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October 12, 2007

Ms. Pamela Lee, Prothonotary
York County Judicial Center
45 North George Street
York, PA 17401

RE: CCSG, et al. v. Carroll Township Board of Supervisors
No.: 2007-SU-1590 T 08
Our File No. 5298/12592

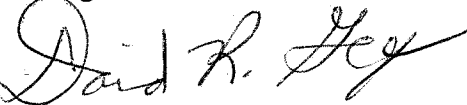
Dear Ms. Lee:

Enclosed for filing please find an original and four copies of the Brief in Opposition to Appellants' Supplemental Brief filed on behalf of JZCM, L.P. in the above matter. Please return two time-stamped copies in the enclosed self-addressed, postage prepaid envelope.

By copy of this letter, we are servicing copies of the Brief to the other parties of record, with a courtesy copy to Judge Linebaugh. Thank you for your attention to this matter

Sincerely,

Wix, Wenger & Weidner

By: 

David R. Getz

DRG/hjob
Enclosures

cc: The Honorable Stephen P. Linebaugh
Steven A. Stein, Esquire
J. Dwight Yoder, Esquire
JZCM, L.P.

CARROLL CITIZENS FOR SENSIBLE GROWTH, WAYNE PEALER, CATHERINE PEALER, and BRAD PEALER,	:	IN THE COURT OF COMMON PLEAS,
	:	YORK COUNTY, PENNSYLVANIA
	:	
Appellants	:	
	:	
v.	:	
	:	NO. 2007-SU-1590 Y 08
CARROLL TOWNSHIP BOARD OF SUPERVISORS,	:	
	:	
Appellee	:	
	:	
JZCM, L.P.,	:	
	:	
Intervener	:	CIVIL ACTION – LAND USE APPEAL

BRIEF SUBMITTED BY INTERVENER JZCM, L.P. IN OPPOSITION TO APPELLANTS' SUPPLEMENTAL BRIEF

Intervener JZCM, L.P. hereby submits this Brief in Opposition to the Appellants' Supplemental Brief. Intervener will not reargue every issue that was raised in the Brief or in the oral argument, but will only address those issues raised by Appellants.

1.) Under the Township's various ordinances, the stormwater management facilities proposed by JZCM for South Mountain Commons do not constitute a "structure."

At Argument Court, this Court asked whether there was case law addressing the interpretation of “structure” under the Carroll Township (“Township”) Zoning Ordinance or the Municipalities Planning Code (“MPC”) as it relates to stormwater management facilities. Counsel for Appellants has been unable to locate any authority. Counsel for Interveners is similarly not aware of any authority. This can lead to only one conclusion: stormwater management measures are not “structures.”

The definition of “structure” in § 107 of the MPC is identical to that of the Township Zoning Ordinance. Specifically, the definition is as follows: “any man-made object having an ascertainable stationary location on or in land or water, whether or not affixed to the land.” Many zoning ordinances, including that of Carroll Township, use this same language. If townships read this definition as narrowly as Appellants urge this Court, nearly every subdivision and land development application in the Commonwealth of Pennsylvania would require a variance, because stormwater management measures are typically very close to streets. Inevitably, many of these would be within setbacks. This would require literally thousands of projects to go before the various municipal zoning hearing boards. Some of those boards would ultimately deny a variance, and there would be appeals. At least some of those appeals would end up with published decisions either by a court of common pleas, the Commonwealth Court or the Pennsylvania Supreme Court. The fact that there are no cases leads to the inescapable conclusion that the position urged by Appellants is extreme and illogical.

Further, if no structure of any kind is allowed in a setback as argued by Appellants, and if Appellants are correct in that anything that is man-made is a structure

(including even a stormwater detention basin as advocated at oral argument and in Appellants' Supplemental Brief), then nothing could exist in a setback area other than natural plantings. There could be no driveways or access ways and no sidewalks from the curb to the building on the lot. Every lot would thus be landlocked from the street. Homeowners could not get to their homes. Business owners could not get to their businesses, and neither could their customers. Stormwater could never leave a property as a stormwater pipes could not be located in the setback. This is not what the Township zoning ordinance or the MPC contemplates.

Appellants have made reference to the Rules of Statutory Construction. JZCM would point this court to two other Rules: the law "does not intend a result that is absurd, impossible of execution or unreasonable"; and the intent that "the entire statute [is] to be effective and certain." 1 Pa. C.S.A. § 1022 (1) and (2). Reading a few words out of context from the Township's entire code of ordinances eliminates the meaning of the rest of the ordinances, and surely produces an absurd result.

Intervener's original Brief on pages 7-10 argues that the proposed Plan does not violate the Zoning Ordinance, and Intervener would direct the Court's attention to those pages. Suffice it to say for these purposes that it is clear that the Zoning Ordinance, when taken as a whole, intends to limit the location of structures with roofs and not stormwater management measures and access drives. Further, the Township Subdivision and Land Development Ordinance ("SALDO") and the Township Stormwater Management Ordinance ("SWMO") support this conclusion. Section 715 of the SALDO provides for the location of buffer yards within setbacks and storm piping

within those areas. Section 401.I of the SWMO requires that stormwater runoff in the post-development condition must leave the site in a similar manner to which it did prior to development, and this can only happen if stormwater pipes can go to a property line. The SWMO **requires** the use of outlet structures within stormwater management facilities that may be located within buffer areas, and therefore within building setback lines. Given that the buffer yard **must** be located within the “building setback area”, all “stormwater management facilities” are permitted within the building setback area by ordinance. Finally, Intervener would again direct this Court to § 603.1 of the MPC, which requires that the language of a zoning ordinance shall be interpreted, where doubt exists, in favor of the land owner. The Zoning Ordinance cannot be reasonably read to forbid access to a property or to prohibit stormwater facilities when other ordinances require their use. When these three Township ordinances are read together, there is no question that stormwater management measures, including storm piping, are permitted within setback areas. Accordingly, Appellants’ argument regarding violations of the zoning ordinance is without merit.

2.) Access drive #5 does not violate the setback or buffer requirements of the zoning ordinance.

Appellants again misconstrue the Township’s SALDO when they contend that the proposed access to Lots 6 and 7 from Access Drives #4 and 5 are prohibited. Appellants argue that access to a subdivision from an Access Drive is not permitted, and that access must be directly from a public street. However, the subdivision, namely South Mountain Commons, does not have access solely from a private drive. Access to

the subdivision itself is from U. S. Route 74 via U.S. Route 15. A cursory review of the Plan makes it clear that ALL of the commercial lots within South Mountain Commons are accessed by private drives. This meets the requirements of the SALDO, which states in § 202 under "Access Drive" that "access drives are *required* for all commercial . . . uses." (emphasis added). Thus, access to Lots 6 and 7 meets the requirements of the SALDO.

Further, access to Lots 6 and 7 has been provided in the safest and most logical manner. If access was directly from Route 74, it would be very close to the traffic signal at Route 15, which is an undesirable location from a traffic safety perspective.

Appellants also contend that Access Drive #5 is improperly within the rear yard buffer. They point to Access Drive #4 as an example of a correct placement. But Access Drive #4 is in part within the front buffer yard of Lot 8. Simply stated, there is no conceivable way to access a lot without breaching the buffer and setback areas. Otherwise, all sites would be islands surrounded by buffers, and no one could access any property. This would be an absurd result. Access Drive #5 breaches the buffer in a parallel method instead of a perpendicular crossing, but the Township ordinances do not prohibit this. In any event, Interveners have provided a landscape buffer on both sides of Access Drive #5. Further, the access drives as proposed are safest from a traffic access point of view, and have the least environmental impact to the site, as there is a small stream and a stormwater drainage easement between the Lots 5 and 6 and relocated Route 74. The Plan meets the requirements of the buffer and was properly approved by the Township Board of Supervisors.

3.) The Traffic Study meets the requirements of the Township Ordinances.

The Traffic Study was approved by the Pennsylvania Department of Transportation (PennDOT) by letter of July 22, 2004. Because this plan involves the relocation of Route 74 and impacts Route 15, both of which are both state roads, PennDOT's approval is paramount. JZCM submitted supplemental materials that the Township found to be satisfactory.

Section 714 of the SALDO does set forth requirements for a traffic impact study (TIS). However, Appellants read requirements into § 714 that are not there. First, the SALDO does not require the use of automatic traffic recorder (ATR) counts, nor does it specify the method for documenting average daily traffic. In fact, in a letter dated March 9, 2007, the Township's traffic consultant, Grove Miller Engineering, Inc., states that the Ordinance requires average daily traffic (ADT) volume data. Grove Miller also stated that "a review of the intersection turning movement counts indicates that the peak hours were indeed included in the count period", and therefore supported a "waiver of the ADT data collection requirement." In spite of the recommendation of a waiver, the Intervener supplied ADT data. By letter dated March 27, 2007 addressed to the Township Engineer, Intervener's traffic consultant, Trans Associates, presented ADT data for the street segments within the study area. This data was obtained from PennDOT's Traffic Volume Information System and estimated based on the peak period traffic counts and data from *2005 Pennsylvania Traffic Data*.

Appellants also contend that ATR counts must be used to determine the existing a.m. and p.m. peak highway hours, and that the TIS does not provide manual counts for

the existing a.m. and p.m. peak highway hours. The data presented in *Trip Generation, 7th Edition* by the Institute of Transportation Engineers defines the peak hour of the adjacent street traffic. By definition, this is a single hour between 7 a.m. and 9 a.m. during weekday mornings and between 4 p.m. and 6 p.m. during weekday evenings. Accordingly, the TIS for South Mountain Commons provides manual turn movement counts for morning (6 a.m. to 9 a.m.) and evening (3 p.m. to 6 p.m.) conditions. Again, Interveners stress that the SALDO does not require ATR counts; merely the identification of ADT volumes.

Appellants also contend that the TIS is incomplete because it did not collect ATR counts during the peak hour of the generator/lots in the subdivision. However, JZCM's traffic expert *did* analyze the peak hour of the generator, which occurs on a Saturday. The TIS prepared for South Mountain Commons provides traffic data and an evaluation of travel impacts from the proposed development for Saturday conditions. The Saturday conditions are representative of the peak hour of the generator. Therefore, the inclusion of the Saturday analysis in the TIS satisfies the Township Zoning Ordinance requirements for data collection and evaluation during peak development generated hours.

Appellants ignore one other important point. When the Board of Supervisors granted approval of the Preliminary Subdivision Plan, it did so subject to a number of comments and conditions. Some of those conditions related to traffic. JZCM will need to address those conditions as part of the final subdivision plan process. The Preliminary Plan is what the name suggests – preliminary. It is not the finished product.

But for purposes of the conditional Preliminary Plan approval and this appeal, it is satisfactory. This Court should therefore affirm the grant of the conditional approval.

Finally, Appellants contend in footnote 3 of their Supplemental Brief that Interveners waived any objections to the draft report by their purported expert. This is not correct. The cover letter signed by Appellants' counsel that accompanied that draft report stated that "he [Mr. Plank] may have additional comments once he completes his review." Thus, even Appellants contemplated that their own consultant had not finished his review and would have more comments. Interveners properly assumed that Appellants were going to submit a final report signed by a professional engineer once that review was completed. For some inexplicable reason, Appellants did not have Mr. Plank attend the special meeting of April 2, 2007 even though the Appellants knew that the Board of Supervisors could make a decision at that meeting. Nor did Appellants submit a signed final report. Interveners did not waive any objections because it was not until after the Supervisors gave conditional approval of the Preliminary Plan that it became clear that Appellants were going to rely on a draft unsigned report written by someone who is apparently not a professional engineer.

4.) **Conclusion**

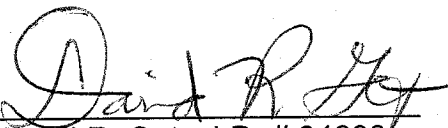
Appellants have raised nothing new in their Supplemental Brief. In fact, the dearth of caselaw on the "structure" issue confirms that the Township did not commit an error of law or abuse its discretion in granting conditional approval to the Preliminary Subdivision Plan. There is no need to further brief or argue this matter. There is no need to remand this matter to the Township. The appeal is ripe for decision.

Intervener, JZCM, L.P., respectfully requests that this Honorable Court affirm the well reasoned and carefully considered decision of the Township Board of Supervisors conditionally approving the Preliminary Subdivision Plan and dismiss the appeal.

Respectfully Submitted,

WIX, WENGER & WEIDNER

Date: October 12, 2007

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CARROLL CITIZENS FOR SENSIBLE GROWTH, WAYNE PEALER, CATHERINE PEALER, and BRAD PEALER,	:	IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA
Appellants	:	
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CARROLL TOWNSHIP BOARD OF SUPERVISORS,	:	NO. 2007-SU-1590 Y 08
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CERTIFICATE OF SERVICE

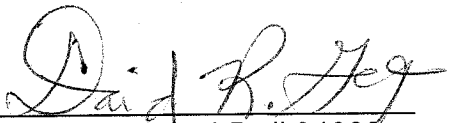
I hereby certify that the foregoing Brief of JZCM, L.P. in Opposition to Appellants' Supplemental Brief has been sent this day by mail, first class, postage pre-paid, to the following:

Steven A. Stein, Esquire
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Hummelstown, PA 17036

J. Dwight Yoder, Esquire
Gibbel Kraybill & Hess LLP
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WIX, WENGER & WEIDNER

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