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November 27, 2017

VIA EMAIL

Township of Westtown Board of Supervisors  
c/o Patrick M. McKenna, Esquire  
Gawthrop Greenwood, PC  
17 East Gay Street, Suite 100  
Post Office Box No. 562  
West Chester, Pennsylvania 19381

Re: Application for Conditional Use Approval  
Toll PA XVIII, L.P. (Crebilly Farm)

Dear Board Members:

This Firm represents the Township of Westtown Planning Commission (the "Planning Commission") with regard to the above matter. We respond here to the Objections to Conditional Use Exhibits which Applicant Toll PA XVIII, L.P. submitted to the Board of Supervisors on November 20, 2017, and, in particular, Objection No. B.1. and Objection No. B.2. (collectively, the "Objections to Planning Commission Exhibits"). The Board of Supervisors should overrule the Objections to Planning Commission Exhibits for the reasons set forth below.

Before we address the Objections to the Planning Commission Exhibits, we note the well-known rule that "[f]ormal rules of evidence shall not apply [in a zoning hearing], but irrelevant, immaterial, or unduly repetitious evidence may be excluded." 53 P.S. § 10908.(6). We also note the rule that "[q]uestions concerning the admissibility of evidence . . . are within the [tribunal's] sound discretion . . .". *Valentine v. Acme Markets, Inc.*, 687 A.2d 1157, 1160 (Pa. Super. Ct. 1997) (citing *Engle v. West Penn Power Co.*, 598 A.2d 290 (Pa. Super. Ct. 1991)). Further, we note the corollary rule that "[g]enerally, a [tribunal] should admit all relevant evidence unless a specific rule bars its admission." *Id.*

**Objection to Planning Commission Exhibit No. B.1.**

Toll bases its objection to the admission of Exhibit PC-6, which is the Goose Creek TMDL and Pollutant Reduction Plan dated June 9, 2017 prepared by Cedarville Engineering Group, LLC, on grounds of hearsay, relevancy, an alleged inability to cross-examine the author of that Exhibit, and the Board of Supervisors' alleged inability to take notice of that Exhibit. That objection must fail.

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Hearsay is “a statement that . . . the declarant does not make while testifying at the current trial or hearing” when “offer[ed] in evidence to prove the truth of the matter asserted in the statement.” Pa.R.E. 801.(c). The witness who identified, and then testified about, Exhibit PC-6, however, is Steven Dadio. N.T., 6/20/17 at 954. Mr. Dadio testified at the Hearing, *inter alia*, in his capacity as an employee of Cedarville Engineering, Inc, which prepared on behalf of the Township the document which is now marked as Exhibit PC-6. Indeed, Mr. Dadio is, himself, an author of that document.<sup>1 2</sup> The document, by definition, is not hearsay.

Relevant evidence is that which “has any tendency to make a fact more or less probable than it would be without the evidence [and] the fact is of consequence in determining the action.” Pa.R.E. 401. The Board of Supervisors must admit Exhibit PC-6, therefore, if (A) the information set forth in that exhibit makes it more probable than not that the TMDL and PRP-reduction recommendations set forth in that document are necessary and (B) the implementation of those recommendations is of consequence when determining whether Toll met the criteria for Conditional Use Approval which are set forth in the Zoning Ordinance or the Board of Supervisors should impose upon such approval certain conditions with which Toll must comply.

Exhibit PC-6 is relevant to understanding the recommendations made by Cedarville Engineering in Exhibit B-25 with respect to the design of certain stormwater BMP’s. Moreover, in order to claim entitlement to Conditional Use Approval, Toll was required to demonstrate, *inter alia*, that the development which is the subject of the Conditional Use Application will “adequate[ly] handl[e] . . . stormwater . . .” Exhibit PC-6 is relevant with regard to that issue.

**Objection to Planning Commission Exhibit No. B.2.**

Toll bases its objection to the admission of Exhibit PC-18 on grounds of hearsay and relevancy. Exhibit PC-18 was an animated map of the Battle of Brandywine prepared by Sean Moir. That objection must fail.

The definition of hearsay belies Toll’s objection. As noted above, hearsay is “a statement that . . . the declarant does not make while testifying at the current trial or hearing” and which is “offer[ed] in evidence to prove the truth of the matter asserted in the statement.” Pa.R.E. 801.(c). Sean Moir, who prepared Exhibit PC-18, testified at the Session of Hearing at which the Planning Commission marked that Exhibit for identification. Indeed, it was Mr. Moir who testified about, and with regard to, that Exhibit.

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<sup>1</sup> To the extent that Exhibit PC-6 is hearsay, admission of that document is permitted pursuant to Pa.R.E. 803.(8). That Rule allows the admission of public records, regardless of whether the author of that record is available to testify. The Township retained Cedarville Engineering, Inc. to prepare the document which is now marked as Exhibit PC-6 in furtherance of the Township’s implementation of the Township’s MS4 Permit, and Toll has not offered any basis to question the trustworthiness of that document.

<sup>2</sup> Toll’s objection to the admission of Exhibit PC-6 on the basis of Toll’s alleged inability to confront the author thereof is confounding. At the Session of the Hearing which occurred on June 20, 2017, Toll’s extremely able counsel examined Mr. Dadio extensively. We query the basis upon which Toll now claims it was unable to conduct that examination.



Toll's objection to the admission of Exhibit PC-18 may be based on information contained therein which Mr. Moir obtained from other sources. That basis, however, does not save the objection. An expert witness may base his opinion upon facts or data which was itself obtained by other parties.<sup>3</sup> Pa.R.E. 703.

Likewise, Toll's relevancy-based objection to the admission of Exhibit PC-18 must fail. Relevant evidence is that which "has any tendency to make a fact more or less probable than it would be without the evidence [and] the fact is of consequence in determining the action." Pa.R.E. 401. The Board of Supervisors must admit Exhibit PC-18, therefore, if (A) the information set forth in that exhibit makes it more probable than not that activity associated with the Battle of Brandywine occurred on or around the Crebilly Farm property and (B) such activity is of consequence when determining whether Toll met the criteria for Conditional Use Approval which are set forth in the Zoning Ordinance or the Board of Supervisors should impose upon such approval certain conditions with which Toll must comply.

Those criteria, of course, include a demonstration that the development which is the subject of the Conditional Use Application "would be consistent with the Westtown Township Comprehensive Plan." Township of Westtown, Zoning Ordinance § 170-902.D. The Comprehensive Plan, in turn, contemplates that development will occur "in a manner that conserves the most important . . . historic features and character of Westtown Township . . ."

Exhibit PC-18 is well within the bounds of relevancy as to the question of (A) whether Toll met those criteria and (B) any conditions with regard thereto which the Board of Supervisors may impose if the Board of Supervisors grants the Conditional Use Approval which Toll now seeks.

**Conclusion.**

For each of the foregoing reasons, the Board of Supervisors should overrule the Objections to Planning Commission Exhibits.

Very truly yours,

  
Kristin S. Camp

KSC/

cc: Counsel of Record (via email)

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<sup>3</sup> Toll suggests that Mr. Moir is not an expert. See Objection to Planning Commission Exhibit No. B.2. That suggestion, however, ignores the fact that the Board of Supervisors accepted Mr. Moir as an expert witness and permitted him to testify as such. N.T., 8/29/17 at 1315. At the Hearing Toll vigorously objected to Mr. Moir's qualification as an expert witness, and the Board of Supervisors overruled that objection.