

**Planning Commission**  
**Wednesday, March 24, 2021 Meeting Minutes**

The March 24, 2021 virtual public meeting of the Upper Makefield Township Planning Commission was called to order by Chair Kathleen Pisauro at 7:00 p.m. In attendance were the following members of the Planning Commission: Chair Kathleen Pisauro, Vice Chair Phil Feig, Member Bud Baldwin, Member Harry Barfoot, Member Ken Rubin, Member Jack Wiseman. Also in attendance were John Baionno with Eastern States Engineering, Gregg Adelman, esq. with Kaplin Stewart, Marc Kaplin, esq. with Kaplin Stewart, Greg LaGreca with Toll Brothers, John Dean with Toll Brothers, Board of Supervisors Liaison Karin Traina, Township Solicitor Mary Eberle, Township Engineer Larry Young, Zoning Director Dave Kuhns, Zoning Administrative Assistant Denise Burmester.

**Public Comment:** No public comment presented.

**Confirmation of a Quorum:** Chair Kathleen Pisauro confirmed a quorum.

**Approval of Minutes:**

**A. February 24, 2021:**

Mr. Baldwin made a motion to approve the minutes of February 24, 2021. Mr. Feig seconded the motion. The motion carried by a unanimous vote with Mr. Rubin abstaining.

**Discussion Items:**

**I. Land Development**

**A. Melsky Final Subdivision Plan, Expiration Date: April 31, 2021:**

Mr. Young, the Township Engineer, opened the discussion with a brief history. In 2006 a Federal Cemetery Ordinance (FCO) was adopted which states the permitted uses and dimensional criteria. The Applicant submitted several sketch plans in 2006. The Applicant is proposing 46 building lots, 2 detention basin lots and 2 open space lots on the 66 acres in Upper Makefield Township. The water service is coming from a community well that uses water from the underlying aquifers and is delivered to the Melsky lots via a water distribution system from the community of Enclave. The Melsky track received Land Development approval in 2007 with 63 outstanding comments and conditions for approval documented in the September 2007 Engineering review letter. A letter from John Rice dated October 29, 2007 offered the approval of revised plans dated August 21, 2007, with 38 conditions attached to the approval. Condition number 15, from the John Rice letter, states that the Applicant must comply with the ground water recharge requirements of section 304.a.2 of the Delaware River South Stormwater Management Ordinance, by amending the plan to include raised inlets, check dams and flat bottom basins in accordance with the sketch plan and recharge calculations prepared by the Applicant dated July 31, 2007, prior to the plan approval of the Board of Supervisors. The Applicant did not request any stormwater waivers at that time.

The Applicant and several residents have a case in the Bucks County Court system with several legal arguments. This case has been before several judges and has been remanded back to the Township for additional testimony.

August 2007 the Applicant received preliminary approval from the Township. In 2010 the Applicant began performing infiltration testing at various locations where brown water

recharge Best Management Practices (BMPs) were proposed and in the detention area basins. Prior to 2010 no infiltration testing had been performed, only dip pole testing and soil logs were performed. The Applicant was crediting for recharge volume in the various submitted Stormwater Reports but no infiltration testing was performed in the area. The 2010 infiltration testing results were not made available until the 2015 submission. Prior to 2015, the Applicant was working to satisfy the conditions of approval and the comments in the various Township Engineering and Township Hydrogeologist Water and Sewer review letters. In the 2016 Engineering Eighth (8<sup>th</sup>) review response, the Applicant removed all brown water recharge BMPs from the plan set, distancing the Stormwater plans from the requirements of condition number 15, to meet the ground water recharge requirements of the Delaware River South Stormwater Management Ordinance. After thirteen plan reviews and revisions, the Applicant has not met the conditions of preliminary approval. The current plan has the following items that the Applicant and Township are not in agreement:

1. A remand question by Judge Scott asked if the proposed stormwater management facility shown on the latest Melsky plan met the Delaware River South Stormwater Management requirement. The Township responded that it did not meet the requirement.

There is a common response from the Applicant regarding ‘volume control’. ‘Volume Control’ is not a term utilized in the Delaware River South Stormwater Management Ordinance. ‘Volume Control’ is defined in the Neshaminy Creek Watershed Ordinance and the NPDES requirements, which Newtown Township uses as they are part of the Neshaminy Creek watershed. Each community has a unique NPDES permit; Upper Makefield Township is the MS4 Municipal Separate Storm/Sewer System, not the Neshaminy Creek Watershed.

The Applicant is proposing construction referred to in the BMP manual. The purpose of the BMP manuals is to provide guidance, options and tools so regulation under the clean water act can be complied with.

The Township’s Stormwater Management Ordinance defines a different term known as ‘Brown Water Recharge’. Brown Water Recharge BMPs can be used as Volume Control under the Neshaminy Creek Watershed Ordinance in Newtown Township and meet the requirements for the NPDES permit. However, Volume Control may not meet the ground water recharge requirement in Upper Makefield Township’s Delaware River South Stormwater Management Ordinance. This is where the Applicant’s responses do not satisfy the ground water recharge requirement. The requirement is that a certain volume of stormwater caused by surface runoff shall be infiltrated into the ground to replenish the aquifer that the Upper Makefield Residents rely on for privet on lot wells. The Upper Makefield portion of the site has 46 lots and rely on water usage coming from the community well located on the adjacent track of land, aka the ‘Gray Tract’ or the ‘Enclave’ as currently known, which does not replenish the aquifer.

Proposed trees, water quality, evaporation, and uncompacted soils, etc., all go towards meeting the Neshaminy Watershed Ordinance and the NPDES requirements. Many of the techniques just named are proposed by the Applicant but do not recharge the aquifer with volume for stormwater runoff. Evaporation, water quality BMPs and planting trees are positive techniques for the environment, but they do not recharge ground water runoff.

The Applicant has stated they have performed adequate testing and find no areas in the 66 acres that can recharge or infiltrate. The Township has repeatedly requested additional infiltration testing. No additional testing has been completed since 2010 and that testing was only in areas that the Applicant stated they could meet the infiltration requirements as stated on the 2007 plan presented prior to the Board of Supervisors granting approval. Toll Brothers did have some success in 2010 for infiltration testing, finding a few areas that did have adequate infiltration rates. To date we have not seen a slow log performed in the wet season where the actual water table is close to the depth of the infiltration tested. The Applicant has requested a waiver for meeting the recharge requirements in return for the volume control BMPs. The Township Engineer does not recommend granting this waiver from the recharge requirements because the township residents rely on the recharge for their water supply.

2. The Delaware River South Stormwater Management Ordinance gives the Township Engineer latitude to determine when the Applicant can or cannot meet the requirements of the Delaware River South Stormwater Management Ordinance. The Applicant, Toll Brothers, removed all the originally proposed BMPs before discussing other options with the Township.

The Applicant, Toll Brothers, has not adequately responded to what the increase of stormwater volume leaving the site will do to downstream flooding. Mr. Young stated that streams will be exposed to longer durations of runoff.

The Township had a study performed by a consultant that stated that there are major flooding and erosion problems in the Hough's Creek Watershed. The Applicant's response was to lessen the peak flow rate and erosive velocity. The Township is still looking for a response to address runoff volume which will increase with the development planned. The consequence of not recharging the ground soil is the loss of recharge, reduced base flow in streams, increased flooding. The Applicant has not provided any information as of yet regarding this issue.

3. Lot 99 was recently created with lot frontage on the road. This lot does not have the required lot width based on the FCO Ordinance and the road frontage based on the SALDO. The Ordinance does not make a distinction between a building lot vs a non-building lot. The lot is termed an 'HOA/Common Area', which is not a permitted Use in the FCO Ordinance. 'Open Space' is a permitted Use in the FCO Ordinance, but this lot cannot be called 'Open Space' due to a retaining wall structure.

Mr. Young noted that there are other issues, but not as major as the three listed above, but are in the review letters.

Mr. Young recommended that the final plan for the Melsky Tract be denied based on the issues presented above and the reasons stated in the March 21, 2021 Township Engineer review letter.

Ms. Pisauro invited Mr. Adelman, to speak on behalf of the Applicant, Dolington Land and Toll Brothers.

Mr. Adelman noted that the Applicant disagrees with a number of issues presented by Mr. Young. Mr. Adelman presented the Overall Site and Construction Phasing Plan for the Melsky Tract, Rev. 14 dated 5/7/20. Mr. Adelman made the following points in his presentation:

- The Melsky Tract spans across two municipalities with the center line of the plans representing the line between Upper Makefield Township and Newtown Township. The portion of the Melsky Tract that is in Newtown is fully built out.
- There is a single State Stormwater Permit (NPDES) issued for both Upper Makefield Township and Newtown Township portions of the Melsky Tract. The NPDES for Phase I was attained a number of years ago, and the second was attained for Phase II. Both NPDES permits follow the stormwater premise of reducing stormwater volume, infiltration is not a requirement.
- Acceptable infiltration parameters were not attained with the testing on the site. Testing was completed through the basins, through home locations and across swaths on the Upper Makefield Township side of the Melsky Tract. Testing done on the Newtown side of the Tract were performed on very few places, with Newtown Township accepting the limited testing as sufficient. Mr. Adelman stated that the Upper Makefield Township site has been adequately tested for infiltration.
- Upper Makefield's Stormwater Ordinance as well as the regulations followed by DEP and Bucks County Conservation District require a separation before the stormwater can infiltrate into the underlying ground water. The testing did not showed satisfaction of the separation parameter.
- Newtown approved the development without infiltration, and the development is complete and operating. Best Management Practices (BMPs) were implemented to reduce stormwater volume, an alternative to recharge.
- There was disagreement with the Township Engineer's comment that there were places that were tested and had acceptable infiltration. The infiltration locations within the test pits were not in compliance with the Upper Makefield Township Ordinance to include the separation.
- In 2007 the plan was designed and attained Preliminary/Final Approval, with the expectation that there would be infiltration. The Remand was for review of the Final Approval but Preliminary Approval was sustained. At this time, discussions and cooperation were occurring between the Township and the Applicant to work towards infiltration. Mr. Adelman and the Applicant felt cooperation dissolved with the Township request to show compliance with the Stormwater Ordinance, which the Applicant felt could not be complied with based on the testing results.
- The Applicant removed the infiltration facilities from the 2007 plan due to the inability to comply with the Stormwater Ordinance, proposing an alternative of reducing Stormwater volume through another means. The plan of reducing the Stormwater volume has been approved by the State and County and is represented on the current plan. The third plan has been fully engineered and has been approved by every governmental agency except Upper Makefield Township.
- The Applicant's goal of Stormwater Management for the site is to reduce stormwater runoff and reduce erosion from occurring downstream, and feel the measures in the current plan meet this goal and comply with the Township Stormwater Ordinance. The Applicant contents the Township Engineer's goal to replenish the aquafer is not the purpose of the Township Stormwater Management Ordinance.
- References were made to other projects within the Township that required litigation, and with which Stormwater Management was an issue. In those cases, an agreement was made to determine infiltration after construction was completed. The 2003 Reeves settlement agreement was presented to show the different parameters that

were identified with a plan to satisfy the infiltration for the possible parameters. Sometimes post construction conditions allow for infiltration that was not found in testing prior to construction.

- The Applicant stated that Upper Makefield has an old Stormwater Management Ordinance, that was enacted in 2005, pursuant to a Bucks County Stormwater/Watershed Management Plan that was enacted in 2004 and references a 1998 Stormwater handbook that is difficult to locate. The Upper Makefield Township Ordinance predates the Best Management Practices manual enacted in 2006 that is currently used by Bucks County and the State for reviews. The Best Management Practices manual recognizes that there are instances where sites cannot infiltrate. The current Ordinance does not allow for infiltration parameters during construction to maximize infiltration when possible. The current Ordinance does not allow for other Stormwater Management alternatives because the Ordinance predates the alternatives documented in the Best Management Practices manual.
- With the current Township Stormwater Management Ordinance, the Applicant feels infiltration requirements cannot be achieved and infiltration is not an option. The Applicant has asked for a Waiver of the Stormwater Management requirement to recharge and has offered an alternative that is equal to or better than the Ordinance requirements.
- The Applicant is proposing to introduce the alternative stormwater management approaches, and re-evaluate the infiltration post construction to determine if infiltration is an available approach. At this point the Applicant cannot guarantee and is not optimistic that there will be the ability to infiltrate. The Applicant has determined that infiltration will be a low probability due to the site's high seasonal water tables and the soils are not conducive to infiltration. This is common throughout this State.
- The Applicant feels that they have met the requirements with alternatives that meet or are better than the goal of reducing Stormwater Volume Run-off, which they feel is the goal and language in the Township Stormwater Management Ordinance. They feel the Township is refusing to accept this. This is the crux of the current litigation case.
- The Applicant feels litigation issues for Site Layout and Site Design have been resolved. With a review of the Township Engineer's letter dated March 23, 2021 for the green comments, Mr. Adelman pointed out that the comments were all related to stormwater management.
- A State Common Law Easement for downstream discharge states that if you are above ground and discharging downstream, you are entitled to do so provided you are decreasing volume. The Applicant stated that they have decreased stormwater volume and the peak rate. With this Right, there is no requirement to evaluate the downstream adverse impact. The Township Engineer is asking for this additional analysis, which the Applicant has not provided due to the Common Law Easement, and as such the Applicant feels it is inappropriate of the Township Engineer to ask for this analysis.
- Lot 99 is a point of disagreement due to frontage and lot width. The Applicant noted that the Single lot frontage on lot 99 does not require minimum frontage because lot 99 is not a lot for a Single-Family Dwelling and as such is not required to comply

with JMZO Ordinance 401.1.D.1. for frontage. Similarly, the requirement of 100 foot lot width is only a requirement for a building lot, which lot 99 is not.

- The Applicant disagrees with the Township Engineer's requirement to infiltrate, when the site cannot infiltrate. The Applicant stated that there needs to be another way to manage the stormwater, and the 2006 BPM is the guidance for alternative methods. The Applicant feels they are complying with the 2006 BPM and as such, the plan should be approved.

Ms. Pisauro called for questions from the Planning Commission; there were no questions.

Ms. Pisauro called for questions from the Public; there were no questions.

Ms. Eberle spoke to the claim that the Stormwater Management Ordinance was out of date. Ms. Eberle explained that there is a procedure in Pennsylvania law to adopt Stormwater Management Ordinances. This adoption requires that the County do a study and that the Township adopt an Ordinance compliant with the County study. Bucks County has not done a study of the Delaware River South Stormwater Management Ordinance in recent years, or at least since the Applicant's current plan has been filed. Because there has not been a Bucks County study the Township Ordinance has not been changed since 2005/2006. When the Applicant came in with their application, the Stormwater Management Ordinance was only two (2) years old. The Applicant received preliminary plan approval.

Mr. Adelman responded to Ms. Eberle noting that the BMP manual was adopted in 2006 and in place with prior to the presentation of the plan in July of 2007. Mr. Adelman stated that there is nothing in Pennsylvania law that prevents the modification or update of a Stormwater Management Ordinance provided the updates continue to be consistent with the county.

Ms. Eberle disagreed with Mr. Adelman's statement, and further noted that there is currently litigation in the Court of Common Pleas regarding the update to the Township's Ordinance.

Planning Commission members asked for clarification if Mr. Adelman was referring to the Township Stormwater Management Ordinance or the Delaware River South Stormwater Management Ordinance being out of date. Mr. Adelman clarified that both the ordinances were out of date and not recognized. Mr. Adelman stated that when laws are out of date, if there is a solution that is equal too or better than the ordinance, the solution can be put forth. Mr. Adelman stated that Bucks County and the State have agreed with the solution they put forth by approving the permits. Mr. Adelman stated that they have done the testing and cannot infiltrate and agree they cannot comply with the Township Ordinance's requirement to infiltrate.

Mr. Young noted that the Township of Upper of Makefield relies on well water and the aquifers being recharged. The County and State permits are based on volume reduction, not groundwater recharge. The Township does agree that the Applicant has reduced the volume as was stated in the County and State permits. Neither the County NPDES or State Neshaminy Ordinance address groundwater recharge for wells. The Township Ordinance addresses the recharge and states that 'The groundwater recharge is the replenishment of the natural underground water supply and the recharge area. The recharge area, undisturbed surface area or impressions where water collects and a portion of which infiltrates and replenishes the underground and ground water.' The Township ordinance defines the terms for recharge because Upper Makefield Township's reliance on well water. The Applicant's site on the Gray Tract relies on a well, which is right

next to the Melsky Tract. Newtown is in a different watershed, the Neshaminy Watershed, with the corresponding ordinance having been updated two or three times with updates similar in nature to the NPDES requirements. Newtown Township does not rely on well water for its community, with a large part of their Township serviced with public water through Newtown Artesian, but there are water sources in Newtown township that do draw from Aquifers.

Mr. Adelman contents that the Stormwater Ordinance is not for protecting well water supply in the Aquafer, but to avoid the contamination of water going into the Aquifers and runoff. Mr. Adelman referenced the purpose sections of the Township and Delaware River South Ordinances it does not mention the protection of water supply or Aquafer supply. Mr. Adelman's position is that the Township is reading in the water supply purpose.

Ms. Eberle stated that the Township strongly disagrees with Mr. Adelman's position on the goal of the Ordinance in regard to infiltration, stating there is indeed a disagreement on the need to infiltrate and the Applicant's obligation to infiltrate.

Mr. Baldwin stated that the residents in Upper Makefield are concerned about contamination of the wells and that there is a supply to the sink when the water is turned on. As such Mr. Baldwin made a motion to deny the Melsky plan as presented, citing Mr. Larry Young's letter of March 23, 2021 as the grounds for denying the plan. Mr. Barfoot seconded the motion.

Mr. Adelman made comment, stating the Planning Commission consider if the site is not infiltrating now, how is it providing any recharge to the Aquafer, and how would it be any different if the site was developed?

Ms. Eberle responded that there were a number of BMPs that were infiltrating and had been removed from the plan. M-9 was in the basin area and was getting adequate levels of infiltration.

Mr. Adelman state the Applicant never had a test with adequate infiltration.

Mr. Young stated that there were sites with adequate infiltration, but did not have adequate separation rates. Mr. Adelman agreed with Mr. Young.

Planning Commission members noted that the development would require all of the new homes to draw water from the Aquafer but not replenish. Mr. Adelman stated that the water for the new homes would not come from the same site and as such the idea is to control the stormwater runoff to prevent erosion downstream.

The motion carried by a unanimous vote by show of hands.

#### **B. Taylor Planning Module, 15 Greenbriar Circle**

Mr. Kuhns presented the Taylor Planning Module for the residents at 15 Greenbriar Circle, in the Weatherfield development off of Woodland Road. The existing home has been there for many years. The residents would like to add a detached garage with an apartment and a pool house with a convenience toilet. For these additions a planning module is required and the process requires a Planning Commission review and recommendation to be followed by the Board of Supervisors review and decision.

The Planning Commission discussed the following:

- The volume needed for the additional bedroom is only 100 gallons less than the total volume for the Main Resident dwelling. This additional volume seemed high. Mr.

Kuhns did agree that the volume did seem out of sync and noted that he would bring that up with the Applicant. CKS did review with written statement approving the planning module.

- It was clarified that this addition would not require a Land Development plan and would not come before the Planning Commission for review.
- Discussion regarding compliance with the Ordinances for the occupation of the accessory apartments could only be occupied by members of the family or housing staff. Ms. Eberle stated that there are Resident Declaration of Covenants regularly recorded for accessory apartments.
- Discussion regarding placement of accessory buildings and that they must be placed behind the setback line on the property. The point was made that with the setback requirements, accessory structures can be placed closer to a neighbor's residence than to the main house on the property with the accessory structure. While these accessory buildings are complying with the Ordinance, the suggestion was that the Planning Commission should review this a bit more, considering if an accessory structure should be closer to a neighbor's main residence than the property's main residence. Ms. Eberle noted that the Planning Commission can work on an amendment to the CM zoning district Ordinance for the placement of accessory buildings. Further, members of the Planning Commission raised a consideration for the placement of a Pool House in proximity to the pool.

A motion was made by Mr. Barfoot to approve the Planning Module on the Taylor property at 15 Greenbriar Circle in Weatherfield as stated. Mr. Wiseman seconded the motion. The motion carried by a unanimous vote by show of hands.

### **Liaison Report:**

Ms. Traina noted the following updates from the Board of Supervisors:

- The Short Term Rental Ordinance was authorized for advertising for adoption at the April 20<sup>th</sup> Board of Supervisors meeting. The intent is to curtail party house rentals in the residential neighborhoods. It is not intended to limit family use or long-term rentals.
- Thirteen road paving projects have been approved for the next year.
- There have been a lot of Zoning Hearing Board applications for pools and pool houses. The Board of Supervisors have been opposed and at best neutral to these requests impacting impervious surface coverage. The Board requests that the Applicant stay within the impervious surface ratios for the project or remediate the coverage from other places on the property.
- The Board of Supervisors have reviewed the Zaveta plan for Brownsburg Road, as the Planning Commission has also reviewed. The Board of Supervisor's general feedback was positive for the plan to reconfigure the lots, stormwater modifications to allow saving many trees on the site.
- Discussion has taken place regarding Solar panels on rear of the house as opposed to the front of the house, since many properties have views to streets and neighbor properties from the rear of the house. If the Solar Ordinance is opened for review that there should be a focus on how to promote green and sustainable energy as the County is bringing more focus to issues such as reducing the carbon footprint and focus on alternate energy sources.

### **Adjournment:**

A motion was made by Mr. Baldwin to adjourn the meeting and was seconded by Mr. Feig. Motion carried by a unanimous vote. The meeting adjourned at 8:45 p.m.

**Approved:** April 28, 2021