoning regulations. The Applicant specifically requested confirmation of the approved height of the new multifamily building to be 44.41 feet tall and five stories.

I. FINDINGS OF FACT

A. The Parties

1. The Applicant is 1400 Mill Creek Associates, LP by its development manager Kevin Kyle.

2. The Applicant is represented by Steven T. Hanford, Esq. (“Attorney Hanford”) of counsel at Silverang, Rosenzweig & Halzman, LLC.

B. The Property

3. The Applicant is the owner of property known as 1400 Mill Creek, a single tract of ground approximately 2.6 acres 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, 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.

5. The Property is currently improved with three buildings. Two buildings are linked together by an elevated crosswalk and a former worker’s cottage. The largest and most important structures are two linked buildings referred to as the “Old Mill” a former grist and munitions mill dating back to the mid-1800s. Both buildings were used in conjunction with mill operations and are Class I Historic Resources listed on the Township’s Historic Resource Inventory. The former worker’s cottage is not a contributing resource.

6. The Applicant has proposed adaptive reuse of the Class I Historic Resources and construction of a new multifamily building on the Property.

C. Prior Applications for Zoning Relief and Land Development Approval

7. On June 20, 2003, the Applicant filed an application for Tentative Sketch approval to renovate two buildings and construct a 9,500 sq. ft. building and a total of 22 units on the Property. It was assigned application #3486 by Lower Merion Township. The Applicant submitted the following plans together with its Tentative Sketch:

Sheet 01 Illustrative Site Plan dated 6-20-03 by Momenee Engineering
Sheet 02 Existing Conditions Plan dated 6-20-03 by Momenee Engineering
Sheet 03 Demolition Plan dated 6-20-03 by Momenee Engineering
Sheet 04 Ground Floor Plan dated 6-20-03 by Momenee Engineering
Sheet 05 First Floor Plan dated 6-20-03 by Momenee Engineering
Sheet 06 Site Plan dated 6-20-03 by Momenee Engineering

All of the engineering plans dated 6-20-03 state the maximum building height is 35 feet.

8. On March 3, 2004 the Board of Commissioners adopted a resolution approving redeliniation of the floodplain on the property. As a result, the Applicant no longer needed a special exception for parking in a floodplain.

9. On April 22, 2004, the Zoning Hearing Board (“ZHB”) granted two variances for relief from:

- (a) rear yard setbacks pursuant to 155-12(E), and
- (b) steep slopes pursuant to 155-166(D).

The ZHB denied a variance for relief from side yard setbacks pursuant to 155-12(D).

10. The Township’s file for LD# 3634 and LD# 3486 contains a spiral bound booklet of VLBJR Architects, Inc. (“VLBJR”) drawings dated October 4, 2004, including “Site Plan” and “Architectural Elevation.” The Architectural Elevation depicts the proposed new

multifamily building. A handwritten note on the Site Plan states “35 ft” and draws a line to the proposed new multifamily building. (Attached hereto as Ex. 1)

11. On October 20, 2004 the Board of Commissioners approved the Tentative Sketch Plan and issued conditions of approval including: :

No. 35: Approval of this Tentative Sketch Plan does not ensure that the developer or the owner can ultimately develop the property as shown on the plan. The proposed development’s compliance with various Township ordinances (...) shall not be determined until the Applicant submits a Preliminary Plan for Township approval.

12. The Applicant submitted a booklet of drawings entitled “Addendum Prepared for the Lower Merion Historical Commission, May 16, 2005.” It contained a proposed elevation of Building No. 3 dated 5-16-05 Sheet A/3.1 prepared by VLBJR depicting a four story building. (Attached hereto as Ex. 2). No information about the height of Building No. 3 or mean grade calculations are shown on Sheet A/3.1.

13. The Applicant submitted a booklet of drawings entitled “Mill Creek Historical Studies & Architectural Vision, in preparation for the Lower Merion Historical Commission 7/28/05.” It contained:

Sheet A/3.0 Building # 3 Proposed Front Elevation dated 7-15-05 prepared by VLBJR.; and,

Sheet A/3.1 Building # 3 Proposed Rear Elevation and Proposed Side Elevation dated 7-15-05 prepared by VLBJR.

(Attached hereto as Ex. 3). No information about the height of Building No. 3 or mean grade calculations are shown on Sheets A/3.0 or A/3.1.

14. On September 25, 2005 the Applicant filed a Preliminary Land Development Plan for 27 condominium units and to construct a 9,000 sq. ft. building on the Property.

15. On November 28, 2005, the Board of Commissioners granted conditional use approval to convert a Class I building in a residential zoning district presently being put to a non-conforming, nonresidential use to a multi-family use as shown on the plan prepared by Momenee Associates, Inc dated February 18, 2005 last revised September 19, 2005. The conditions of approval included:

(4) The applicant shall return to the Historical Commission for resolution of the following (...) to present revised elevations which show details that break up the large expanse of stucco on the rear side of building no. 3.

(5) A complete and correct set of elevations for building no. 3 shall be submitted to the Township for review. The set shall include a roof plan that shows balconies which coordinate with the revised site plan.

16. The Lower Merion Historical Commission's 2006 file for 1400 Mill Creek Road contains drawings by VLBJ stamped Jul 11, 2006:

Sheet A3.1 Building #3 Proposed Courtyard Elevation dated 10 July 2006

Sheet A3.2 Building #3 Proposed Partial Courtyard Elevation and Building #3 Proposed Right Side Elevation dated 10 July 2006;

Sheet A3.3 Building #3 Proposed Left Side Elevation dated 10 July 2006;

Sheet A3.4 Building #3 Proposed Rear Elevation dated 10 July 2006.¹

(Attached hereto as Ex. 4). Sheets A3.1- A3.4 do not contain information about the height of Building #3 or mean grade calculations.

17. Architect Victor Barr of VLBJR ("Architect Barr") wrote a memo dated July 13, 2006 to Lower Merion Township Senior Planner Andrea Campisi ("Campisi") stating in pertinent part:

Attached please find 10 sets of revised submission drawings for Building #3 at Mill Creek. Dominique suggested I add some clarifying notes to the drawings

¹ This is the first version of Sheet A3.4 dated 10 July 2006 (depicting Proposed Rear Elevation).

submitted earlier this week. I'm hoping you can easily make the substitution for Building #3.

The following drawings for Building #3 were included with Barr's memo:

Sheet A3.4 Proposed Building #3 Partial Courtyard Elevations with Exterior Materials Legend dated 10 July 2006²;

Sheet A3.5 Proposed Building #3 Side Elevation with Exterior Materials Legend dated 1 July 2006;

Sheet A3.6 Proposed Building #3 Rear Elevation with Exterior Materials Legend dated 1 July 2006.

(Attached hereto as Ex. 5). Sheets A3.4 - A3.6 do not contain information about the height of Building #3 or mean grade calculations.

18. A table entitled "Mill Creek: Conditional Use Approval by Historical Commission" states the Historical Commission requested O'Neill return to discuss the following issues and O'Neill's response to Historical Commission with reference sheets. Under column "O'Neill's Response to Historical Commission," the table states "Proposed drawings for building no. 3 were presented for review on June 2, 2006, including all building elevations, floor plans indicating all balconies and roof plan." Reference sheets are A3.1, A3.2, A3.3, A3.4 on 10 July 2006.³ (Attached hereto as Ex. 6).

19. On September 20, 2006 the Board of Commissioners granted conditional use approval to convert a Class I historic resource in a residential zoning district to multi-family use and construct a new multifamily building ("Building #3").

20. The original approval expired when a building permit to construct the project was not issued within one year from the date approval was granted, pursuant to Code 155-153(A)(6).

² This is the second version of Sheet A3.4 dated 10 July 2006 (depicting Partial Courtyard Elevations with Exterior Materials Legend.)

³ Date appears to be inaccurate because the Historical Commission meeting on June 6, 2006 could not review plans dated July 10, 2006.

21. The Applicant filed a conditional use application in 2009 seeking reconfirmation of previously granted 2006 conditional use approval, pursuant to Code 155-151.

22. On September 4, 2009, Land Development Committee Meeting No. 10-09 was conducted. Minutes from the meeting state:

Reviewed an Amendment Plan prepared by Momenee and Associates Inc. dated February 18, 2005 last revised August 21, 2009, proposing revisions to the previously approved Land Development Plan. In 2006 the applicant received Conditional Use and Land Development Approval to convert the two existing mill buildings into condominiums and construct a new condominium building for a total of 33 new residential units. The Amendment Plan alters the path of the sanitary sewer force main from being routed through Mill Creek Park and reroutes it down Mill Creek Road to an existing force main located at the intersection of Mill Creek and River Roads. Comments include, but are not limited to:

(...)

No. 4 **The mean grade calculations and height of the buildings shall be provided.**

No. 5. Revised Elevations shall be provided as the layout of Building 3 has been altered. (...)

No. 6 The applicant shall present their **revised elevations** to the Historical Commission prior to review by the Planning Commission.

(Emphasis added)(LDC minutes attached hereto as Ex. 7)

23. Michael Bowker, P.E. ("Bowker") employed by Momenee and Associates, Inc. wrote a letter dated October 22, 2009 to Bob Duncan, Director of Building and Planning, responding to LDC comments as follows:

No. 4 **As discussed at our meeting with Township Staff the mean grade and building height calculations remain as previously approved.**

No. 5. As discussed at our meeting with Township Staff; although the plan view of the building was slightly modified on the land development plans that actual elevations previously reviewed by the Township did reflect the building footprint as depicted on the amended plans previously submitted.

No. 6 The applicant agrees to verify that the current building elevations are consistent with previous approvals and shall meet with the Historic Commission.

(Emphasis added) (Bowker letter attached hereto as Ex. 8)

24. The Lower Merion Township Preliminary Plan and Conditional Use file contains a spiral bound booklet dated October 2009 submitted by the Applicant containing:

Building Footprint, Proposed Building #3 dated 22 October 2009;

Side Elevation as presented on 10 July 2006 and Side Elevation as revised 22 October 2009 for Proposed Building #3 dated 22 October 2009;

Sheet A3.1 Building #3 Proposed courtyard elevation date 10 July 2006;

Sheet A3.2 Building #3 Proposed partial courtyard elevation and Building #3 Proposed right side elevation dated 10 July 2006;

Sheet A3.3 Building #3 Proposed left side elevation dated 10 July 2006;

Sheet A3.4 Building #3 Proposed rear elevation dated 10 July 2006.⁴

(Attached hereto as Ex. 9) Sheets A3.2 to A3.4 do not contain building height information or mean grade calculations. Sheet A3.4 does not depict Proposed Building #3 Partial Courtyard Elevation with Exterior Materials Legend.

25. The Lower Merion Historical Commission's 2009 file for 1400 Mill Creek Road contains a spiral bound booklet entitled "Mill Creek Architectural Vision in Preparation for the Lower Merion Historical Commission 10/22/09" submitted by the Applicant containing:

Sheet A3.3 Building #3 Courtyard Elevation with Exterior Materials Legend dated 10 July 2006;

Sheet A3.4 Building #3 Proposed Partial Courtyard Elevation and Right Side Elevation with Exterior Materials Legend dated 10 July 2006;⁵

⁴ This is the first version of Sheet A3.4 dated 10 July 2006 (depicting Proposed rear elevation).

⁵ This is the second version of Sheet A3.4 dated 10 July 2006 (depicting Proposed partial courtyard elevation and right side elevation).

Sheet A3.5 Building #3 Proposed Side Elevation with Exterior Materials Legend
dated 10 July 2006;

Sheet A 3.6 Building #3 Proposed Rear Elevations with Exterior Materials
Legend dated 10 July 2006

(Attached hereto as Ex. 10). Sheets A3.- A3.6 do not contain information about the height of Building #3 or mean grade calculations.

26. The Assistant Director of the Building and Planning Department Christopher Lessing (“Leswing”) wrote a memo dated 10-30-09 to Planning Commission which included a table noting under building height: “4 stories proposed*****” and “*****Check the proposed height,” CUH Ex. A-1.

27. On November 11, 2009, a conditional use hearing was conducted by the Board of Commissioners and recorded on DVD. The height of Building #3 was not discussed at the hearing although, in response to a question from Commissioner Rogan, the Applicant’s Attorney stated drawings were submitted to HARB⁶ and recommended. The Township Solicitor subsequently submitted findings of fact, discussion and order recommending approval to convert a Class I historic resource in a residential zoning district to multi-family use and construct a new multifamily building, pursuant to Code §155-151, to the Board of Commissioners.

28. Leswing wrote a memo to the Planning Commission dated December 4, 2009 regarding the Applicant’s Amendment Plan which was proceeding at the same time as the conditional use application. It sought to amend the Preliminary Land Development Plan previously approved in 2006 with revised grading at the south elevation of Building #3 and sanitary sewer line relocation. Leswing’s 12-4-09 memo states:

⁶ Presumably the Applicant’s attorney was referring to the Historical Commission since HARB did not review this project.

the previously approved plan included the following: (...) construction of a **four-story building (no. 3)** with an approximately 9,000 square foot footprint.

proposed building height **35'**.

(Emphasis added). Leswing's memo dated 12-4-09 attached recommendations from the Township Engineer and the Montgomery County Planning Commission.

29. On December 16, 2009, the Board of Commissioners approved the Applicant's Amendment Plan which sought revised grading at the south elevation of Building 3 and sanitary sewer line relocation. The order granting land development approval of the Amendment Plan contained conditions of approval stating, in pertinent part:

No. 46 The mean grade for each structure shall be calculated and shown on the plan. The architectural plans shall be coordinated with and shall comply with the grading proposed with this application. (TE)(PGP)

(...)

No. 56 The property owner(s) shall comply with all federal state and applicable Lower Merion Township ordinances and laws regardless of specific mention herein.

30. On December 16, 2009, the Board of Commissioners also reconfirmed previously granted conditional use approval from 2006 for similar adaptive re-use of the historic resource pursuant to Code §155-151 and to construct a new multifamily building. Additionally, conditional use approval to increase the building area of the new multifamily building by 15%, pursuant to Code §155-152 was granted by the Board of Commissioners. The order granting conditional use approval contained condition of approval No. 6 stating:

All of the conditions for the original and amended development no. 3486 and 3634 are incorporated as conditions to the grant of this conditional use application, except those related to the sewer easement through the Township's Mill Creek Park.

31. The 2009 conditional use approval expired when a building permit to construct the project was not issued within one year from the date approval was granted, pursuant to Code 155-153(A)(6).

32. On April 12, 2018, a conditional use hearing was conducted. The Applicant sought reconfirmation of the 2009 conditional use approval. The entire files maintained by Lower Merion Township regarding conditional use approvals granted in 2009 and 2006 were incorporated by reference at the request of the Applicant. The Applicant's engineer Michael Bowker testified the Illustrative Site Plan dated 2/18/05 last updated 12/18/17 showed changes in red ink intended to comply with the Township's conditions of approval issued in 2009. (Ex. T-6 & A-2). The Applicant's architect Victor Barr, the principal of VLBJR, testified the new multifamily building would have twenty (20) units and two (2) stories because it was being built into the side of a hill. The Hearing Officer submitted recommendations for findings of fact, conclusions of law and order to the Board of Commissioners. The proposed order stated:

[t]his grant of Conditional Use approval is based on the documents and plans submitted in support of the current conditional use application, as well as the 2009 and 2006 conditional use applications, all of which are specifically incorporated by reference.

33. On May 16, 2018 the Board of Commissioners reconfirmed the previously granted conditional use approval from 2009 and issued Resolution No. 2018-19 containing an Order stating in pertinent part:

AND NOW on the 16th day of May 2018 application 3634C for conditional use approval is granted and the previous grant of conditional use approval is reconfirmed based on the documents and plans submitted in support of the application, all of which are specifically incorporated herein by reference.

34. The 2018 approval will expire if a building permit to construct the project is not issued within one year from the date approval was granted, pursuant to Code 155-153(A)(6).

D. Current Application for Conditional Use Approval

35. The Applicant submitted an Historic Resource Overlay District conditional use application dated February 15, 2019 stating conditional use relief is sought from zoning code §155-151(B)(1)(f)(2). (“2019 CU Application”). The Application specified conditional use relief for “incentive use” while the box next to “dimensional relief” was left blank. CUH Ex. T-2. An attachment to conditional use application was also submitted. CUH Ex. T-3.

36. A conditional use hearing was held on April 8, 2019. Attorney Hanford stated the Applicant seeks to reconfirm prior conditional use approval and extend the time to obtain a building permit to May 16, 2020. He also requested clarification of the approved building height of the new multifamily apartment building, or in the alternative, conditional use relief for a 44.4-foot building height pursuant to Code 155-152, raising a new dimensional issue.

37. The Applicant offered the following exhibits into the record at the hearing:

A-1 Lower Merion Township staff memo by Leswing dated 10-30-2009;

A-2 Building Exhibit dated 4-2-2019 prepared by Bowker/Momenee;

A-3 Illustrative Drawings of Proposed Building # 3 dated 7/10/06, sheets A3.3 - A3.6,⁷ prepared by VLBJR and unnumbered sheet “Proposed Building #3”;⁸

A-4 Post Construction Stormwater Management Plan dated 2-18-05 last revised 1-15-19 prepared by Bowker/Momenee.

CUH Ex. A-3, sheets A3.1-A3.6, do not contain information about the height of Building #3 or mean grade calculations, however, the unnumbered sheet contains it. (Attached hereto as Ex. 11).

⁷ Including the second version of Sheet A3.4 dated 10 July 2006.

⁸ Unnumbered sheet “Proposed Building #3” containing building height and mean grade calculations was not found in either Historical Commission or Building and Planning Department files for 1400 Mill Creek Road maintained by Lower Merion Township.

38. Andrea Campisi, Senior Planner in the Department of Building and Planning, offered the following exhibits into evidence:

T-1 Proof of Publication.

After the Conditional Use Hearing, the following documents were sent for the record:

T-2 Cover letter enclosing Conditional Use Application dated 1-30-19;

T-3 Attachment to Conditional Use Application received 2-15-19;

T-4 Agenda Item Information for Building and Planning Committee May 2018

39. The entire files maintained by Lower Merion Township regarding conditional use approvals granted in 2018, 2009, and 2006 were submitted into evidence by virtue of the Applicant seeking to reconfirm conditional use approval granted in 2018.

40. Attorney Hanford initially stated the building height of Building 3 was “left open in 2009” and requested “clarification on that open item.” He explained the numerical height of Building 3 was calculated as 35-feet by the Architect, but the Engineer calculated 44.41-feet because the mean grade was calculated in different ways. Hanford explained the discrepancy by stating “the building height hasn’t changed, but the methodology to calculate it has changed.” He further explained the method for calculating height has changed since the Architect prepared the original elevations using the arithmetic average of the highest and lowest elevations. Now building height is calculated using an arithmetic mean of all surrounding changes in grade measured to the mid-point of the roof.

41. The Applicant presented testimony from engineer, Michael J. Bowker, P.E. (“Engineer Bowker”) a civil engineer licensed in the Commonwealth of Pennsylvania and employed by Momenee Inc. Bowker had testified at the 2009 and 2018 conditional use hearings.

He prepared the Building Exhibit dated April 2, 2019 depicting mean grade and height calculations for Building 3 as calculated by the Architect and himself (CUH Ex. A-2).

42. Engineer Bowker testified he calculated the arithmetic mean grade to be 100.59', and the mid-point of the roof to be 145', resulting in a building height of 44.41' as depicted on Ex. A-2. The Architect calculated Building 3 would be 35-feet high. These differing building height measurements arose from divergent methods of determining mean grade:

Bowker: On the Architect's plan when he established the mean grade from which to measure from. This was developed under previous definition of building height which was the mean grade to midpoint of roof. **So when the Architect performed his mean grade calculation, he took just the lowest grade at that first floor to the highest grade and picked the midpoint. It wasn't the arithmetic mean if you take grade all around the building and calculate what the actual mean grade in form the Township requires that calculation.** So, according to his calculation ended up with a building height of 35 feet (from his calculated mean grade to midpoint of roof.) When you take that from our calculation you end up with a building height based on that definition of 44.41 feet.

Conditional Use Hearing tape at 11:58 -12:53.

43. Engineer Bowker also testified about the Architect's calculations in relation to Code's definition of "Height of Building" in an exchange with Attorney Hanford, Senior Planner Campisi and the Hearing Officer:

Bowker: It was approved under old definition, but even under old definition it would be 45 feet tall and five stories, which you were limited to 35 feet or three stories and this has always been a five-story building

Hanford: But again, we're not looking to increase height. Just looking to essentially ratify the previously approved building foot print and height.

Hearing Officer: I have a question. Why use different method now to calculate the height? Is that a new Code requirement?

Campisi: We have since changed the definition of how building height is measured from the time this application was initially approved until...

Bowker:Actually it was different even under that definition...

Hanford:But it has changed over the 13 years that this has been pending.

Bowker: 2004 or 2005.

Conditional Use Hearing tape at 17:23-19:06.

44. Lastly, Engineer Bowker testified the requirement in a condition of approval for a public trail connection has been eliminated by the Lower Merion Township's Parks and Recreation Department. A connection between the upper trail and lower trail was proposed, but due to the grade and the impact on existing natural features, Parks and Recreation determined that a public trail connection was not desirable. The trails already connect further upstream. The area is very steep and would have been destructive to natural features. There will be on site access for Bridlewild Trail members, residents of the complex and their guests.

45. Members of the public who were present at the hearing asked Bowker questions. Lou Savastini, a member of the Lower Merion Cycling Club, asked how many parking spaces would be provided. 72 parking spaces answered Bowker. Savastini asked about trail connectivity. Bowker responded that the Bridlewild Trail continues through the site for Bridlewild members, but there is no other public use of the site.

46. Janet Cusack, a resident of Bryn Mawr and frequent trail hiker asked how long it would take to start development. Hanford responded the "property is under Agreement with a Developer who intends to begin construction as soon as closes on transaction. I don't speak for Developer. We hope to close within 90 days. Developer will do what they do after that."

47. Rachel Weiner, a resident of Ardmore, asked whether traffic and right of way studies were conducted for the project. Attorney Hanford responded a traffic study was conducted at the time of the original conditional use application in 2006 and PennDOT may

follow up on it. Weiner asked if this application could be approved without a new traffic study. Attorney Hanford said the Applicant is seeking approval without a new one.

48. At the end of the conditional use hearing, Savastini stated he represented the interests of cyclists in Lower Merion and noted Mill Creek Road is lightly traveled. He is concerned about the number of residences increasing from two (2) to thirty-five (35) and increasing traffic. Savastini requested road improvements on Mill Creek Road. He would like sharrows and signage stating that cyclists may use the full lane.

49. In summation, Attorney Hanford requested the conditional use approval dated 5-16-18 be extended for an additional year to 5-16-20. As part of that approval, he requested the Board of Commissioners confirm the building height of 44.41-feet from calculated arithmetic mean grade to the midpoint of the roof on elevations of Building 3 as previously approved.

50. The day after the conditional use hearing, on April 9, 2019, Engineer Bowker emailed copies of plans to Senior Planner Campisi including “VLBJR Proposed Building # 3 dated 7/10/06 sheets A3.3 -A3.6,” had been marked A-3 at the conditional use hearing and do not contain information about building height or mean grade calculations. (Attached hereto as Ex. 11).

51. On April 16, 2019, the Conditional Use Hearing Officer requested proposed findings of fact and conclusions of law from the Applicant. Attorney Hanford sent the following documents by email on April 24, 2019:

Applicant’s Proposed Findings of Fact and Conclusions of Law;

Ex. A Building and Planning Committee Issue Briefing dated May 4, 2018 by Christopher Leswing;

Ex. B Right and Left Side Elevations dated 9-25-06 updated 12-22-06 by VLBJR sheet A2.3 (containing information about building height) and.⁹ (Ex. 12)

Ex. C. Memorandum dated 11-2-09 from Vic Barr/VLBJR to Kevin R. Kyle stating:

Memorandum:

Date: 02 November 09

To: Kevin Kyle / O'Neill Properties Group From: Vic Barr / VLBJR

Re: Mill Creek / Height Clarification

Lower Merion Township, PA

When the building height for Building #3 at Mill Creek was discussed and approved by Lower Merion Township in late 2005¹⁰, the following was presented:

The definition of "Building Height" in the applicable ordinance measured the height of the building from the "mean level of the ground surrounding the building "to the "mean height of the roof".

It was agreed at that time that the definition of "mean" is the midpoint between the highest point and the lowest point, not to be confused with "average" which is the sum of numerous points divided by the number of points.

See copy insert of 01 October 05 memo below:

VLBJR Architects Inc

Memo

Date: 01 October 05

To: File / O'Neill Properties / Mill Creek / 1055.14 From: Vic Barr

Re: Building Height Calculation / Building # 3

Cc: Jim Ettelson

Mike Trio

⁹ Right and Left Side Elevations dated 9-25-06 updated 12-22-06 by VLBJR sheet A2.3 was not found in either Historical Commission or Building and Planning Department files for 1400 Mill Creek Road maintained by Lower Merion Township.

¹⁰ Building #3 was approved by the Board of Commissioners on September 20, 2006, *see supra* para XX.

Lowest Grade @ Building Line is elevation 90.00 Highest Grade @ Building Line is elevation 130.00 Therefore: Mean Grade is elevation 110.00

35' Height Limit @ Mean Grade equates to elevation 145.00

*Lowest Point of Roof is elevation 130.00
Highest Point of Roof is elevation 160.00 Therefore: Mean Height of Roof is elevation 145.00*

52. The Conditional Use Hearing Officer posed the following questions to Attorney Hanford about Barr's memo in email on 4-24-19:

1. Did Victor Barr or anyone at his firm receive a response to his memo dated Oct. 1, 2005? If so, please forward to me.
2. Who agreed with Victor Barr about the definition of "mean"?

53. Attorney Hanford responded in email dated 4-26-19 as follows :

I asked Mr. Barr about the two questions you raise below. He advises as follows:

The dictionary definition of "mean," which term was not otherwise defined in the regulations at that time, is the "midpoint between two extremes," which was the approach he used to determine the mean grade (i.e., midway between the high point and the low point), as outlined in his memo.

He did not receive a response to his October 1 memo, nor was his calculation of the building height questioned or objected to in the process of submitting his plans to the Historic Commission, etc. When his memo noted that "it was agreed," what he meant was that no one disagreed and his plans and accompanying calculations were accepted as submitted.

54. The Conditional Use Hearing Officer posed the following questions to Attorney Hanford about Ex. C in email dated 4-25-19:

1. When did Barr submit plans to the Historic Commission?
2. Which plans did Barr submit to the Historic Commission?

55. Attorney Hanford responded in email dated 4-26-19 attaching two documents:

I followed up with Mr. Barr regarding your questions in your email of April 24 and the email below. He provided the following responses:

As architect working under the direction of the Owner/Developer I would not have reached out to any Township Official unless in was in direct response to a question from that individual. Based on that, I would have to conclude that my copying Mr. Ettelson on the 2005 memo must have been in his capacity as an Owner/Developer legal consultant and not as a representative of the Township.

Since the height of Building #3 was of interest in all of the many presentations and meetings, the Townships' height definition using the reference of "mean" and the definition of "mean" / midpoint between two extremes was always part of my presentation and explanation in describing the proposed development and its conformance to Township Ordinances.

The attached historic submission drawings clearly defines the "mean" grade / "mean" height illustration (see sheet A3.3)

Note sheet A3.5 , the uphill rear of the building is essentially a 1 story building.

In addition, in response to your two questions below, I have attached the meeting agenda for the meeting of the Township Building and Planning Committee from September 13, 2006. Please see the notation in item 3 that the Historical Commission reviewed the July 10, 2006 drawings for Building 3 (including A3.3 to A3.6 attached) and recommended approval of Building 3 as submitted.

VLBJR Proposed Building #3 dated 7-10-06 sheets A3.3-A3.6 (containing building height and mean grade)¹¹;

Building and Planning Committee Meeting Agenda dated 9-13-06.

(Attached hereto as Ex. 12) Sheets A3.3 to A3.6 from Attorney Hanford include information about building height.¹²

56. Files maintained by the Lower Merion Township Department of Building and Planning and the Historical Commission from 2004 to 2019 ("Township Files") were reviewed by the Hearing Officer on April 24 and 27, 2019.

II. APPLICABLE ORDINANCES

¹¹ This document set contains the third version of Sheet A3.4, including height measurements and mean grade calculations for the first time.

¹² Cf Sheets A3.3-A3.6 sent by Engineer Bowker without building height measurements or mean grade calculations which had been marked Ex. A-3 at the Conditional Use Hearing on 4-8-19.

57. In 2003, Code §155-4 defined “Height of Building” as follows:

HEIGHT OF BUILDING – 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]

58. In 2005, Code §155-4 defined “Height of Building” as follows:

HEIGHT OF BUILDING – 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]

59. Code §155-151 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:
(...)

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.

60. Code depicting § 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.

67. Code § 155-153 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.

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

III. CONCLUSIONS OF LAW/DISCUSSION

69. The Applicant has never requested conditional use relief to increase the building height of Building #3 in a conditional use application in compliance with Code §155-153(A)(2)(f).

70. The Board of Commissioners has never granted conditional use relief to increase the height of Building #3 in a conditional use order.

71. Documents specifically calling out proposed Building #3's building height and mean grade calculations were not found in files maintained by the Lower Merion Township's Building and Planning Department and Historical Commission, prior to the conditional use hearing on April 8, 2019.

- a. "Right and Left Side Elevations dated 9-25-06 updated 12-22-06 by VLBJR sheet A2.3;"
- b. Unnumbered sheet "Proposed Building #3 dated 10 July 2006";
- c. VLBJR Proposed Building #3 dated 7-10-06 sheets A3.3-A3.6 (Attorney's set).

72. The testimony and exhibits conflicted on the issue of proposed Building #3's height at the 2019 conditional use hearing and in post-hearing submissions. Building Exhibit

dated 4/2/19 depicts differing mean grade and building height calculations in 2006 and 2019, *see* CUH Ex. A-2 attached hereto as Ex. 11. Engineer Bowker testified the Building #3 “has always been 44.41-feet tall and five stories tall,” and explained the architect incorrectly calculated 35-foot building height in 2006 irrespective of changes in the definition of “Height of Building” in Code. At the conditional use hearing, the Applicant submitted “VLBJR sheets A.3.3-A.36 dated 10 July 2006” which did not contain building height or mean grade calculations, and one unnumbered sheet “Proposed Building #3” which includes it. CUH Ex. A-3; also attached hereto as Ex. 11.¹³ After the conditional use hearing, the Applicant submitted VLBJR sheet A2-03 dated 9-25-06 last updated 12-22-06 with building height and mean grade calculations, attached hereto as Ex. 12. The Applicant also submitted VLBJR sheets A.3.3-A.36 dated 10 July 2006 which contain building height or mean grade calculations, attached hereto as Ex. 13.¹⁴

73. The Applicant’s compliance with specific requirements for conditional use approval in the Historic Resources Overlay District, pursuant to Code § 155-153, cannot be determined where three different versions of Sheet A3.4 has been submitted by the Applicant since 2006. Moreover, two different versions of Building #3 elevations labeled sheets A3.3-A3.6 dated 10 July 2006 have created confusion about which set was reviewed and approved by the Planning Commission, Historical Commission, Township Staff and the Board of Commissioners in 2006 and 2009, and reconfirmed in 2018:

Illustrative Drawings of Proposed Building # 3 dated 7/10/06, sheets A3.3-A3.6, prepared by VLBJR which are devoid of building height information, CUH Ex A-3 attached hereto as Ex. 11, (“Engineer’s sheets A3.3-A3.6”)

or

¹³ Including version two of Sheet A3.4 dated 10 July 2006.

¹⁴ Including version three of Sheet A3.4 dated 10 July 2006.

Proposed Building # 3 dated 7/10/06, sheets A3.3 -A3.6, prepared by VLBJR containing building height information sent by email dated 4-26-19 (Attached hereto as Ex 13) (“Attorney’s sheets A3.3-A3.6”).

74. The Applicant’s compliance with general requirements for conditional use approval, pursuant to Code § 155-141.2, also cannot be determined when it is not clear which set of architectural elevations previously were reviewed and approved by the Planning Commission, Historical Commission, Township Staff and the Board of Commissioners in 2006 and 2009, and reconfirmed in 2018, *supra*.

75. This Application appeared to be a straight forward request to reconfirm previous conditional use approvals granted in 2018, 2009 and 2006 until the Applicant sought clarification of the approved height of Building #3 at the conditional use hearing on April 8, 2019. To the Applicant’s credit, Engineer Bowker was forthcoming about Building #3 exceeding Code’s 35-foot maximum height and Attorney Hanford initially admitted building height was “left open” in previous conditional use proceedings. Engineer Bowker testified he correctly calculated building height of 44.41-feet in 2019 and the Architect incorrectly calculated 35-feet in 2006, irrespective of the definition of “Height of Building” changing in Code § 4. As a result of the foregoing, material issues have arisen regarding :

1. Whether the Historical Commission reviewed and approved Conditional Use applications in 2006 and 2009 based on elevations of Building #3 containing accurate building height and mean grade calculations;
2. Whether the Planning Commission reviewed and approved Conditional Use applications in 2006 and 2009 based on elevations of Building #3 containing accurate building height and mean grade calculations;
3. Whether the Board of Commissioners relied on the Architect’s seemingly code compliant 35-foot height calculation for Building #3 when it granted conditional use approval in 2006 and reaffirmed it in 2009 and 2018; and
4. Whether the Board of Commissioners knew Building #3’s height exceeded 35-feet when it granted conditional use approval in 2006 and reaffirmed it in 2009 and 2018.

It is recommended that the Board of Commissioners determine these issues because the Conditional Use Hearing Officer does not have jurisdiction to recommend building height in excess of Code's 35-foot maximum in the RAA district. Nothing in the Historic Resource Overlay District or elsewhere in Code confers such authority to her.

76. The Applicant requested approval of Building #3 at 44.41-feet tall pursuant to Code §155-152 at the Conditional Use Hearing in 2019. New dimensional relief was not requested in the Applicant's conditional use application dated February 15, 2019, and as a result, the issue of increased building height was not properly raised in this conditional use proceeding. Moreover, building height has never been increased pursuant to this code section according to Senior Planner Campisi. Engineer Bowker opined building height falls within the meaning of "bulk" in Code §155-152, but that is immaterial when new dimensional relief for building height has not been requested in the conditional use application.

77. The Applicant's request for ratification of 44.41-foot building height of Building #3 based on prior approvals is not supported by the underlying record. The Applicant has never requested conditional use relief to increase the building height of Building #3 in a conditional use application, in compliance with Code §155-153 (A) (2)(f). Likewise, the Board of Commissioners has never expressly granted conditional use relief to increase the building height of Building #3 in any approval. The Zoning Hearing Board granted two variances for dimensional relief in 2004 and the Board of Commissioners granted conditional use dimensional relief for building area in 2009. Dimensional relief from building height wasn't requested from either body by the Applicant. This omission indicates the Board of Commissioners did not approve conditional use relief from the RAA district's 35-foot building height maximum, contrary to the Applicant's assertions. The Land Development Committee's

minutes dated 9-4-09 state “mean grade calculations and height of the buildings shall be provided,” indicating this information had not yet been received, *supra* para. 22. Similarly, Engineer Bowker’s letter dated 10-22-09 stated “the applicant agrees to verify that the current building elevations are consistent with previous approvals and shall meet with the Historic Commission,” *supra* para. Although the Leswing memo dated 10-30-09 states “four story building” and notes “check building height,” in a subsequent memo dated 12-4-09, Leswing wrote a “four story building” “35-feet” high is proposed, *supra* para. 26 & 28.

78. The Board of Commissioners must be able to rely on the accuracy of measurements and mathematical calculations on written plans submitted by the Applicant in conditional use and land development applications. The 44.41-foot height of Building #3 does not appear in any document submitted by the Applicant until April 8, 2019 when Ex. A-2 was provided at the Conditional Use Hearing. From 2004 until early 2019, all documents in the record either referred to Building #3 as 35-feet tall or were silent as to height and mean grade.

79. The Applicant argues the “intended use is the same, the number of units and parking spaces is the same, the treatment of both historic structures is the same, and the building footprint and height of Building #3 is the same, although the method for calculating building height has changed.” While the definition of “Height of Building” has changed since 2003, it should not have materially affected mean grade calculations according to Engineer Bowker. The 2003 definition of Code §4 “Height of Building” contains the same phrase “mean level of the ground surrounding the building” as the current definition enacted in 2005. Other language has changed in this definition, but not pertinent language about the mean level of the ground surrounding the building. Engineer Bowker admitted in testimony that Building #3 was

“approved under old definition, but even under old definition it would be 45 feet tall and five stories.”

80. As a result of the foregoing, the Applicant’s request for reconfirmation of the 2018 conditional use approval is not recommended by the Conditional Use Hearing Officer and must be resolved by the Board of Commissioners.

IV. Order

Conditional Use approval is not recommended, but if it is in the future, sharrows and road signs for cyclists should be conditions of approval.