

**BEFORE THE DERRY TOWNSHIP BOARD OF SUPERVISORS  
DAUPHIN COUNTY, PENNSYLVANIA**

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**IN RE:           CONDITIONAL USE APPLICATION           :**  
**OF LINLO GOVERNOR CROSSING, LLC        :**

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**ADJUDICATION**

Linlo Governor Crossing, LLC (“*Linlo*”), along with Sheetz, Inc. as co-applicant, filed a conditional use application (“*Application*”) with the Derry Township Board of Supervisors (“*Board*”) seeking the approval of a Master Plan Development including a convenience store with fuel service, a mixed-use building with food service/retail and multifamily apartments, a medical office building, and a group child care facility (“*Project*”). The subject property consists of 22 separate parcels that are all owned by Linlo, along with portions of two other properties that Linlo has under an agreement of sale (“*Property*”). The parcels that make up the Property are currently improved or were improved for a variety of uses, including retail businesses and single-family residences. Linlo is seeking conditional use approval under Section 225-501.58 of Chapter 225 of the Township Code (“*Zoning Ordinance*”) to establish this Master Plan Development upon the Property. In addition, Linlo is seeking conditional use approval under Sections 225-501.58.A.7.a.IV and 225-315, Table 28 for the proposed multifamily apartment dwellings; conditional use approval under Sections 225-501.58.A.7.a.IV and 225-315, Table 28 for the proposed fuel service-major use; and conditional use approval under Sections 225-501.52 and 225-315, Table 28 for the proposed group child care facility. The Property is located in the Hershey Mixed-Use (HMU) Zoning District and is also located within the Southern Core Overlay and Central-Master Plan Approval Overlay Districts. (Exhibits A-31, B-1).

Pursuant to the Pennsylvania Municipalities Planning Code, Act 247, as amended, (“*MPC*”), the Board held hearings on September 21, 2022; October 24, 2022; November 21, 2022; November 29, 2022; December 12, 2022; January 31, 2023; February 22, 2023; March 21, 2023; March 29, 2023; April 26, 2023; May 31, 2023; June 21, 2023; July 18, 2023; July 31, 2023; and August 24, 2023 (“*Hearing*”). Oral argument was accepted from all the parties who wished to present such to the Board on September 26, 2023. In accordance with the schedule agreed to by all parties, those parties who wished to submit written findings of fact and conclusions of law needed to do so by October 1, 2023, and the Board would issue this written Adjudication the day after voting on it at its regularly advertised public meeting on November 14, 2023. Notice of the Hearing was sent to Linlo and posted and advertised pursuant to law. Board Chair, E. Chris Abruzzo, Board Vice-Chair, Natalie Nutt, and Board Members Michael P. Corado, Carter

Wyckoff, and Richard Zmuda were in attendance at most of the various nights of testimony that made up the Hearing. When a Board Member was unable to attend a night of testimony, they were provided the opportunity to review the notes of testimony from that night prior to deliberating on this matter and voting on this Adjudication.<sup>1</sup> All five members of the Board took part in the deliberations. In addition, Peter Nelson, Esquire, the Board's Solicitor, was in attendance as was the Board's Stenographer. Linlo was represented by James M. Strong, Esquire. Scheetz was not represented by counsel at the Hearing. Numerous individuals and entities asked for and were granted party status in this matter.

Based on the testimony and evidence presented at the Hearing, the Board, after discussion and due deliberation, makes the following Findings of Fact and Conclusions of Law in accordance with the Discussion set forth below.

## **FINDINGS OF FACT**

### **PARTIES, WITNESSES, AND PROCEDURAL ISSUES**

1. The Applicant is Linlo Governor Crossing, LLC with a corporate address of 150 Corporate Center Drive, Suite 100, Camp Hill, PA 17011. (Exhibit B-1)
2. Sheetz, Inc. is a co-applicant concerning the conditional use application for the fuel service-major use. Sheetz has a business address of 5700 Sixth Avenue, Altoona, PA 16602. Sheetz was not represented independently at the Hearing. (Exhibit B-1)
3. As allowed under the MPC, Derry Township became a party to this matter and was represented by Scott MacNair, Esquire. (Notes of Testimony ("N.T."), 10/24/22, pg. 46-47)
4. The Board granted party status to the following persons and entities:
  - Mary Beth Backenstose, 218 West Governor Road, Hershey, PA 17033
  - Michael J. Miller, 441 Elm Avenue, Hershey, PA 17033
  - A to Z Realty, LLC, 721, 725, & 739 Fishburn Road, Hershey, PA 17033
  - Douglas Miller, 721, 725, & 739 Fishburn Road, Hershey, PA 17033
  - Ronald J. Blumberg, 637 Fishburn Road, Hershey, PA 17033
  - Anne Newman, 533 Elm Avenue, Hershey, PA 17033
  - Doug Ednie, 47 Peach Avenue, Hershey, PA 17033
  - Sheree Paija, 709 Fishburn Road, Hershey, PA 17033
  - FSC Hershey, PA, LLC, 667 Cherry Drive, Hershey, PA 17033

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<sup>1</sup> See Notes of Testimony ("N.T.") 10/24/22, pg. 49; 7/18/23, pg. 1331; 7/31/23, pg. 1444.

- KinderCare Learning Centers, 667 Cherry Drive, Hershey, PA 17033
- Theresa Wilkins, 194 W. Governor Road, Hershey, PA 17033
- Robert Smith, 101 Almond Drive, Hershey, PA 17033
- Mark Winter, Esquire, 23 Almond Drive, Hershey, PA 17033
- Matt Hitchcock, 110 Peach Avenue, Hershey, PA 17033
- Thomas Stang, 76 Almond Drive, Hershey, PA 17033
- Kerry Twyman, 117 Almond Drive, Hershey, PA 17033

(N.T., 10/24/22, pg. 40-48; 11/29/22, pg. 396-397; 12/12/22, pg. 411-415)

5. The following persons were called and testified as witnesses at the Hearing:

- Lowell Gates
- Gregory Rogalski, P.E., LEED
- Gregory E. Creasy, P.E.
- Douglas C. Tilley, AIA, NCARB
- Steven J. Lyncha, P.E.
- Christopher G. Commarota
- Eric J. Stump, P.E., PTOE
- Lori Neff
- Mary Beth Backenstose
- Ronald Blumberg
- Douglas Miller
- Anne Newman, Ph.D, P.E.
- Annette Means
- Mark Winter, Esq.
- Charles Emerick

6. Lowell Gates is President of Linlo Realty, Inc. which is the manager of Linlo.  
(N.T., 10/24/22, pg. 74-75)

7. Mr. Gates was not presented or admitted as an expert in traffic engineering and did not have specific numbers and information to back up his opinions concerning the effect the Project would have on traffic in the area of the Property. (N.T., 11/21/22, pg. 188-193)

8. Gregory Rogalski, P.E., was accepted by the Board as an expert in civil engineering. (N.T., 11/29/22, pg. 290)

9. Gregory E. Creasy, P.E., was accepted by the Board as an expert in transportation planning generally and traffic impact studies in particular. (N.T., 12/12/22, pg. 449-452)

10. Douglas C. Tilley, AIA, NCARB was accepted by the Board as an expert in architectural engineering. (N.T., 3/21/23, pg. 747-750)

11. Steven J. Lynch, P.E. is an engineering and permits manager with Sheetz, Inc. (N.T., 3/21/23, pg. 806)

12. Christopher Commarota is the Vice President for Construction for Kiddie Academy Domestic Franchising, LLC. (N.T., 3/29/23, pg. 864)

13. Eric J. Stump, P.E., PTOE was admitted by the Board as an expert in traffic engineering. (N.T., 3/29/23, pg. 942)

14. Mr. Stump has worked for Derry Township in various engineering capacities for approximately 15 years. (N.T., 3/29/23, pg. 940; 4/26/23, pg. 1024)

15. Lori Neff is employed by KinderCare as the District Leader for Central Pennsylvania. (N.T., 6/21/23, pg. 1233)

16. Mary Beth Backenstose owns 218 West Governor Road, Hershey, PA located at the southeast corner of the intersection of Governor Road and Fishburn Road and operates her therapy practice at this location. (N.T., 6/21/23, pg. 1260-1261; Exhibit A-24)

17. Ms. Backenstose disagrees with the cuing length measurements along Fishburn Road in front of her property as testified to by Linlo's witnesses. (N.T., 6/21/23, pg. 1270-1272)

18. Ronald Blumberg owns a property located at 637 Fishburn Road, Hershey, PA and operates his business, Ron's Barber Shop and Shaving Parlor, from this property. (N.T., 7/18/23, pg. 1333)

19. Annette Means is the Managing Member of A-to-Z Realty, which is the owner of the properties located at 721, 725, and 739 Fishburn Road, Hershey, PA. (N.T., 7/31/23, pg. 1445-1447)

20. Douglas Miller owns and operates the Seedlings Academy for Young Learners, which is a daycare located at 721, 725, and 739 Fishburn Road. (N.T., 7/18/23, pg. 1360-1361)

21. Under its conditional use approval from Derry Township, Seedlings Academy is required to have everyone enter its site from Fishburn Road and exit the site onto the Alley that runs behind these parcels. (N.T., 7/18/23, pg. 1362-1364)

22. Anne Newman resides at 533 Elm Avenue, Hershey, PA. (N.T., 7/18/23, pg. 1428)

23. Mark Winter, Esq. owns and resides at 23 Almond Drive, Hershey, PA. Mr. Winter's property is located in the Cocoa Townes development. (N.T., 7/31/23, pg. 1463)

24. Charles Emerick is the Derry Township Director of Community Development, which includes being the Township's Zoning Officer. He has been employed by the Township since 2009. (N.T., 8/24/23, pg. 1543)

25. As testified to by Mr. Emerick, his memo, entered into the Record as Exhibit A-31, is only meant to provide guidance to the Board of Supervisors and does not constitute a recommendation or official zoning determination. (N.T., 8/24/23, pg. 1605-1606, 1619-1620)

26. The following persons were sworn and provided public comment as part of the Hearing:

- Terri Miller, 228 Clark Road, Hershey, PA 17033
- Philip Jurus, 58 Locust Avenue, Hershey, PA 17033
- Matt Hitchcock, 110 Peach Avenue, Hershey, PA 17033
- Robert Smith, 101 Almond Drive, Hershey, PA 17033
- Christine Stickler, 43 Locust Avenue, Hershey, PA 17033
- Robert Welsh, Hilltop Road, Hershey, PA 17033
- David Brewin, 105 Almond Drive, Hershey, PA 17033
- Angel Rosado, 762 Fishburn Road, Hershey, PA 17033
- Douglas Ednie, 47 Peach Avenue, Hershey, PA 17033
- Michael Miller, 441 Elm Avenue, Hershey, PA 17033
- James Cichelli, 131 Almond Drive, Hershey, PA 17033
- Madelyn Twyman, 117 Almond Drive, Hershey, PA 17033
- Thomas Stang, 76 Almond Drive, Hershey, PA 17033
- Erin Gattens, 716 Fishburn Road, Hershey, PA 17033
- Heather Perry, 726 Fishburn Road, Hershey, PA 17033
- Frank Etchberger, 125 Almond Drive, Hershey, PA 17033
- Linda Eng, 23 Almond Drive, Hershey, PA 17033
- Greg Starr, 1603 Church Road, Hershey, PA 17033
- Eric Williams, 40 Almond Drive, Hershey, PA 17033
- Robert Wolff, 630 Appenzell Drive, Hershey, PA 17033
- Kevin Ferguson, Carlisle Road, Hershey, PA 17033
- Rich Barley, 29 Maple Avenue, Hershey, PA 17033
- Serena Demagno, 514 Hockersville Road, Hershey, PA 17033
- Kristin Shaub, 92 JMR Circle, Hershey, PA 17033
- Dennis Phillippy, 20 Maple Avenue, Hershey, PA 17033
- Michael Davis, 1524 Church Road, Hershey, PA 17033
- Greg Kadel, 133 Good Bar Court, Hershey, PA 17033
- Joan May, 88 JMR Circle, Hershey, PA 17033
- Rich Gamble, 39 Hockersville Road, Hershey, PA 17033

27. Terri Miller is the co-owner and full-time director of Seedlings Academy for Young Learners and is married to Douglas Miller, who is a party in this matter. (N.T., 7/31/23, pg. 1481-1482)

28. Madelyn Twyman is married to Cary Twyman, who is a party in this matter. (N.T., 8/24/23, pg. 1559-1560)

29. Linda Eng resides at 23 Almond Drive with Mark Winter, Esq., who is a party in this matter. (N.T., 7/31/23, pg. 1463; 8/24/23, pg. 1568-1569)

30. Eric Williams is the President of the Cocoa Townes Homeowner's Association and spoke on its behalf. Several properties in the Cocoa Townes development abut the Alley. (N.T., 8/24/23, pg. 1572-1573; Exhibit B-19)

31. On the first night of testimony on September 21, 2022, the Hearing was opened, and various individuals and entities were allowed to request party status. Such requests, however, were ruled upon at the next Hearing night of October 24, 2022. No actual testimony was taken on September 21, 2022, and the only Exhibits accepted that night into the Record were Board Exhibits. (N.T., 9/21/22, pg. 5, 8-19)

32. The public hearing on September 21, 2022 was continued because proper notice was not provided pursuant to the MPC. (N.T., 9/21/22, pg. 19-21)

33. Notice of the public hearing on October 24, 2022 was posted at least one (1) week before the hearing in accordance with Section 908(1) of the MPC. Notice of the public hearing also was published in a newspaper of general circulation with the Township on September 1, 2022 and September 8, 2022. Notice of the public hearing also was provided to adjoining landowners in accordance with the Township's Zoning Ordinance. The Township also sent notice of the public hearing to non-abutting landowners who live across from the Property and other nearby landowners. (Exhibits B-11, B-12, B-13, B-15, B-16, & B-17)

34. The parties agreed to waive all of the time requirements set forth in Section 908(1.2) of the MPC. (N.T., 12/12/22, pg. 409-416)

35. The parties agreed to waive the 45-day requirement for the Board to render its decision, as set forth in Section 908(9) of the MPC, and agreed that the Board would vote on its decision at its November 14, 2023 public meeting and issue this written decision on November 15, 2023. (N.T., 8/24/23, pg. 1639-1643)

36. The parties agreed to close the evidentiary portion of the hearing on August 24, 2023 and to meet on September 26, 2023 for closing arguments. (N.T., 8/24/23, pg. 1622-1643)

37. Jonathan. Crist, Esquire, attorney for Ms. Backenstose, filed a “motion” which the Board considered as a request for recusal and denied and dismissed this request. Each of the members of the Board of Supervisors, after being asked a series of questions concerning their impartiality regarding this particular Application, stated that they could listen to the evidence presented and decide this matter in an unbiased manner and did not wish to recuse themselves at that time. (N.T., 10/24/22, pg. 50-57; Exhibit B-18)

38. The dialysis center, which was part of the original Application (Exhibit B-1) decided not to be part of this Project, and so the Application was amended to have that particular building become medical offices. (N.T., 10/24/22, pg. 62-63; Exhibit B-14)

39. The Board admitted the following exhibits into the Record during the Hearing:

- B-1 Linlo Governor Crossing, LLC Conditional Use Application
- B-2 Letter from James M. Strong, Esquire to Derry Township Board of Supervisors dated June 7, 2022
- B-3 Letter from James M. Strong, Esquire to Derry Township Board of Supervisors dated June 30, 2022
- B-4 Letter from James M. Strong, Esquire to Derry Township Board of Supervisors dated July 15, 2022
- B-5 Letter from James M. Strong, Esquire to Derry Township Board of Supervisors dated September 9, 2022
- B-6 Master Plan and Conditional Use Review Letter #1 prepared on July 5, 2022, by Herbert, Rowland & Grubic, Inc.
- B-7 Transportation Impact Study Review Letter #2 prepared on August 22, 2022, by Herbert, Rowland & Grubic, Inc.
- B-8 Letter from Jenelle E. Stumpf, Planning/Zoning Coordinator to Lowell Gates and Steven Lyncha, P.E. dated July 25, 2022
- B-9 Memorandum from Thomas R. Clark, Director of Public Works, to Jenelle E. Stumpf, Planning/Zoning Coordinator and Charles Emrick, Director of Community Development dated March 29, 2022
- B-10 Dauphin County Subdivision/Land Development Review Report
- B-11 Affidavit of Publication - Notice of Public Hearing, dated September 8, 2022
- B-12 List of Abutting Properties with Notice of Hearing mailed September 2, 2022
- B-13 Proof of Posting of Notice on September 13, 2022
- B-14 Letter from James M. Strong, Esquire to Derry Township Board of Supervisors dated October 14, 2022
- B-15 Affidavit of Publication - Notice of Public Hearing, dated October 13, 2022

- B-16 List of Abutting Properties with Notice of Hearing mailed September 30, 2022 and October 10, 2022
- B-17 Proof of Posting of Notice on October 12, 2022
- B-18 Motion to Appoint Hearing Officer, dated October 17, 2022
- B-19 Cocoa Townes HOA Letter to BOS, dated November 20, 2022
- A-1 Master Plan Set, dated June 7, 2022, consisting of 5 sheets
- A-2 Master Plan Set (revised), dated June 7, 2022, last revised September 9, 2022, consisting of 5 sheets
- A-3 Deed between C&S Kray Real Estate, LLC and Linlo Governor Crossing LLC for Premises A - T, dated June 2, 2022
- A-4 Deed for Defelice Property (UPI 24-044-049-000-0000), Instrument # 20220029896
- A-5 Real Estate Exchange Agreement between C&S Kray Real Estate, LLC and Grandview Corporate Place Associates, dated November 7, 2017 (with exhibits)
- A-6 Agreement of Sale between C&S Kray Real Estate, LLC and Edward J. Leppold, dated May 23, 2016, with exhibits, addendum dated June 20, 2017, and assignment dated June 2, 2022, consisting in total of 20 pages
- A-7 Signage Plan, dated March 7, 2022, consisting of 13 sheets
- A-8 Signage Plan (Revised), dated June 21, 2022, consisting of 11 sheets
- A-9 Declaration of Condominium for Governor Crossing Condominium (draft), undated, consisting of 34 pages
- A-10 Cost-Benefit Analysis, consisting of 1 sheet
- A-11 Concept Plan for Hope Drive Extension (revised), dated June 1, 2021, last revised February 9, 2022
- A-12 Truck Turning Templates (revised), dated March 4, 2022, last revised September 9, 2022
- A-13 DTMA Review Letter, dated June 28, 2022
- A-14 Gregory Rogalski, P.E., LEED AP Resume
- A-15 Pennoni Waiver Request Letter, dated September 9, 2022
- A-16 Derry Township Planning Commission Recommendation Letter, dated July 25, 2022
- A-17 Shared Parking Demand Analysis, consisting of 2 sheets
- A-18 Gregory E. Creasey, P.E. Resume
- A-19 Traffic Impact Study, dated December 2021
- A-20 Doug Tilley, AIA Resume
- A-21 Survey of Existing Development and Land Uses, consisting of 24 sheets
- A-22 Building Elevation Set, consisting of 16 pages
- A-23 Building Elevations Cross Sections and Building Materials, consisting of 19 sheets



- A-24 Master Plan Set (revised), dated June 7, 2022, last revised October 13, 2022, consisting of 5 sheets
- A-25 Master Plan Color Rendering, by Snyder Secary & Associates
- A-26 Conditional Use Application Narrative, dated October 13, 2022
- A-27 Tri-County Regional Planning Commission Letter, dated September 22, 2022
- A-28 PennDOT HOP Revision Letter, dated October 19, 2022
- A-29 Transportation Impact Study, last revised September 2022
- A-30 Apartment Building Floor Plans and Sheetz Canopy Depictions
- A-31 Staff Agenda Item Memo, last revised July 31, 2023
- T-1 Eric J. Stump, P.E. Resume
- T-2 TIS Scoping Application Review Letter #1 prepared on August 2, 2021, by Herbert, Rowland & Grubic, Inc.
- T-3 Transportation Impact Study Review Letter #2 prepared on October 17, 2022, by Herbert, Rowland & Grubic, Inc.
- T-4 Governor Crossing TIS Roadway Improvements Concept Plan as marked up by Herbert, Rowland & Grubic, Inc.
- T-5 Highway Occupancy Permit Operations Manual, Chapter 2 – Application Submission (pg. 54-61)
- T-6 Pages 19-16 and 20-6 of the Highway Capacity Manual, Version 7.0
- Back-1 Aerial Photo of Site
- Back-2 Fuel Distance Map
- Back-3 Scoping Minutes with cover email from Jacob Hughes dated August 30, 2021
- Back-4 Hughes email dated October 4, 2021
- Back-5 Excerpts from PennDOT Access Manual
- Back-6 Email Packet of Technical Review, dated January 17, 2022
- Back-7 Excerpt from Traffic Engineering Manual and Map
- Back-8 PHMC Letter, dated September 17, 1973
- Back-9 Traffic Count Calculations (2 sheets)
- Back-10 Cover page & photos (11 pages) of local streets & traffic, dated March 25, 2022
- Back-11 PHMC & PennDOT MOU, dated June 22, 2011
- FSC-1 Hope Drive Extension Concept Improvement Plan, dated June 2020
- FSC-2 Combination of Exhibits A11 and FSC1
- FSC-3 Deed for KinderCare Property, dated March 9, 2022
- KC-1 Route 322 Corridor Evaluation Study, July 2015
- W-1 PennDOT Scoping Meeting Minutes, dated October 22, 2021
- W-2 PennDOT Scoping Meeting Minutes, revised October 28, 2021
- SA-1 PennDOT Pub 282 - TIS regulations (Appendix A)

SA-2	PennDOT Information on Roundabouts, dated February 21, 2023
SA-3	HOP Review Excerpt
SA-4	Aerial of Seedlings Academy area with arrows on drives
SA-5	Aerial of Seedlings Academy area with arrows on drives and Alley
SA-6	Aerial of Project area with arrows on roadways
SA-7	Exhibit A-11 with arrows through Property
SA-8	Photograph of Alley with bike and ball
SA-9	Seedlings Academy Family Survey Report, dated July 18, 2023
SA-10	Photograph of Seedlings Academy sign
SA-11	Photograph showing distance between cartway and sign
SA-12	Newspaper Excerpt, dated July 6, 2023
SA-13	Schematic comparison of a roundabout and an intersection
SA-14	Study - Impact of Roundabouts on Urban Air Quality, dated Sept. 2018
SA-15	Study – Environmental Impact of Modern Roundabout, dated Feb. 2008
SA-16	Deed of Dedication for Alley, dated December 30, 2008
SA-17	Quit Claim Deed for Alley, dated December 31, 2008
M-1	Excerpts from Township Zoning Ordinance, 8 pages
M-2	Article VII-A of the MPC
M-3	Traditional Neighborhood Development Booklet for PA Governor’s Center for Local Government Services
AN-1	Statement of Anne Newman, Ph.D, P.E.

#### BACKGROUND AND GENERAL FINDINGS

40. The 2018 Conditional Use Approval obtained by C & S Kray, Charles Kray, and Sheetz for a portion of the Property has expired. (N.T., 10/24/22, pg. 78-79, 134)

41. The initial plan for the Project was dated June 7, 2022. This plan was revised on September 9, 2022 and then a second time on October 13, 2022 (“*Amended Master Plan*”). (N.T., 10/24/22, pg. 75-76; Exhibits A-1, A-2, A-24, & A-25)

42. The Amended Master Plan shows the Project encompassing 22 properties that Linlo owns fee simple and portions of two additional properties which Linlo has under separate agreements of sale. These agreements of sale are with Karns and Leppold. (N.T., 10/24/22, pg. 79-82; Exhibits A-3, A-4, A-5, A-6, & A-24)

43. The Property is located within the Hershey Mixed-Use (HMU) Zoning District, as well as being located in two overlay districts identified as the Southern Core Overlay and Central - Master Plan Approval Area Overlay. (N.T., 10/24/22, pg. 82-83)

44. The Property has a gross site area of 7.42 acres and a net site area, taking out the rights-of-way, of 6.92 acres. (N.T., 11/29/22, pg. 295; Exhibit A-24)

45. The Project is made up of four (4) separate buildings: a Sheetz with gas pumps at the corner of Governor and Fishburn; a three (3) story mixed-use building with retail and restaurants proposed for the first floor and apartments proposed for the second and third floors at the corner of Fishburn and relocated Sand Hill Road; a one (1) story medical office building that backs up to relocated Sand Hill Road; and a one (1) story daycare building. (N.T., 10/24/22, pg. 83-85; Exhibits A-22, A-23, A-24, & A-25)

46. Mr. Gates testified that if the conditional use approval is granted, Linlo shall comply with the Township's Subdivision and Land Development Ordinance concerning the land development approval of the Project. (N.T., 10/24/22, pg. 108-109)

47. Mr. Gates came up with the fair market values used in Linlo's Cost-Benefit Analysis (Exhibit A-10). (N.T., 10/24/22, pg. 144-145)

48. The Cost-Benefit Analysis (Exhibit A-10) contains numerous estimates and guesses because Linlo does not know the actual tenants who will be occupying the retail spaces in the mixed-use building nor the medical office building. (N.T., 10/24/22, pg. 145-146)

#### ALLEYWAY

49. Sheet MP 2.1 of the Amended Master Plan shows an alleyway running over and adjacent to the Property shaded in gray ("Alleyway") and demarked with a note that states "Alleyway conveyance (See Note No. 2)". This sheet contains General Note 2, which states "the right-of-way areas to the centerline of the alleyways have been conveyed to the adjoining property owners by grantior (sic) of law." (Exhibit A-24)

50. The Amended Master Plan contains no additional information regarding the ownership of the Alleyway and contains no information as to who owned the Alleyway prior to the "conveyance to adjoining property owners". Moreover, no such conclusive evidence or information was presented at the Hearing. (N.T., 12/12/22, pg. 443-444; Exhibit A-24)

51. The Amended Master Plan contains no information as to what access rights, if any, this Alleyway provided or preserved nor any information as to who could still hold such access rights nor any information how such access rights have been extinguished nor any information how such access rights are being maintained and honored by the construction of the Project. Moreover, no such evidence or information was presented at the Hearing. (Exhibit A-24)

52. The Amended Master Plan does not clearly show what portion, if any, of the Alleyway, where it runs adjacent to the neighboring property owned by Grandview Corporate

Place Associates, is proposed to be a part of the Project. Moreover, no such conclusive evidence or information was presented at the Hearing. (N.T., 12/12/22, pg. 445; Exhibit A-24)

53. Linlo failed to provide any evidence at the Hearing that its Amended Master Plan and Project would comply with the Zoning Ordinance if it could not use all or parts of the Alleyway in the construction of this Project or if it had to honor existing access rights over all or parts of this Alleyway in the construction of this Project.

54. Linlo presented no evidence at the Hearing that any component of the Project (i.e., the Sheetz, the daycare center, the medical offices, or the mixed-use building) would comply with the Zoning Ordinance if all or parts of the Alleyway could not be used in the construction of this Project or if Linlo had to honor existing access rights over all or parts of this Alleyway in the construction of this Project.

55. Linlo failed to present any evidence at the Hearing what the traffic impacts of the Project would be if all or parts of the Alleyway could not be used in the construction of this Project or if Linlo had to honor existing access rights over all or parts of this Alleyway in the construction of this Project.

#### RELOCATION OF SAND HILL ROAD

56. Derry Township owns and controls the right-of-way of existing Sand Hill Road. Existing Sand Hill Road is a dedicated Derry Township road.

57. Sand Hill Road used to be called Middletown Road. (N.T., 6/21/23, pg. 1264)

58. While there have been some crashes at the intersection of existing Sand Hill Road and Fishburn Road, this number is not significant and is not the driving force behind the proposed relocation of Sand Hill Road. (N.T., 5/31/23, pg. 1137-1138)

59. Neither the current Board of Supervisors nor the current Township Manager ever specifically voiced support of relocating Sand Hill Road or of signaling the intersection of a relocated Sand Hill Road with Fishburn Road. (N.T., 5/31/23, pg. 1177-1178)

60. Based on a review of sheets MP 2.1 and MP 2.2 of the Amended Master Plan, the boundaries of lots 8-13 and 22, located along the northwestern side of the existing Sand Hill Road, go to the right-of-way line and not to the centerline of Sand Hill Road. This is also reflected in the legal descriptions included in the deeds for these lots. Likewise, lots 6 and 7 appear to only go to the right-of-way line of Sand Hill Road. The boundaries of the lots on the other side of existing Sand Hill Road appear to go to the centerline of Sand Hill Road. Thus, there are orphan pieces of land under the right-of-way of existing Sand Hill Road. No evidence was presented at the Hearing as to who owns these orphan pieces of land, and no evidence was presented as to Linlo's right to develop these orphan pieces of land as part of the Project. Exhibits A-3, A-4, and A-24.

61. Linlo did not present any evidence at the Hearing as to any right it has to relocate the right-of-way of existing Sand Hill Road as proposed on the Amended Master Plan nor any evidence of any acquiescent or affirmative agreement by Derry Township as to Linlo's right to relocate this existing right-of-way.

62. Linlo failed to present any evidence at the Hearing that it had any ownership or control over the right-of-way of existing Sand Hill Road such that it could build portions of the Project over and through this right-of-way.

63. Linlo failed to present any evidence at the Hearing that it had any ownership or control over the right-of-way of existing Sand Hill Road such that it had the legal ability to vacate this right-of-way and use the area of this right-of-way as a part of the Project.

64. Linlo failed to present any evidence of a valid request to vacate existing Sand Hill Road nor any evidence that such a request had been granted.

65. Linlo provided no legal argument or explanation at the Hearing as to its right and ability to use the right-of-way of existing Sand Hill Road as lands for part of its Project.

66. Linlo failed to present any evidence at the Hearing that Derry Township had agreed to take dedication of the relocated Sand Hill Road as shown on the Amended Master Plan.

67. Linlo failed to present any evidence at the Hearing that Derry Township had agreed to take ownership of and responsibility for the proposed traffic signal at the intersection of relocated Sand Hill Road, Fishburn Road, and the Alley as shown on the Amended Master Plan.

68. Linlo failed to provide any evidence at the Hearing that its Amended Master Plan and Project would comply with the Zoning Ordinance if it could not use the right-of-way of existing Sand Hill Road as part of this Project.

69. Linlo presented no evidence at the Hearing that any component of the Project (i.e., the Sheetz, the daycare center, the medical offices, or the mixed-use building) would comply with the Zoning Ordinance if the right-of-way of existing Sand Hill Road could not be used as part of this Project.

70. Linlo failed to present any evidence at the Hearing what the traffic impacts of the Project would be if Sand Hill Road could not be relocated as shown on the Amended Master Plan.

71. The proposed radius of a curve on relocated Sand Hill Road going east and approaching the southern access point to the Property does not meet the required 300-foot minimum center lane radius set forth in the Township's Subdivision and Land Development Ordinance. (N.T., 4/26/23, pg. 1006-1007; Exhibits A-24 & A-25)

72. If Linlo had to redesign relocated Sand Hill Road to accommodate the required 300-foot radius, such accommodation could impact additional lands which are not a part of the Property as well as the size and location of buildings and other structures proposed to be built as part of the Project. (N.T., 4/26/23, pg. 1008; Exhibits A-24 & A-25)

73. If the Township were to undertake the relocation of Fishburn Road as shown on the Amended Master Plan without the Project moving forward, there would be no right in/right out only access point along Fishburn Road and thus no need for the median barrier in the centerline of Fishburn Road. Moreover, at the new intersection of relocated Sand Hill Road/Fishburn Road/ and the Alley, the turn lanes would be shorter and thus there would be fewer properties on Fishburn Road that would be negatively impacted by this new intersection. (N.T., 4/26/23, pg. 1028-1029)

74. Mr. Gates testified that the Pennsylvania Department of Transportation (“PennDOT”) was hesitant to approve the signal for the intersection of Fishburn Road and relocated Sand Hill Road. (N.T., 10/24/22, pg. 147-149)

#### TRAFFIC ISSUES

75. The existing intersection of Governor, Fishburn, and Hockersville Roads is listed by the Harrisburg Area Transportation Study as one of the three most congested intersections in the three-county region. (N.T., 10/24/22, pg. 110-111; 12/12/22, pg. 454; Exhibit A-27)

76. The 2015 Derry Township Comprehensive Plan identified Governor Road and Fishburn Road as community arterial roadways that experience severe congestion due to providing access to the Hershey Medical Center and various schools of the Derry Township School District. (N.T., 12/12/22, pg. 454-455)

77. As admitted by Linlo’s civil engineer, Mr. Rogalski, and Linlo’s traffic engineer, Mr. Creasy, the Project, if built, will generate additional traffic in the area around the Property, the Governor/Fishburn/Hockersville intersection in particular. (N.T., 12/12/22, pg. 421-422; 2/22/23, pg. 671-672; Exhibit A-29)

78. As admitted by Linlo’s traffic engineer, Mr. Creasy, while the Project may attract bypass traffic, that traffic will end up going through more intersections and will stay in the general area of the Property longer if the Project is built than what happens currently with this traffic just driving straight past the Property. (N.T., 2/22/23, pg. 646-647)

79. As of December 2021, Governor Road had an average daily traffic volume of 17,300 vehicles per day along the frontage of the Property. (N.T., 1/31/23, pg. 573-574; Exhibits A-19 & A-29)

80. As of December 2021, Fishburn Road had an average daily traffic volume of 11,300 vehicles per day along the frontage of the Property. (N.T., 1/31/23, pg. 573-574; Exhibits A-19 & A-29)

81. As of December 2021, Sand Hill Road had an average daily traffic volume of approximately 3,200 vehicles per day. (Exhibits A-19 & A-29).

82. As of September 2022, Hockersville Road had an average daily traffic volume of approximately 11,000 vehicles per day. (Exhibits A-19 & A-29).

83. The Project will generate 6,143 new trips per day. (N.T., 11/21/22, pg. 192)

84. The Project will cause an 8%-9% increase in traffic at the Governor/Fishburn/Hockersville intersection during the peak hours. (N.T., 4/26/23, pg. 1021-1022)

85. The Project will cause a 4%-5% increase in traffic at the Governor Road – Cherry Street intersection during the peak hours. (N.T., 4/26/23, pg. 1021-1022)

86. If one or two uses were eliminated from the Project, that reduction in uses would result in a reduction in the amount of traffic produced by the Project. (N.T., 4/26/23, pg. 1022)

87. None of the traffic associated with the retail uses, the apartments, the daycare, nor the medical office building are projected to be bypass and will all constitute new trips. (N.T., 6/21/23, pg. 1203)

88. More the 50% of the trips produced by the Project will be new trips. (N.T., 6/21/23, pg. 1203; Exhibit A-29)

89. Most of the traffic into and out of the Property created by the daycare and the apartments will occur during the morning and afternoon rush hours, which is the same time the vast majority of the traffic is entering or leaving the neighboring Hershey Medical Center. (N.T., 12/12/22, pg. 446-447).

90. The proposed access to the Project would be a right in only from Governor Road, a right in and right out only from Fishburn Road, and full access from the southern access point on relocated Sand Hill Road. (N.T., 10/24/22, pg. 84-85; Exhibits A-24 and A-25)

91. Due to the right in only entrance on Governor and the right in/right out only access point on Fishburn, accessing the Property will be quite convoluted and will require many drivers to take a circuitous route in order to get into the Property. (N.T., 10/24/22, pg. 135-143; Exhibit A-25)

92. Due to the limited entrances to the Property off of Governor and Fishburn Roads, drivers going west on Governor or going north on Fishburn will have a somewhat circuitous route to enter and/or exit the Property. In fact, only drivers going east on Governor or south on Fishburn will have a direct entrance into the Property, and even then, unless they are continuing south on Fishburn, they will have a circuitous route exiting the Property to continue on the same direction. (N.T., 11/21/22, pg. 215-219; Exhibit A-25)

93. If access to and from Seedlings Academy is limited by the Project, this would cause some of the families using the Academy to take a more circuitous and convoluted way to get to the Academy, thereby increasing traffic in the area. (N.T., 7/18/23, pg. 1423-1425; Exhibits SA-5, SA-6, & SA-7)

94. If the construction of the Project results in limiting the access to many of the properties along Fishburn Road as discussed at the Hearing, this access limitation will result in exacerbating the traffic even more because people will be forced to take circuitous and convoluted routes through the area to get to and from these limited access properties. (N.T., 7/31/23, pg. 1527-1528)

95. The entrances and exits proposed for the Project will lead to increased traffic at some of the existing problem intersections, including but not limited to Governor/Fishburn/Hockersville intersection. (N.T., 11/21/22, pg. 230-232, 235, 242-243)

96. As part of the Project, Fishburn Road would be widened in the areas around its proposed intersection with relocated Sand Hill Road. (N.T., 2/22/23, pg. 672-676; Exhibits A-24 & A-25).

97. To prevent people from making a left turn out of the Property directly onto Fishburn Road at the right in/right out only access point, Linlo is proposing a pork chop to funnel right turns into and out of the Property. In addition, Linlo is proposing to construct a barrier down the center line of Fishburn Road to physically prevent any persons exiting the Property and going directly into the northbound lane of Fishburn Road. (N.T., 10/24/22, pg. 126-128; Exhibits A-24 and A-25)

98. If the median is constructed within the centerline of Fishburn Road as proposed on the Amended Master Plan, people driving south on Fishburn Road will not be able to make left hand turns into and out of the residences and businesses located on the east side of Fishburn Road as they can do now. (N.T., 11/21/22, pg. 204-205; Exhibits A-24 & A-25)

99. If the right in/right out only access point from the Property was eliminated on Fishburn Road, that would eliminate the need for the median barrier within the centerline of Fishburn Road. (N.T., 2/22/23, pg. 678-680; 5/31/23, pg. 1104-1105)



100. The Project could be developed without the right in/right out only access point on Fishburn Road or could be developed with just a right in only entrance on Fishburn Road. This change in the Project would not have a significant impact on the Project or on traffic flow. (N.T., 5/31/23, pg. 1115-1118)

101. The proposed median barrier to be installed within the centerline of Fishburn Road as part of the Project would restrict access to and from the property owned by Ron Blumberg. (N.T., 5/31/23, pg. 1119-1121)

102. Linlo has not approached or otherwise contacted any of the property owners who would be impacted by the construction of the median barrier going down the centerline of Fishburn Road or the other changes to Fishburn Road proposed on the Amended Master Plan. (N.T., 10/24/22, pg. 127-128; N.T., 11/21/22, pg. 205-206, 262-263)

103. Linlo did not include Elm Avenue, specifically the intersection of Elm Avenue and Governor Road, in the study area of the Traffic Impact Study (Exhibit A-29) submitted in conjunction with this Project. The Governor/Elm intersection was excluded even though this intersection is less than 200 feet from the Governor/Fishburn/Hockersville intersection. (N.T., 1/31/23, pg. 555-556; 12/12/22, pg. 463-464; 2/22/23, pg. 666-667; Exhibit A-29)

104. Traffic turning at the Governor/Elm intersection impacts traffic traversing the Governor/Fishburn/Hockersville intersection. (N.T., 7/31/23, pg. 1467-1468; 8/24/23, pg. 1552-1554)

105. The Governor/Elm intersection will be impacted by traffic created by the Project. (N.T., 7/31/23, pg. 1467-1468; 8/24/23, pg. 1552-1554)

106. In addition to the Governor/Elm intersection, the intersections of Glen and Governor Roads and Peach and Sand Hill Roads were not included as part of the Traffic Impact Study (Exhibit A-29) despite being closer to the Property than some other intersections included in the Study. (N.T., 2/22/23, pg. 726-727; Exhibit A-29)

107. The truck turning template Linlo provided as Exhibit A-12 shows that trucks accessing and leaving the Property will not be able to stay within their proper driving lanes and will impact other traffic accessing, leaving, or driving around the Property and force this other traffic out of their lanes or to stop while these trucks are navigating various turns being constructed as a part of this Project. (N.T., 11/29/22, pg. 332-340, 381-383; 4/26/23, pg. 1018; Exhibit A-12)

108. Linlo's truck turning exhibit shows three locations at which trucks would impinge upon opposing traffic: the right turn from southbound Fishburn Road onto westbound relocated Sand Hill Road; the right turn from westbound relocated Sand Hill Road into the southern entrance

to the Property; and the right turn exit from the Property through the “pork chop” onto southbound Fishburn Road. (N.T., 4/26/23, pg. 1015-1018; Exhibit A-12)

109. The encroachments shown on the truck turning template (Exhibit A-12) increase the potential for traffic accidents. (N.T., 6/21/23, pg. 1204)

110. As currently designed, the Project does not fully allow truck turning movements within the travel lanes of trucks in certain areas. Linlo could address these truck turning issues by adjusting the turning radii in these problem locations, however such adjustments could end up impacting other portions of the Project, resulting in relocated or smaller buildings or corrections to the stormwater system. (N.T., 4/26/23, pg. 1015-1016; 6/21/23, pg. 1203-1205; Exhibits A-12 & A-24)

111. Linlo did not prepare any truck turning templates showing turns into and out of the Alley at the relocated Sand Hill/Fishburn/Alley intersection. (N.T., 5/31/23, pg. 1181; Exhibit A-12)

112. Mr. Blumberg testified that he disagrees with the testimony and exhibits presented by Linlo’s traffic engineer, Mr. Creasy, and disagrees with the testimony of the Township traffic engineer, Mr. Stump, in that this testimony and these exhibits do not reflect or match with what he sees occurring on a day-to-day basis along Fishburn Road and at the intersections in the general area of the Property. (N.T., 7/18/23, pg. 1355-1357)

113. Mr. Douglas Miller testified that he disagrees with the exhibits and testimony presented by Linlo’s traffic engineer, Mr. Creasy, and with the testimony of the Township traffic engineer, Mr. Stump. He stated that this testimony and these exhibits do not reflect or match with what he sees occurring on a day-to-day basis along Fishburn Road and at the intersections in the general area of the Property. (N.T., 7/18/23, pg. 1366-1367)

114. Ms. Means testified that she disagrees with the exhibits and testimony presented by Linlo’s traffic engineer, Mr. Creasy, and with the testimony of the Township traffic engineer, Mr. Stump, in that this testimony and these exhibits do not reflect or match with what she sees occurring on a day-to-day basis along Fishburn Road and at the intersections in the general area of the Property. Ms. Means believes the Project will greatly exacerbate the existing traffic problems along Fishburn Road and at the intersections in the area of the Property. (N.T., 7/31/23, pg. 1452-1454)

115. Ms. Miller testified that she challenges and disagrees with the exhibits and testimony presented by Linlo’s traffic engineer, Mr. Creasy, and with the testimony of the Township traffic engineer, Mr. Stump, in that this testimony and these exhibits do not reflect or match with what she sees occurring on a day-to-day basis along Fishburn Road and at the intersections in the general area of the Property. Ms. Miller testified that traffic currently in the

area of the Property is extremely congested and that the Project will just make this congestion worse. (N.T., 7/31/23, pg. 1482-1486)

116. Mr. Douglas Miller does not believe the Traffic Impact Study properly encompasses the current traffic in the area of the Property nor properly predicts what the traffic impacts of the Project will be on Derry Township. (N.T., 7/18/23, pg. 1417-1418)

117. Mr. Douglas Miller testified the traffic currently on Fishburn Road during the peak drop-off times (7:00 to 8:30 a.m.) and the peak pickup times (3:30 to and 5:00 p.m.) at the daycare is very heavy, and he would expect that traffic would be even heavier if the Project was built. (N.T., 7/18/23, pg. 1419-1421)

118. Mr. Ferguson testified that he does not believe the Traffic Impact Study properly reflects the massive amount of traffic congestion that is currently experienced along the various roads and at the various intersections in and around the Property. (N.T., 8/24/23, pg. 1577-1578)

119. Ms. Demagno testified that the Traffic Impact Study is inherently flawed and does not properly reflect the massive traffic congestion around the Governor/Fishburn/Hockersville intersection. (N.T., 8/24/23, pg. 1580-1583)

120. Mr. Gamble testified that the Traffic Impact Study is flawed and does not appropriately reflect the actual traffic congestion that he sees on a day-to-day basis in the area around the Property. (N.T., 8/24/23, pg. 1594-1596)

121. Mr. Barley testified that the Project will make an already bad traffic situation worse. (N.T., 8/24/23, pg. 1579-1580)

122. The exhibits and testimony presented by Linlo's traffic engineer, Mr. Creasy, do not reflect or match with what occurs on a day-to-day basis along the roads and at the intersections in the general area of the Property. (N.T., 12/12/22, pg. 446-447; 7/18/23, pg. 1355-1357, 1366-1367, 1417-1421; 7/31/23, pg. 1452-1454, 1482-1486; 8/24/23, pg. 1577-1578, 1579-1583, 1594-1596)

123. The traffic currently in the area of the Project is extremely congested, and the Project will just make this congestion worse. (N.T., 12/12/22, pg. 446-447)

124. Mr. Hitchcock is concerned that the south access point from the Property onto the relocated Sand Hill Road will impact Peach Avenue's access onto Sand Hill. He is also concerned that the tight curve on relocated Sand Hill Road west of this access point will endanger children waiting at the bus stop at the intersection of Peach Avenue and Sand Hill Road. (N.T., 7/31/23, pg. 1497)

125. The statement made by Linlo's traffic engineer, Mr. Creasy that the new light at the intersection of relocated Sand Hill Road and Fishburn Road will "meter" traffic along Fishburn Road so that the traffic travelling north on Fishburn will not have as great an impact on and will not queue as much at the Governor/Fishburn/Hockersville intersection ignores the fact that the Project will dump almost all of its exiting traffic on to relocated Sand Hill Road and subsequently to the relocated Sand Hill/Fishburn/Alley intersection. Much of this traffic will then flow towards the Governor/Fishburn/Hockersville intersection when the traffic on Fishburn Road going north is stopped. As such, traffic will not be metered in any way. (N.T., 12/12/22, pg. 475-476)

126. Despite touting the design of relocated Sand Hill Road as shown on the Amended Master Plan and how it will link up to a relocated Hope Road in the future, Linlo's traffic engineer, Mr. Creasy, did not do any analysis of the impact the additional traffic from a relocated Hope Road would have on the proposed relocated Sand Hill/Fishburn/Alley intersection nor on the existing Governor/Fishburn/Hockersville intersection. (N.T., 2/22/23, pg. 646; Exhibit A-29)

127. The statement by Linlo's traffic engineer, Mr. Creasy, that this Project would be "more tuned to local traffic" ignores the massive amount of tourist and convention traffic drawn to the Hershey area every year and the fact that these tourists and convention goers will be drawn to the Sheetz and the restaurants within the Project. (N.T., 12/12/22, pg. 477-478)

128. The Amended Master Plan may need to be revised to show the 100-foot taper lengths that PennDOT is requiring of lanes coming off the various intersections proposed to be constructed or augmented as part of the Project. (N.T., 1/31/23, pg. 538-540)

129. As part of this Project, Linlo is proposing to adjust the timings of several of the traffic signals at several intersections around the Property. While the Traffic Impact Study was written based on these adjusted timings, PennDOT may further adjust these timings during the Highway Occupancy Permit ("*HOP*") review process. The Traffic Impact Study does not take into account the impact any possible timing adjustments required by PennDOT will have on the traffic in the area of the Project. (N.T., 1/31/23, pg. 541-543)

130. The Traffic Impact Study did not utilize the correct square footage of the medical office building. The Study was based on the old square footage of 8,400 and not the new square footage of 9,709, which is the size of the medical office building presented at the Hearing. This additional square footage will result in additional new trips which are not accounted for in the Traffic Impact Study. (N.T., 12/12/22, pg. 494-495)

131. The traffic counts used in the Traffic Impact Study were done in June, 2021 during the Covid pandemic when the traffic was suppressed by the pandemic. Linlo's traffic engineer, Mr. Creasy utilized a Covid factor to address this issue. This Covid factor, however, was calculated by comparing the June 2021 counts with counts from October 2019. Due to the heavy tourist traffic during the summer months in the Township, this is not a like to like comparison, and

this comparison of summer to fall traffic counts impacted the accuracy and appropriateness of this Covid factor. (N.T., 12/12/22, pg. 497-500; Exhibit A-29)

132. The use of traffic counts from October 2019 does not comply with the Derry Township requirement that all traffic counts must be done between June and September. (N.T., 12/12/22, pg. 501)

133. The traffic counts from October 2019 did not include any numbers for Saturday peak hours. Linlo's traffic engineer, Mr. Creasy, estimated and assumed such numbers in creating his Covid factor. (N.T., 12/12/22, pg. 501-503)

134. The use of October 2019 traffic numbers in calculating the Covid coefficient was inappropriate and suppressed this coefficient by suppressing the size difference between the October 2019 numbers and the June 2021 numbers. (N.T., 12/12/22, pg. 497-503)

135. The Traffic Impact Study did not include two large land developments being constructed within Derry Township, the Hershey West End Development and the Hershey Foods factory, which developments may negatively impact traffic volumes, levels of service, and queue lengths at the intersections around the Project. (N.T., 2/22/23, pg. 708-709)

136. The Traffic Impact Study was prepared assuming the Project would be complete and operating sometime in 2022. The delay in the Project's completion impacts the current and projected traffic counts listed in the Study, in that these number do not properly account for growth rate projections. (N.T., 12/12/23, pg. 503-504)

#### ALLEY

137. The existing alley across Fishburn Road from relocated Sand Hill Road ("*Alley*") runs from its intersection with Fishburn Road generally south to its intersection with the driveway of the University Physicians Center. This driveway is privately owned, and there is no public right of access over it. (N.T., 5/31/23, pg. 1113; 7/18/23, pg. 1364-1365; 7/31/23, pg. 1470)

138. The Traffic Impact Study (Exhibit A-29) did not take into account that the construction of the proposed relocated Sand Hill/Fishburn/Alley intersection will have a profound change on the use of the Alley in general, and even more so, if left hand turns are prohibited into and out of the properties that front Fishburn Road and back up onto this Alley. (N.T., 1/31/23, pg. 558-560; 2/22/23, pg. 704-706; 5/31/23, pg. 1172-1173; Exhibit A-29)

139. Linlo has not yet determined whether the relocated Sand Hill/Fishburn/Alley intersection will have to be split-phased (the traffic on Sand Hill Road and the Alley cannot go concurrently but rather must go separately). If this intersection has to be split-phased, Linlo failed to clearly determine what impact such a requirement would have upon the Traffic Impact Study (Exhibit A-29). (N.T., 1/31/23, pg. 558-560; 3/29/23, pg. 960-962; Exhibit A-29)

140. Split-phasing is necessary for the Alley in the configuration proposed on the Amended Master Plan. (N.T., 4/26/23, pg. 1008-1009)

141. When undertaking an informal analysis to determine whether or not the relocated Sand Hill/Fishburn/Alley intersection would have to be split-phased for the Sand Hill/Alley direction, Linlo's traffic engineer, Mr. Creasy, viewed the traffic on the Alley as "limited" and did not take into consideration the fact that the turning restrictions on Fishburn Road imposed in conjunction with the creation of this intersection would result in much increased traffic entering and exiting the Alley. (N.T., 12/12/22, pg. 469-470)

142. As part of the Project, Linlo may need to realign the Alley at its intersection with relocated Sand Hill Road and Fishburn Road to intersect with Fishburn Road at more of a right angle. (N.T., 4/26/23, pg. 1009)

143. Linlo has yet to determine what work, if any, will have to be done to the Alley leg of the relocated Sand Hill/Fishburn/Alley intersection. (N.T., 1/31/23, pg. 561-562)

144. Fourteen and half (14.5) feet is too narrow to safely have two (2) cars passing each other on a roadway of that width. The Alley is that narrow in several locations, including at its intersection with Fishburn Road. As such, the Alley needs to be widened to at least twenty (20) feet as part of the Project in order to accommodate two-way traffic. (N.T., 4/26/23, pg. 1008-1009, 1033-1034; 5/31/23, pg. 1110-1111; Exhibit A-24)

145. The entrance to the Alley is too narrow for two-lane traffic. With the Alley being added to a signalized intersection, the entrance to the Alley would need to be widened from fourteen and half (14.5) feet to twenty (20) feet in order to safely accommodate two-way traffic. The Amended Master Plan does not propose any widening to the entryway of the Alley. (N.T., 3/29/23, pg. 961-962; 7/31/23, pg. 1469-1470; Exhibits A-24, A-25, & A-29)

146. Linlo's traffic engineer, Mr. Creasy, when discussing the possible need to widen the Alley as part of the Project, failed to take into consideration that any such widening would require condemnation of the neighboring properties. (N.T., 12/12/22, pg. 479-480)

147. To widen the Alley, Linlo would need to acquire right-of-way on one or both sides of the Alley. Linlo has not forwarded any proposal as part of the Application to widen the Alley, nor did it present any evidence at the Hearing concerning such required widening, nor has it shown a widening of the Alley on its HOP plans. (N.T., 4/26/23, pg. 1009-1010; 5/31/23, pg. 1121)

148. Mr. Smith's property abuts the Alley, and he testified that it is absolutely impossible anywhere in the Alley to pass another car unless one of the cars gets off the cartway. (N.T., 7/31/23, pg. 1503-1504)

## ROW ACQUISITION

149. Linlo failed to present any evidence at the Hearing that Derry Township had agreed to or was willing to obtain any and all of the rights-of-way necessary to relocate Sand Hill Road and create the relocated Sand Hill/Fishburn/Alley intersection, as shown on the Amended Master Plan.

150. Linlo failed to present evidence of any sort of agreement by Derry Township, the Pennsylvania Department of Transportation, or any other entity having the power to condemn road rights away, showing that such entity was willing and able to condemn the necessary rights-of-way to relocate Sand Hill Road and create the relocated Sand Hill/Fishburn/Alley intersection, as shown on the amended Master Plan.

151. In conjunction with relocating Sand Hill Road, the Project will require the acquiring of approximately five (5) additional feet of right-of-way width on either side of Fishburn Road to the south of the new intersection with relocated Sand Hill Road. (N.T., 11/21/22, pg. 246-247)

152. Linlo presented no evidence that any of the property owners along Fishburn Road would be willing to sell any additional right-of-way to them in conjunction with the construction of the relocated Sand Hill/Fishburn/Alley intersection, nor did Linlo present any evidence that any entity clothed with the power of eminent domain would be willing to condemn such land if these owners refused to sell. Lastly, Linlo presented no evidence as to what it would do or what would happen if it were unable to obtain the additional right-of-way for this proposed intersection as shown on the Amended Master Plan or as required by PennDOT. (N.T., 2/22/23, pg. 636-637)

153. The success of the Project is dependent upon Linlo being able to acquire the additional rights-of way outside of the Property as shown on the Amended Master Plan. (N.T., 11/29/22, pg. 365-366)

154. Linlo's Engineer, Mr. Rogalski, testified that it would be Derry Township's responsibility to undertake and pay for the condemnation of any land outside of the Property necessary for the construction of the Project as depicted on the Amended Master Plan. (N.T., 11/29/22, pg. 367-368)

155. Linlo failed to present any evidence that Derry Township was willing to condemn any property necessary to construct the Project as depicted on the Amended Master Plan.

156. Based upon the plans and testimony presented at the Hearing, Linlo will need to get the approval of Ms. Backenstose, the owner of 218 Governor Road, for the proposed lengthening of the existing right and left turn lanes at the Governor/Fishburn/Hockersville intersection and the grant of additional temporary or permanent right-of-way. Linlo has not asked

for or received such approval from Ms. Backenstose. (N.T., 3/29/23, pg. 963-966; Exhibits A-24, A-29, & T-4)

157. Based upon the exhibits and testimony presented at the Hearing, Linlo will need to get the approval of Katherine E. Nelson, the owner of 633 Fishburn Road, allowing for the extension of the left turn lane in front of this property and the possible placement of a median barrier in front of this property. Linlo has not asked for or received such approval from Ms. Nelson. (N.T., 3/29/23, pg. 967; Exhibits A-24, A-29, & T-4)

158. Based upon the testimony and exhibits presented at the Hearing, Linlo will need to get the approval of Mr. Blumberg, the owner of 637 Fishburn Road, for the grant of additional right-of-way and for the possible placement of a median barrier in the centerline of Fishburn Road. Linlo has not asked for or received such approval from Mr. Blumberg. (N.T., 3/29/23, pg. 967-968; Exhibits A-24, A-29, & T-4)

159. Based upon the exhibits and testimony presented at the Hearing, Linlo will need to get the approval of the owners of the six properties on the east side of Fishburn Road and directly south of the Alley intersecting with Fishburn Road for the acquisition of additional right-of-way needed for the widening of Fishburn Road. Linlo will also need approval of the possible left turn restrictions placed on these properties due to the installation of the left turn lane going north on Fishburn Road. (N.T., 3/29/23, pg. 968-969; Exhibits A-24, A-29, & T-4)

160. Based upon the exhibits and testimony presented at the Hearing, Linlo will need to get the approval of the owners of the four properties on the west side of Fishburn Road and directly south of the relocated Sand Hill Road intersecting with Fishburn Road for the acquisition of additional right-of-way needed for the widening of Fishburn Road. Linlo will also need approval of the possible left turn restrictions placed on these properties due to the installation of the left turn lane going north on Fishburn Road. (N.T., 3/29/23, pg. 969-971; Exhibits A-24, A-29, & T-4)

161. Linlo failed to present any evidence at the Hearing showing that it had approached any of the existing property owners along Fishburn Road who would be impacted by the proposed road improvements for the Property. Moreover Linlo has presented no evidence of how it will deal with PennDOT requiring any approvals for these improvements from these various property owners. Finally, Linlo has failed to present any evidence showing how the Project will change if it is unable to get these approvals from these landowners and/or is not able to acquire the additional right-of-way necessary to make these proposed improvements. (N.T., 10/24/22, pg. 127-128; 11/21/22, pg. 205-206, 262-263; 4/26/23, pg. 993-1005; Exhibits T-4 & T-5)

162. If Linlo fails to acquire all of the right-of-way along Fishburn Road necessary to undertake the improvements proposed along this roadway, that failure could result in PennDOT denying the HOP for this Project. (N.T., 4/26/23, pg. 1002-1003; Exhibit T-5)



163. A failure by Linlo to acquire the right-of-way to necessary undertake the proposed improvements along Fishburn Road along with a refusal by Derry Township to undertake any eminent domain proceedings to acquire such rights-of-way could result in the Project being unable to move forward because the proposed improvements cannot be built without this right-of-way. (N.T., 4/26/23, pg. 1004-1005; Exhibits A-24, A-29, & T-4)

#### INTERNAL CIRCULATION

164. Due to the right entrance into the Property from Governor Road and the right in/right out only access point along Fishburn Road, the vast majority of the traffic entering the Property will have to exit using the southern access on relocated Sand Hill Road. This will result in a large number of vehicles travelling along the back driveway back to this Sand Hill Road exit and thus going past several back out parking spaces which provide parking to the proposed daycare center. (N.T. 10/24/22, pg. 122-125; Exhibits A-24 and A-25)

165. The Amended Master Plan fails to provide adequate internal pedestrian circulation. Specifically, there is no crosswalk shown connecting the mixed-use building and the medical building with the daycare and there is no crosswalk connecting the daycare to the Sheetz. (N.T. 10/24/22, pg. 129-131; 3/29/23, pg. 901; Exhibits A-24 & A-25)

166. The Amended Master Plan fails to provide a connection from the shared use path running along the frontage of Governor and Fishburn Roads to the Sheetz or the daycare center. (N.T., 4/26/23, pg. 1014-1015; Exhibits A-24 & A-25)

167. The Project, as currently designed, is not pedestrian oriented and is proposing a set of buildings that are much larger than would be expected in a pedestrian oriented neighborhood. (N.T., 7/31/23, pg. 1448-1453)

168. The Amended Master Plan does not contain sidewalks around half the parking lot located directly in front of the entrance to the daycare center, thereby forcing people to traverse the parking lot on foot instead of being able to walk around it. (N.T., 5/31/23, pg. 1106-1107; Exhibit A-24 & A-25).

169. If one or two of the uses in the Project were eliminated, that elimination would reduce the potential for pedestrian/vehicle conflicts within the Property. (N.T., 5/31/23, pg. 1094-1095)

#### SHEETZ

170. The Sheetz will be a convenience store that sells food, beverages, convenience items, and gasoline and diesel fuel. It will be open 24 hours a day, 7 days a week, 365 days a year. (N.T., 3/21/23, pg. 807)

171. The Sheetz will have six (6) fuel pumps with twelve (12) fueling positions. (N.T., 3/21/23, pg. 809; Exhibits A-24 & A-25)

172. The Sheetz will have thirty (30) internal seats for customers if they wish to consume products on the premises. (N.T., 3/21/23, pg. 822-823)

173. The Sheetz store is proposed to be 25 feet, 10 inches tall. The Sheetz canopy would be 21 feet, 6 inches tall along the highest side. (N.T., 3/21/23, pg. 775; Exhibits A-22 & A-23)

174. The Sheetz canopy is proposed to be built on a horizontal angle, so it has a high side and a low side. The trusses supporting this canopy are proposed by Linlo to provide visual breaks required by the Zoning Ordinance. These trusses, however, are not visible along low side of the canopy, and thus there is no visual break on the low side of the canopy based on this assertion. (N.T., 3/21/23, pg. 785-787; Exhibit A-22)

175. The canopy over the fuel pumps for the proposed Sheetz does not contain any break as required by Section 225-105.19.D of the Zoning Ordinance. Instead, it is constructed with a sloped roof and exposed roof trusses. This canopy, however, is one structure with no visual breaks. (N.T., 10/24/22, pg. 112-114; Exhibit A-26, pg. 43)

176. The Amended Master Plan does not provide any of the buffering required under Subsection 225-501.19.E of the Zoning Ordinance. Moreover, under the current design of the Project, Linlo cannot provide this required buffering in the appropriate location in compliance with this Section. (N.T., 11/29/22, pg. 321-322; Exhibits A-24 & A-25)

177. Some of the apartments in the mixed-use building will have bedroom and kitchen windows that face the Sheetz building and the Sheetz gas pumps. (N.T., 3/21/23, pg. 777-778; Exhibits A-23, A-24, & A-25)

178. As admitted by Mr. Gates and Mr. Rogalski, headlights from cars using the Sheetz at night will shine into the windows of the apartments in the mixed-use building, and buffering would be useful in minimizing this light pollution. Such buffering is not shown on the Amended Master Plan. (N.T., 10/24/22, pg. 152-156; 11/29/22, pg. 322-324; Exhibits A-24 & A-25)

#### MIXED-USE BUILDING/APARTMENTS

179. The mixed-use building is proposed to contain three stories and be 45 feet and 4 inches tall. (N.T., 3/21/23, pg. 775; Exhibits A-22 & A-23)

180. There are no buildings in the immediate vicinity of the Property that contain three stories or are 45 feet in height. The properties directly across Governor, Fishburn, and relocated Sand Hill Roads are all one and two stories tall. (N.T., 3/21/23, pg. 780; Exhibit A-21)

181. The mixed-use building will have 40 apartments. The apartments will be divided into 20 units per floor for the second and third floors. Each set of 20 on each floor will be made up of 12 one-bedroom apartments and 8 studio apartments. Each unit will be roughly between 800-825 sq. ft. in floor space. (N.T., 10/24/22, pg. 118-119; 3/21/23, pg. 772-773)

182. The 40 apartments in the mixed-use building will house between 50-60 tenants. (N.T., 11/21/22, pg. 197-198)

183. In regard to the first floor of the mixed-use building, Linlo is currently under contract with a small restaurant to occupy approximately 3000 sq. ft. of this first floor. The remaining 14,567 sq. ft. would be divided up into two (2) other storefronts which would be occupied either by an additional restaurant or retail uses. (N.T., 10/24/22, pg. 119-121)

#### DAYCARE

184. The daycare building is proposed to be one (1) story and 24 feet and 1 inch tall and has a 9,892 square foot footprint. (N.T., 3/21/23, pg. 775; Exhibits A-22 & A-23)

185. Linlo will remain the owner and landlord of the daycare building, and this entire building will be leased to Kiddie Academy. (N.T., 10/24/22, pg. 115-116)

186. The proposed daycare will have two playgrounds and 11 classrooms. It will have a maximum capacity of 150 children and approximately 21 staff. (N.T., 3/29/23, pg. 866, 872; Exhibits A-22, A-23, A-24, & A-25)

#### MEDICAL OFFICE

187. The medical office building is proposed to be one (1) story and 24 feet and 9 inches tall. (N.T., 3/21/23, pg. 775; Exhibits A-22 & A-23)

188. Linlo will remain the owner and landlord of the medical office building. This building may be divided up into several spaces for various medical practices. (N.T., 10/24/22, pg. 116-117)

#### PARKING

189. Linlo does not know what type or how many medical practices or uses will be established in the medical office building nor does it have any idea as to the number of employees, the number of patients, or the hours of operation of these unknown medical uses. As such, Linlo parking calculations for this building are based entirely on assumptions. (N.T. 10/24/22, pg. 117-118; 11/29/22, pg. 383-388)

190. In regard to the first floor of the mixed-use building, Linlo does not know what uses will occupy the uncommitted 14,567 sq. ft. Thus, Linlo does not know the activities, number of employees, the number and type of customers, and the hours of operation of these additional uses. As such, Linlo parking calculations for the first floor of this building are based mainly on assumptions. (N.T., 10/24/22, pg. 119-121)

191. Linlo does not know the precise number of children who will attend the daycare and so made assumptions concerning this number when calculating the number of parking spaces needed for the daycare. If this assumption is incorrect, the number of required parking spaces will change. (N.T., 11/29/22, pg. 315)

192. Linlo's parking calculations are based on assumptions concerning the type of uses which will occupy the various buildings that are going to be constructed as part of the Project. In particular, these assumptions include: the number and types of medical professionals which would occupy the medical office building, the types and sizes of the retail stores or restaurants that would occupy the first floor of the mixed-use building, the number and age of the children who would attend the daycare center, and the number of seats and seating area of the indoor dining at the Sheetz. Linlo's civil engineer, Mr. Rogalski, could not explain where these parking calculations came from or how they were calculated while testifying at the Hearing. (N.T., 11/29/22, pg. 312-318)

## DISCUSSION

Linlo is seeking to establish a Master Plan Development upon the Property pursuant to Sections 225-302.3 and 225-501.58 of the Zoning Ordinance. In this regard, Linlo applied to Derry Township for the following: (1) conditional use approval for their Master Plan pursuant to Section 225-501.58 of the Township Code, (2) conditional use approval of a Fuel Service-Major Use pursuant to Section 225-501.19 of the Township Code<sup>2</sup>, (3) conditional use approval of the Multifamily Apartment Dwelling pursuant to Section 225-501.2 of the Township Code, and (4) conditional use approval of a Group Child Care Facility pursuant to Section 225-501.52 of the Township Code. Since the gas station, apartment building, and the daycare are all subject to the Master Plan Development conditional use approval, the Board will analyze the Master Plan portion of the Application before analyzing any of the other three conditional uses being sought as part of the Application.

After reviewing the 45 hours of testimony, thousands of pages of exhibits, and hundreds of pages of legal argument, the Board found five specific areas that need to be focused upon in determining whether to grant the Master Plan Development conditional use: 1) ownership and

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<sup>2</sup> Sheetz is a co-applicant concerning this conditional use.

control of the Property, 2) compliance with Fuel Station-Major zoning requirements, 3) traffic impacts of the Project, 4) impacts of the Project on the Alley, and 5) parking compliance. While the Board has decided to focus on these five areas, this focus does not mean there were not other issues with this Application, but rather, this focus arises because these five areas are where the Application most prominently fails to meet the necessary requirements to be granted the requested conditional use for a Master Plan.

A conditional use is nothing more than a special exception that falls within the jurisdiction of the municipal legislative body rather than the zoning hearing board. 53P.S. §603(c)(2). The applicant in the conditional use hearing bears the burden of proving that its proposal meets the requirements provided for in the zoning ordinance for the use sought as conditional use. *Northampton Area S.D. v. East Allen Twp. Bd. of Supervisors*, 824 A.2d 372, 76 Pa. Commw. Ct. 2003), *alloc. denied*, 834 A.2d 1144 (Pa. 2003); *Bray v. ZBA*, 48 Pa. Commw. 523, 526, 410 A.2d 909, 911 (1980). These requirements are as follows:

1. The kind of use (or area, bulk, parking, or other approval) – i.e., the threshold definition of what is authorized as a conditional use;
2. Specific requirements or standards applicable to the conditional use – e.g., special setbacks, size limits; and
3. Specific requirements applicable to such kind of use even when not a conditional use – e.g., setback limits or size maximums or parking requirements applicable to that type of use whenever allowed, as a permitted use or otherwise.

*Bray*, 48 Pa. Commw. at 526, 410 A.2d at 911. It is not enough for an applicant to prove that a proposed conditional use complies with the specific conditional use zoning ordinance requirements. *Sheetz, supra*. The applicant must also clear a second step by proving that the proposal does not violate other applicable sections of the zoning ordinance. *McMann v. Kingston Twp. Bd. of Super.*, 771 A.2d 96 (Pa. Commw. Ct. 2001).

A conditional use can only be granted or refused in accordance with the terms of the ordinance itself. *McGinty v. ZBA*, 717 A.2d 34, 36 (Pa. Commw. Ct. 1998). Whether an applicant has met its burden of proof is within the discretion of the governing body. *Accelerated Enterprises, Inc. v. Hazle Twp. ZHB*, 773 A.2d 824, 826 (Pa. Commw. Ct. 2001). Failure to comply with any one specific requirement constitutes the basis for denying a conditional use application. *Levin v. Bd. of Super. of Benner Twp.*, 669 A.2d 1063, 1069 (Pa. Commw. Ct. 1995), *aff'd*, 547 Pa.161, 689 A.2d 224 (1997).

Additionally, the activity sought as a conditional use must not be injurious to the public's health, safety, and general welfare. This requirement, along with any general policy concerns regarding conditional uses provided for in the zoning ordinance, are commonly referred to as general requirements for the conditional use. The applicant does not have to show that its proposal meets these general requirements. Instead, those parties objecting to the conditional use application bear the burden of showing that the use sought violates any of the general requirements. To meet this burden, the objectors must show that the proposed use's "impact would be greater than would normally be expected from that type of use and that this use would pose a substantial threat to the health, safety, and welfare of the community." *Amerikohl Mining, Inc. v. ZHB of Wharton Twp.*, 142 Pa.Comm. 249, 258, 597 A.2d 219, 223 (1991), *alloc. denied*, 602 A.2d 861 (Pa. 1992); *see also, Aldridge v. Jackson Twp.*, 983 A.2d 247, 253 (Pa. Commw. Ct. 2009)(to meet their burden, objectors must prove, "to a high degree of probability, the proposed use will adversely affect the public welfare in a way not normally expected from the type of use.") If the objectors satisfy their burden, the burden shifts back to the applicant to rebut or negate the issues raised by the objectors. *Bray*, 48 Pa.Comm. at 529, 410 A.2d at 912; *see also, Graterton Properties, Inc. v. Lower Merion Twp.*, 796 A.2d 1038, 1045-1046 (Pa. Commw. Ct. 2002).

In this matter, Linlo is seeking to develop the Property with a Master Plan Development containing a Sheetz convenience store/gas station, a mixed-used building, a health care practitioner's office building, and a KinderCare daycare center. In accordance with Section 225501.58A.1.d and Section 225-315, Map 17, a Master Plan Development is allowed within the Central – Master Plan Approval Area Overlay ("CMP Overlay") as a conditional use. Likewise, under Section 225-315, Table 28, Fuel Service-Major, Multifamily Apartment Dwellings, and Group Child Care Facilities Uses are allowed in the HMU/CMP Overlay as conditional uses and Health Care Practitioner's Office and Mixed Use Build Uses are allowed in the HMU/CMP Overlay as uses by right. All five of these aforementioned Uses are allowed to be a part of a Master Plan Development under Section 225-315, Table 28.

As stated above, a conditional use shall comply with all the zoning requirements applicable to: that specific use, all uses within that zoning and/or overlay district, all requirements generally applicable throughout the Township, and requirements applicable to all conditional uses. In this regard, Section 225-315, Tables 28 and 29 and Section 225-501.58 set forth the requirements specifically applicable to a Master Plan Development in the HMU/CMP Overlay; while, Sections 225-501.2, 225-501.19, and 225-501.52 set forth the specific requirements for Multifamily Apartment Dwellings, Fuel Service-Major, and Group Child Care Facilities Uses, respectively. In addition, the definitions found in Section 225-1103 also apply to the establishment of all these Uses. Lastly, all conditional use applications shall comply with and fulfill the provisions set forth in Section 225-501 of the Zoning Ordinance.

## OWNERSHIP AND CONTROL OF THE PROPERTY

Section 225-501.58.A.2.a of the Zoning Ordinance sets forth the following requirement concerning proving ownership of all lands included in an application for a Master Plan Development:

- a. Site Requirements. Property subjected to Master Plan approval shall, at the time of first approval, meet the following site requirements:
  - i. Ownership. The entire site for the Master Plan shall:
    - a. Be owned or controlled (i.e. contract purchaser, ground lease, etc.) by the developer, or
    - b. The owners of all the land shall submit a document in recordable form and in a form approved by the Township Solicitor binding all owners to comply with the Master Plan approved by the Conditional Use approval.

In presenting its case in chief to the Board, Linlo introduced testimony and evidence showing ownership of the 22 parcels that make up the bulk of the Property, as well as agreements of sale concerning portions of the other two parcels also included in the Property. (Exhibits A-3 - A-6). Linlo, however, failed to present any evidence, or even attempt to present any evidence, of its ownership rights in the right-of-way of existing Sand Hill Road.

The right-of-way of Sand Hill Road is owned by Derry Township. While some of the parcels owned by Linlo go to the centerline of existing Sand Hill Road, that fact alone does not mean that Linlo owns the right-of-way on top of that land. Moreover, Linlo did not present any evidence at the Hearing that it had any right to purchase or move the right-of-way of Sand Hill Road. Likewise, it did not provide any evidence that Derry Township agreed in any enforceable way to have this right-of-way moved or vacated.<sup>3</sup> Finally, Linlo did not present any evidence at the Hearing that this roadway had been vacated or that any request to vacate this roadway had been filed with or approved by Derry Township.

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<sup>3</sup> At the Hearing, Linlo presented evidence concerning two documents recommending the relocation of Sand Hill Road in the general location shown on the Amended Master Plan. These documents, however, are merely planning documents. They place no obligation upon Derry Township to agree with or support any project that proposes to move Sand Hill Road as shown within these planning documents. If Linlo relied upon these documents in the mistaken belief that the Township would support this relocation, such reliance has no legal justification. *Lobolito, Inc. v. North Pocono School Dist.*, 562 Pa. 380 (2000)(a board of supervisors must be free to engage in its governmental functions without consideration to how those functions were treated by prior regimes). Likewise, the fact that the Township may have supported the relocation of Sand Hill Road under prior Boards does not place any obligation upon the current Board hearing this Application to support this proposed relocation of Sand Hill Road. *Program Admin. Services, Inc. v. Dauphin County General Authority*, 593 Pa. 184 (2007)(prior board cannot make decisions which will serve to bind the governing power of current board).

In addition to failing to show that it had any right or ability to move or vacate the right-of-way of existing Sand Hill Road, Linlo also failed to show that it owned all of the land upon which this right-of-way is located. While the deeds for the lots along the southeast side of existing Sand Hill Road show these lots extending to the centerline of this road, the deeds to the lots on the northwest side of Sand Hill Road only go to the right-of-way line of the road and not to the centerline. This fact is also reflected on the Amended Master Plan presented at the Hearing. (Exhibits A-3, A-4, & A-24) Linlo failed to present any evidence at the Hearing of who owns these orphan pieces of land under the right-of-way of existing Sand Hill Road. Linlo did not present any evidence showing, or even implying, that it owns these orphan pieces of property. Likewise, Linlo did not present any evidence showing, or even implying, that Derry Township owned these orphan pieces of property. As such, even if Linlo had some right or ability to move or vacate existing Sand Hill Road, it would not own the land underneath that right-of-way and still would have failed to show that it owns all of the property being developed as a part of this Master Plan Development in violation of Section 225-501.58.A.2.a of the Zoning Ordinance.

Additionally, Sheet MP 2.1 of the Amended Master Plan shows the Alleyway (shaded in dark gray) running through portions of the Property and along the Property's boundary with the lands owned by Grandview Corporate Place Associates ("*Karns Lot*"). (Exhibit A-24). This Sheet of the Amended Master Plan also contains two figures, each with an arrow pointing to the Alleyway; both of which state "[a]lleyway conveyance see note No. 2." Note No. 2 on this Sheet states, "[t]he right-of-way areas to the centerline of the alleyway have been conveyed to the adjoining property owners by grantior (sic) of law". Linlo presented no competent evidence as to what this Note No. 2 means. "Grantior of law" is not a term of art. The Board could assume that this note is referencing Pennsylvania law that states when a right-of-way is offered for dedication to a municipality and that dedication is not accepted within 21 years, the land so offered reverts back to the adjoining property owners with an access easement continuing to exist over this land to all the appropriate parties, but it would not be appropriate in this circumstance to make such an assumption. 36 P.S. §1961; *see also, Estojak v. Mazsa*, 522 Pa. 353, 359, 562 A.2d 271, 274 (1989).

Ownership and control of the subject property is a very simple yet very important aspect of proving one's case in a conditional use application. *See* Section 225-501.58.A.2.a of the Zoning Ordinance. Moreover, even if the Board did make the above-mentioned assumption, there is no evidence as to what properties would continue to have an access easement over the Alleyway and no evidence how such an access easement would be maintained and observed once the Project was built. Linlo's civil engineer, Mr. Rogalski, did present some testimony concerning this Note No. 2 and the Alleyway, but it was clear from his demeanor that he was not sure of his answers and that they were based upon assumptions. Lastly, Linlo did not present evidence showing exactly what portions of the Alleyway were actually included in the Property and were being used as part of the Project. Specifically regarding, the portions of the Alleyway that runs along the boundary



line between the Property and the Karns Lot, it is unclear if the Property runs to the centerline of the Alleyway or runs to one or other of the boundary lines of the Alleyway. (Exhibit A-24). This is something that should have been made clear from the onset, and even if Linlo thought it had done so, when questions regarding the Alleyway were asked of its engineer, Linlo should have recognized the issues here and corrected them if it could. (See N.T., 12/12/22, pg. 443-445).

It is a basic premise of all zoning applications that the first thing the applicant must do is show the right to make the requested changes or obtain the requested approvals on the subject lands. This should be done, and normally is done, by the presentation of deeds showing ownership of the subject lands, agreements of sale for the future purchase of the subject lands, or letters of consent from the current owners of the subject lands granting the applicant the right to prosecute the application. In this matter, Linlo failed to do any of these three things and failed to present any sufficient evidence in the absence of these steps showing that it has the appropriate ownership, control, or right over all of the lands involved in this Project allowing it to undertake the Project on this Property. Obviously, the Project cannot be completed as presented to the Board at the Hearing if Sand Hill Road cannot be relocated and/or if Linlo does not have full ownership and control over the Alleyway running through and beside the Property. Moreover, even if Linlo could build the Project with Sand Hill Road running through the middle of it and/or without full ownership or control of the Alleyway, Linlo still would have to redo all of its zoning calculations and its traffic impact study based on the existing location of Sand Hill Road instead of the proposed location of Sand Hill Road and based on the Alleyway not being part of the Property. For these reasons and for Linlo's failure to comply with Section 225-501.58.A.2.a of the Zoning Ordinance, the Board has determined that it has no option but to deny this Master Plan Development and deny the three other conditional use applications for these same reasons and upon the basis that there is no approval for the Master Plan.

#### COMPLIANCE WITH FUEL STATION-MAJOR ZONING REQUIREMENTS

Based upon the testimony presented at the Hearing, the largest and most important component of the Project is the Sheetz convenience store and gas station. In order to obtain the conditional use approval for the Master Plan containing this Sheetz, as well as the conditional use approval for the Fuel Service-Major Use, Linlo needs to show compliance with all of the requirements of Section 225-501.19, Fuel Service-Major, of the Zoning Ordinance. This Section of the Zoning Ordinance contains seven requirements. After reviewing all of the evidence presented at the Hearing, it is clear to the Board that Linlo and Sheetz failed to prove compliance with two of these seven requirements.

First, subsection D of this Use requires that "canopies serving more than 8 vehicles must provide a visual break in canopy size or projection to avoid the over simplified, unarticulated, or commercial look of longer canopies." While at the Hearing, Linlo's witnesses provided evidence

that the proposed canopy would be a large flat roof that was on a horizontal tilt so one of its longer sides was higher than the other, they failed to show that this design met the requirements of this Subsection D. Linlo's witnesses asserted that this design provides the necessary visual breaks, because when looking at the high side of the canopy, the observer would be able to see the underlying superstructure or trusses holding up this canopy and these trusses breaks up the look of this canopy. (N.T., 11/29/22, pg. 320-321; 3/21/23, pg. 773-774, 785-787, 813). The Board does not find such testimony credible or persuasive. To begin with, even with the ability to see these underlying trusses, this design is still overly simplified, unarticulated, and has a very commercial look to it, thus violating subsection D. Moreover, Linlo's witnesses admitted that when looking at the lower side of this canopy, one could not see the underlying trusses and instead only small posts jutted out underneath the roof. (N.T., 3/21/23, pg. 786-787). Therefore, even under Linlo's own testimony, only half of the canopy possibly meets this requirement, and the other half clearly does not. The Board concludes that while this design may be an improvement over earlier types of canopies, it does not contain any visual break running along the length of this roof in compliance with the requirement set forth in Section 225-501.19.D.

Second, Subsection E of this Use requires "fuel service establishments adjacent to residential uses shall provide a landscape buffer consistent with this Chapter." Linlo's witnesses argued that this provision was not applicable to the Project because there were no existing residential uses adjacent to this Sheetz. They argued that no buffer was required against the proposed apartments because these apartments are not yet existing.<sup>4</sup> Linlo's argument concerning this provision does not comply with the rules of statutory construction and is clearly wrong.<sup>5</sup>

One of the primary tenets of the Statutory Construction Act is that in interpreting language, a court (or in this case, a board) must not add words to or eliminate words from the language being interpreted. *THW Grp., LLC v. ZBA*, 86 A.3d 330, 336 (Pa. Commw. Ct. 2014); *see also*, 1 Pa.C.S.A. §1921; 1 Pa.C.S.A. §1922. Linlo's argument clearly violates this tenet because it is adding the word "existing" to the language of this provision E. instead of interpreting the language as it stands within the Zoning Ordinance.

Moreover, Subsection G of this Use states "building and structures associated with a major fuel service establishment must be located no closer than 200 feet to a building used as a dwelling which exists at the time of the establishment of the facility...". Another tenet of the Statutory

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<sup>4</sup> Linlo's witnesses cited to the opinion of Charles Emerick, the Township Director of Community Plannings, stated in the Staff Memo introduced as Exhibit A-31 that he found this provision inapplicable because the apartment building was not yet built. This reliance fails to acknowledge the fact that Mr. Emerick specifically stated under oath that this memo was merely to provide guidance to the Board in preparation for the Hearing and did not constitute a recommendation, nor did it constitute an official zoning opinion regarding the applicability of this particular regulation. Moreover, this opinion is not binding upon the Board. *See Borough of Jenkintown v. Bd. of Commissioners of Abington Twp.*, 858 A.2d 136 (Pa. Commw. Ct. 2004).

<sup>5</sup> The Pennsylvania Statutory Construction Act (1 Pa.C.S.A. §1901 *et seq*) applies to ordinances as well as to statutes. *Kohl v. New Sewickley Twp. ZHB.*, 108 A.3d 961, 968 (Pa. Commw. Ct. 2015).

Construction Act is that every word should be construed as necessary and not superfluous and should be provided impact in undertaking the interpretation of that language. *THW, supra.*; 1 Pa.C.S.A. §1921(a). The appellate courts have interpreted this tenet to mean that where one provision of the law contains a term and another provision of the law does not contain the term, this absence is viewed as essential and as such the interpretation should be based on the intentional leaving out of this term. *Twp. of O'Hara v. Condemnation of a Permanent Fee Simple Interest for Pub. Park & Rec. Area & Facilities of 4.65 Acres*, 910 A.2d 166 (Pa. Commw. Ct. 2006)(when interpreting ordinances, courts “cannot supply omissions, especially where it appears that such omission is intentional”); *see also, Marion Center Area S.D. v. Marion Center Area Education Assoc.*, 982 A.2d 1041, 1044 n.2 (Pa. Commw. Ct. 2009)(“[t]he principle *expressio unius est exclusio alterius* provides ‘that the expression of one thing implies the exclusion of another thing not mentioned.’”) and *Adams Outdoor Advertising, Ltd. v. Hanover Twp. ZHB*, 159 Pa. Commw. 372, 633 A.2d 240 (1993)(each section of a zoning ordinance must be read as part of the whole and not as independent provision with a separate meaning). Thus, when comparing Subsection E to Subsection G, the fact that G specifically references “existing” buildings while E specifically does not, the absence of this term “existing” in E must be interpreted to mean that a buffer is required between the gas station and any existing or proposed residential use. Linlo’s interpretation of Subsection E is incorrect, and it must comply with this buffer requirement. Linlo engineer, however, testified at the Hearing that Linlo could not comply with this requirement under the current design of the Project. (N.T., 11/29/22, pg. 321-322; Exhibits A-24 & A-25). As such, the Board denies the Master Plan conditional use and the Fuel Service-Major condition use for Linlo’s failure to prove compliance with Subsections 225-501.19.D and 225.501.19.E of the Zoning Ordinance.

#### TRAFFIC IMPACTS OF THE PROJECT

As stated above, when an applicant for a conditional use has shown compliance to all of the applicable zoning requirements, the burden shifts to any objectors of the application to show non-compliance to the general conditions applicable to the applied-for conditional use. More specifically, because a conditional use is presumed to be a permitted use, the objectors must show that the proposed use’s “impact will be greater than would normally be expected from that type of use and that this use would pose a substantial threat to the health, safety, and welfare of the community” *Amerikohl, supra*. During the Hearing, it quickly became clear to the Board that the biggest issue for the vast majority of the numerous objectors to this Application was the impact the Project would have upon traffic flow and congestion around the Property. Once Linlo made out, what it claimed to be, a *prima facie* case of compliance with all the applicable traffic requirements, the burden shifted to the various objectors to show noncompliance with the general conditions as described above. *Id.*

Throughout the Hearing, practically every witness agreed that the traffic in this part of Derry Township, especially the intersection of Governor, Fishburn, and Hockersville Roads, is horribly congested. Likewise, no one disputed the classification of the Governor/Fishburn/Hockersville intersection as one of the worst in the tri-county area. Moreover, the evidence presented at the Hearing showed that the vast majority of the traffic exiting the Property would have to do so at the southernmost access point on relocated Sand Hill Road. Several of the objectors presented credible evidence that the traffic impact study did not appropriately reflect how bad the traffic congestion is at the Governor/Fishburn/Hockersville intersection, as well as neighboring intersections. (N.T., 12/12/22, pg. 446-447; 7/18/23, pg. 1355-1357, 1366-1367, 1417-1421; 7/31/23, pg. 1452-1454, 1482-1486; 8/24/23, pg. 1577-1578, 1579-1583, 1594-1596). Linlo's own witnesses admitted that the Project would increase traffic in the area and would cause more cars to be on these roadways than would be there if the Project was not built. (N.T., 12/12/22, pg. 421-422; 2/22/23, pg. 646-647, 671-672). Lastly, the evidence presented at the Hearing shows that, regardless of its final configuration and regardless of what PennDOT finally requires for improvements connected to this intersection, the new relocated Sand Hill/Fishburn/Alley intersection will have a massive negative impact upon the existing properties running along Fishburn Road to the north and south of this proposed new intersection.

While Linlo argued throughout the Hearing that it was not yet clear what exactly PennDOT would require it to do in conjunction with the creation of this new intersection, even under the best case scenario where no existing access rights were legally impacted and no additional right-of-way was required from any third parties, this intersection would still have a massive impact upon the properties fronting Fishburn Road directly to the north and south of it, just through increased queue lengths and traffic on Fishburn Road. The Board views such a minimum impact outcome as pollyannish and highly unlikely. Based on all of the testimony presented both by Linlo, the Township, and the objectors, it is clear that the most likely outcome will be access restrictions on numerous properties running along the east and west side of Fishburn Road to both the north and south of this new intersection, as well as required acquisition of additional right-of-way from many of these same properties in order to install all of the proposed improvements needed to make this intersection work as designed. (Exhibit T-4 & T-5). The Board finds credible the objectors' arguments that these access restrictions will have profound negative effect upon the value of the effected properties, as well as a profound negative effect upon the operations and viability of the businesses located on these properties, most particularly Seedlings Academy, Ron's Barber Shop, and Ms. Backenstose's therapy practice. The Board wholeheartedly supports and accepts objectors' arguments that it is economically and morally bankrupt to saddle and inhibit existing businesses that have been operating in the Township for decades with such restrictions for the benefit of a new project that has no long-term connections with the Township.

Based on the evidence presented at the Hearing by the objectors and the Township, and in some cases admitted to by Linlo, the Board finds the objectors have met their burden that the

impact from the Project is much greater than what would normally be expected from a Master Plan Development and would pose a substantial threat to the health, safety, and welfare of the community. To start with, this Project directly abuts up against and will profoundly impact one of the three most congested intersections in three counties. By definition, this is a highly unusual circumstance; one that can only occur in three locations within these three counties. This aspect of the Project is only compounded by the fact that the Project will clearly increase traffic at this intersection, as well as many others in the general area that are also congested. The evidence shows that despite the fact that Linlo kept emphasizing the Sheetz would attract mostly bypass trips, more than 50% of the trips created by the Project will be new. (N.T., 6/21/23, pg. 1203).

Moreover, the negative impact of these bypass trips cannot be discounted. The necessary access arrangement for the Project will only exacerbate the existing traffic problems because in order to access and/or leave the Property, many visitors will be forced to undertake convoluted and circuitous routes based upon where they are coming from and/or where they want to go to. (N.T., 10/24/22, pg. 135-143; 11/21/22, pg. 215-219, 230-232, 235, 242-243). This fact marginalizes Linlo's arguments about bypass trips in that these bypass trips will end up having to go through multiple intersections just to get into and out of the Property. In other words, even the bypass trips will increase the number of vehicles going through various intersections on the road because these vehicles are not simply getting off Governor Road and getting right back on Governor Road in the exact same location; they are driving through numerous intersections in the general vicinity of the Property just to be able get into the site and/or will have to drive through these same intersections just to exit the site and get back on the road they started from. Thus, the bypass trips are impacting additional intersections that they would not have impacted if they were not entering the Property at all. A normal bypass trip does not have a different impact upon neighboring intersections because ideally that particular visitor would not be going through additional intersections because of his or her visit to the subject site. As proven by the objectors, the Project is a different type and scale of Master Plan Development with a different, greater, and more unusual set of negative impacts than is normally anticipated or encountered.

Lastly, the massive potential negative impact upon access to and from neighboring properties along Fishburn Road, as well as the need to take land from these neighboring properties, is clearly unusual and certainly not something that would be normally associated with your average Master Plan Development. Additionally, the number of properties potentially being impacted by these restrictions and/or takes greatly exceeds what normally would be expected in conjunction with a similar development. It is not normally the case that any development, much less a Master Plan Development, would propose moving an existing, heavily traveled road several hundred feet and create a new signalized intersection that would change the way more than a dozen properties would be accessed. For these reasons, as well as several others raised over the 15 nights of testimony encompassed in the Hearing, the Township and the objectors have proven the unusually

tremendous negative impact this Project would have on the neighboring community's health, safety, and welfare, as well as on the Township's health, safety, and welfare as a whole.

As stated above, with the Township and the objectors meeting their burden of proof, the burden then shifts back to Linlo to counter the Township's and objectors' arguments concerning the Project's impact upon traffic in the area. A review of the testimony presented by Linlo, as well as its cross examination of the objectors, shows that Linlo failed to rebut the Township's and the objectors' assertions concerning traffic in the area and the Project's exacerbation of this traffic. Additionally, Linlo failed to rebut testimony that it failed to properly and fully mitigate its contribution to the congestion in the area in designing and laying out the Project. Linlo had no response to numerous objectors credibly stating that the Traffic Impact Study is flawed and does not appropriately encompass the massive congestion experienced in the area around the Property during the morning and afternoon rush hours, not to mention the off-peak hours traffic that is experienced, especially during the summertime due to the tourism in the area. Linlo never addressed the fact that traffic experienced in certain areas of Hershey is highly unusual when compared to other municipalities due to the amusement parks, concert venues, convention center, and associated tourism-based businesses and hotels all located within Derry Township. Linlo had no rebuttal concerning the convoluted routes people will have to take to enter and exit the Property if they are coming from or going to certain locations outside of the Property. Linlo had no response to all the concerns raised by the numerous objectors whose property access will be impaired and/or whose property will be taken from them in order to construct the road improvements as proposed by the Amended Master Plan, other than to say that it's not 100% assured that these improvements will be approved and built as presented at the Hearing. As such, Linlo failed to rebut the assertions by the Township and the objectors concerning the unusual and extreme harm the Project will cause to the public's health, safety, and welfare. The Board finds that the Township and the objectors met their burden concerning noncompliance with the applicable general conditions and thus is denying the Application on this basis.<sup>6</sup>

Not only did the Township and the objectors prove noncompliance with the general conditions applicable to the Application, but their evidence also raised questions as to Linlo's compliance with the specific traffic requirements applicable to this Application. Subsection 225-501.58A.2.a.iv of the Township Ordinance requires the following:

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<sup>6</sup> An interesting side street the Board was led down during the Hearing had to do with the Hope Drive extension. While the Board fully acknowledges that the Hope Drive extension is not part of the Project, it found it quite interesting and telling that while Linlo spent a great deal of time showing how the Amended Master Plan would enable the Hope Drive extension to be undertaken in a variety of forms, it did not spend any time discussing or examining the traffic impact the future construction of the Hope Drive extension would have upon the intersection of relocated Sand Hill Road, Fishburn Road, and the Alley or on the southern access point for the Project or on Governor/Fishburn/Hockersville Roads intersection. The Board can only surmise this analysis was intentionally avoided because the construction of the Hope Drive extension would only exacerbate the traffic issues at these intersections.

- a. Site Requirements. Property subjected to Master Plan approval shall, at the time of first approval, meet the following site requirements:
  - iv. Access. The lot must provide for direct points of ingress and egress in a manner to assure convenient and safe access, which will not cause undue congestion or hazards on local roads.

*Emphasis added.* As set forth above in detail, the unusual points of ingress and egress for this Project will increase congestion and driving hazards on neighboring streets because of the convoluted and circuitous routes visitors will have to take to access or exit the Property. (N.T., 10/24/22, pg. 135-143; 11/21/22, pg. 215-219, 230-232, 235, 242-243). Likewise, Linlo's own truck turning template shows multiple areas where trucks will not be able navigate around the Property without endangering other drivers on the roads. (N.T., 11/29/22, pg. 332-340, 381-383; 4/26/23, pg. 1015-1018; Exhibit A-12). Additionally, Linlo is required to submit a Township Subdivision and Land Development Ordinance (Chapter 185) compliant Traffic Impact Study as a part of this Application. §225-501.A.4.g.xiv. The submitted Study so clearly minimized the existing traffic currently on the studied roads and intersections and so clearly minimized the projected traffic to be created by the Project, that the Board could not assign any weight to it. The credible evidence presented at the Hearing clearly showed that this Study did not account for or reflect the traffic and congestion that the objecting witnesses and residents saw, encountered, and dealt with on a day to day basis. (N.T., 12/12/22, pg. 446-447; 7/18/23, pg. 1355-1357, 1366-1367, 1417-1421; 7/31/23, pg. 1452-1454, 1482-1486; 8/24/23, pg. 1577-1578, 1579-1583, 1594-1596). For these reasons, the Board finds that Linlo failed to prove compliance with Subsections 225-501.58.A.2.a.iv and 225-501.A.4.g.xiv of the Township Ordinance

#### IMPACTS OF THE PROJECT ON THE ALLEY

Another issue raised by the Objectors during the Hearing is the impact of the Project, in particular the relocation of Sand Hill Road and the creation of a new four-way intersection of Sand Hill Road, Fishburn Road, and the Alley, would have upon the use of this Alley. The Amended Master Plan presented at the Hearing proposes a left hand turn lane into the Alley at this new signalized intersection. This Plan recognizes that the Alley is currently used for two-way traffic and is relying upon the Alley being available for two-way traffic if and when the access restrictions related to the creation of this new intersection ever went into place. It came out during the Hearing, however, that Linlo put absolutely no thought into if the Alley would be able to handle an increase in two-way traffic being funneled into it by the Project or handle the left turning traffic directed into it by this new intersection. Moreover, Linlo did not put any thought into whether or not the Alley could or should be improved in any way to handle these impacts from the Project.

A review of Linlo's testimony, as well as a Traffic Impact Study, shows that Linlo merely presumed that the traffic impact upon the Alley would remain the same and that all the changes to

traffic patterns of Fishburn Road, Sand Hill Road, and Governor Road would have no impact whatsoever upon the usage of the Alley. Apparently, Linlo did not even know who owned or who was responsible for the maintenance of this Alley. The objectors presented credible evidence at the Hearing that the Alley was much too narrow throughout its length, but especially at its intersection with Fishburn Road, for two-way traffic and that any increase in traffic along the Alley would pose a substantial threat to other drivers in the Alley, as well as to other users of the Alley and the owners and visitors to properties located along the Alley. In addition to being too narrow, the Alley is, legally speaking, a dead end, because its only legal access is to Fishburn Road. The other end of the Alley intersects with a private driveway which access could be cut off by that driveway's owner at any time. (N.T., 7/18/23, pg. 1364-1365; 7/31/23, pg. 1470). Based on the evidence presented by the objectors, and sometimes admitted to by Linlo, the Project as proposed on the Amended Master Plan would have a profound negative affect upon the Alley and its usability. Such an impact would directly harm and put at risk the public health, safety and welfare of the people using this Alley and living alongside it. Linlo presented no credible rebuttal to this evidence.<sup>7</sup> For this reason the Board of Supervisors have found that the objectors have upheld their burden of showing noncompliance with the general conditions applicable to the Project, and thus the Application is being denied on this basis.

#### PARKING COMPLIANCE

Subsection 225-501.58.A.4.g.ii of the Zoning Ordinance requires the following of an applicant for a Master Plan Development:

- ii. Site Development Plan. The plan shall be at a minimum scale of 1 inch equals 100 feet, and depict the following information:
  - f. The location of all off-street parking spaces and the total number of spaces to be provided, in accordance with the requirements of §225-402 of this Chapter; provided however the applicant may propose shared parking in accordance with §225-402.4.B.

While, Subsection 225-501.58.A.7.e of the Zoning Ordinance imposes the following requirement, in part:

- e. Off Street Parking. Off street parking spaces shall comply with §225-402.5 of this Chapter; provided, however, the applicant may propose shared parking by agreement of the users in accordance with §225-402.4....

During the Hearing, Linlo stated that it does not know the number or type of medical practices that will occupy the medical office building and does not know the type of additional

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<sup>7</sup> Basically, the only way to address these issues would be to widen the alley, and or make it one way, both solutions would pose massive issues for Linlo in terms of needing to obtain additional right-of-way as well as access rights.



restaurant or retail uses that will occupy the remainder of the mixed use building and does not know how many children will occupy the daycare. This would not be an issue, except parking calculations depend on knowing this type of information. For example the parking requirements for a Health Care Partitioner's Office Use call for three (3) spaces for each professional who typically sees patients, plus one (1) space for each professional or employee who typically does not see patients; while parking requirements for a Food Services without Drive-Thru Use call for one (1) space per every three (3) seats indoor, plus one (1) space per every six (6) seats outdoor; and the parking requirements for a Retail, Small Scale Use call for one (1) space per each 200 square feet of gross floor area. See §225.402.5.A, Table 35. Since it has no idea who is going to occupy these buildings, Linlo's parking calculations are merely guesses based on what could occur or what it hopes will occur. See *Elizabethtown/Mt. Joy Assocs., L.P. v. Mount Joy Twp. ZHB.*, 934 A.2d 759, 766 (Pa. Commw. Ct. 2007)(denial of conditional use upheld where applicant attempt to prove ordinance compliance "on erroneous data and unfounded assumptions.") As such, these calculations are not definitive enough to meet Linlo's obligations under the requirements of Subsections 225-501.58.A.4.g and 225-501.58.A.7.e, and the Board denies the Application on this basis. See *In re Thompson*, 896 A.2d 659, 680 (Pa. Commw. Ct. 2006)(a promise to comply with requirements of the zoning ordinance does not satisfy the applicant's burden of proof); *Edgemont Twp. v. Springton Lake Montessori School, Inc.*, 622 A.2d 418, 419 (Pa. Commw. Ct. 1993)("[e]vidence is not a 'promise' that the applicant will comply because that is a legal conclusion the Board makes once it hears what the applicant intends to do and then determines whether it matches the requirements set forth in the ordinance."); see also, *Mushroom Hill, LLC v. Swatara Twp. Bd. of Commissioners*, No. 178 C.D. 2021, 2022 Pa. Commw. LEXIS \*83 (Pa. Commw. Ct. March 8, 2022).

## SUMMATION

In summary, the Board denies the Master Plan Development conditional use application and thus the other three conditional use applications filed by Linlo due to Linlo's failure to properly prove ownership and control over all of the lands proposed to be included in the Project; for failing to prove compliance with subsections D and E of Section 225-501.19 of the Township Code concerning the Fuel Service-Major Use; and for failing to prove compliance with Subsections 225-501.58.A.4.g and 225-501.58.A.7.e of the Township Code concerning parking. In addition, the Board denies these applications for having a substantial and profound negative impact upon the public's health, safety and welfare due to the unusual negative impact the Project will have on traffic congestion in the area and the use of the Alley, such impact being significantly greater than would be normally be expected from a Master Plan Development, or from a Fuel Service-Major, Multifamily Apartment Dwellings, or Group Child Care Facility Use.

## CONCLUSIONS OF LAW

- a. Proper public notice of the Hearing was provided in accordance with the MPC and the Zoning Ordinance.
- b. Linlo failed to prove that it had ownership of or control over all of the lands encompassed and proposed to be developed by the Project.
- c. Linlo neither has the right nor the ability to relocate Sand Hill Road, as shown on the Amended Master Plan.
- d. Derry Township is under no obligation to agree to or approve the relocation of Sand Hill Road as shown on the Amended Master Plan.
- e. Linlo failed to prove that it has the appropriate ownership of and or control over the Alleyway shown traversing the Property and running along the border with the Karns Lot necessary to develop the Alleyways as part of the Project.
- f. Linlo failed to prove compliance with Subsections 225-501.19.D and 225-501.19.E of the Township Code concerning the proposed Sheets convenience store and gas station.
- g. Linlo wrongly interpreted Subsection 225-501.19.D of the Township Code in determining its proposed canopy meets the requirements of this Subsection.
- h. Linlo wrongly interpreted Subsection 225-501.19.E of the Township Code when it believed the requirements of this Subsection do not apply to the Project.
- i. Linlo has not and cannot provide a buffer between the proposed Sheetz convenience store and gas station and the proposed residential apartments to be constructed within the mixed-use building in compliance with Subsection 225-501.19.E of the Township Code; thus the Amended Master Plan does not conform with Subsection 225-501.19.E.
- j. Linlo failed to prove compliance with Subsections 225-501.58.A.4.g.ii.f and 225-501.58.A.7.e of the Township Code concerning parking calculations for the Master Plan Development.
- k. The Project fails to comply with Subsection 225-501.58.A.2.a.iv of the Township Code in that it fails to provide convenient and safe access to and from the Property.
- l. The Application fails to comply with Subsection 225-501.K.1 of the Township Code in that the Project will adversely affect the health, safety, and welfare of the immediate neighborhood surrounding the Property.

m. The Application fails to comply with Subsection 225-501.K.2 of the Township Code in that the Project will overburden the public roads and intersections located in the immediate area around the Property.

n. The Application fails to comply with Subsection 225-501.K.3 of the Township Code in that the Project will detrimental to the use and development of the immediate neighborhood surrounding the Property and will change the essential character of this neighborhood.

o. Linlo failed to prove that it would not have to obtain any rights-of-way from third parties in order to undertake the roadway improvements shown on the Amended Master Plan.

p. Linlo failed to show that it had the ability to obtain all the necessary additional rights-of-way in order to construct the roadway improvements shown on the Amended Master Plan

q. Linlo failed to prove the Alley would be able to handle being the fourth leg of the relocated Sand Hill/Fishburn/Alley intersection and would be able to handle the traffic impacts of being made the fourth leg of this intersection.

r. Linlo failed to prove that it would not have to widen and or otherwise re-configure the Alley in order for it to work as the fourth leg of the proposed relocated Sand Hill/Fishburn/Alley intersection.

s. Linlo failed to prove that the improvements necessary to construct the relocated Sand Hill/Fishburn/Alley intersection would not create more traffic upon the Alley.

t. Objectors and residents, in particular, Ms. Backentose, Mr. Blumberg, Mr. Douglas Miller, and Ms. Means, credibly testified as to the existing profound traffic congestion in the area and how the Traffic Impact Study did not properly reflect what they observed traffic- and congestion-wise on a day-to-day basis.

u. Objectors, in particular, Mr. Douglas Miller and Ms. Means, credibly testified as to the inability of the Alley to handle two-way traffic and how the Project would lead to increased two-way traffic upon this roadway.

v. Objectors, in particular, Mr. Douglas Miller and Ms. Means, proved that limiting the access to 721, 725, and 739 Fishburn Road would have a profound negative impact upon the use of these parcels and the operation and viability of the daycare center located thereon.

w. Objectors, in particular, Mr. Blumberg and Mr. Winter, proved that the proposed access limitation upon Mr. Blumberg's property located at 637 Fishburn Road would have a profound negative affect upon his use of this property and the operation and viability of his Barber Shop located thereon.

x. Objectors, in particular, Ms. Backenstose, proved that access limitation upon her property located at 218 West Governor Road would have a profound negative impact upon her use of this property and the operation and viability of her therapy practice located thereon.

y. Objectors credibly testified as to the convoluted and circuitous routes certain visitors to the Property would have to take in order to enter and or exit the Property.

z. The Project will have a negative impact upon the local community's public health, safety, and welfare, as well as the Township's public health, safety, and welfare as a whole, well beyond and above that would be normally expected from an average Master Plan Development.

aa. The testimony of Linlo's traffic engineer, Mr. Creasy, did not properly reflect the actual traffic conditions as they exist today nor the impact the Project would have on these conditions; thus his testimony concerning these subject matters is found not credible.

bb. The testimony of Linlo's traffic engineer, Mr. Creasy, concerning the impact the Project would have on amount of traffic using the Alley was found not to be credible.

cc. The testimony of Linlo's traffic engineer, Mr. Creasy, concerning the impact the Project would have on traffic congestion in the area of the Property was found not to be credible.

dd. The testimony of Linlo's civil engineer, Mr. Rogalski, concerning the calculation of the amount of required parking and whether or not the Amended Master Plan met the minimum required parking was based on assumptions, which could not be explained or further clarified, and were ultimately found to be very nebulous. As such, this testimony was found not to be credible.

ee. The Board finds credible the testimony of the various objector Parties who testified at the Hearing and the sworn statements made by residents during public comment that the evidence presented by Linlo concerning the existing traffic in the area of the Property is flawed and does not appropriately reflect the actual traffic congestion seen by these witnesses and residents.

ff. The Board finds credible the testimony of the various objector Parties who testified at the Hearing and the sworn statements made by residents during public comment that the existing traffic in the area of the Property is extremely heavy and congested, especially during peak commuting times.

gg. Linlo's Traffic Impact Study admitted as Exhibit A-29, is flawed; is based upon assumed, improper, and/or outdated numbers and counts; and does not appropriately reflect the traffic experienced by the community in the area of the Property on a day-to-day basis.

hh. Linlo's Traffic Impact Study inappropriately and inexplicably excluded the Elm Avenue/Governor Road intersection from its scope.

ii. The Board finds the Traffic Impact Study to not properly or appropriately reflect or match with what currently occurs traffic-wise on the roads and at the intersections in the general area of the Property. As such, the Traffic Impact Study (Exhibit A-29) is found to have no evidentiary value.

jj. Due to it being based upon numerous estimates, approximations, and guesses, the Board finds the Cost-Benefit Analysis to have no evidentiary value.

**ORDER TO FOLLOW**

**BEFORE THE DERRY TOWNSHIP BOARD OF SUPERVISORS  
DAUPHIN COUNTY, PENNSYLVANIA**

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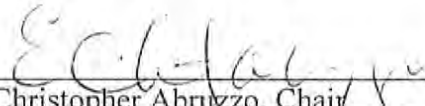
**IN RE:           CONDITIONAL USE APPLICATION           :**  
**OF LINLO GOVERNOR CROSSING, LLC        :**

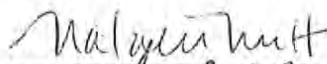
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**ORDER**

AND NOW, this 14<sup>th</sup> day of November, 2023, upon consideration of the foregoing Findings of Fact, Discussion, and Conclusions of Law, and at a publicly advertised meeting, the Board of Supervisors of Derry Township hereby denies Linlo Governor Crossing, LLC's Application for Conditional Use Approval of a Master Plan Development, Application for Conditional Use Approval of a Fuel Service-Major, Application for Conditional Use Approval of Multifamily Apartment Dwellings, and Application for Conditional Use Approval of a Group Child Care Facility on lands located at the southwest corner of West Governor Road and Fishburn Road, otherwise known as the Property as defined in the above Findings of Fact. The basis for these denials is set forth more fully in the Findings of Fact, Discussion, and Conclusions of Law laid out in the attached Adjudication.


**DERRY TOWNSHIP  
BOARD OF SUPERVISORS**

  
\_\_\_\_\_  
E. Christopher Abruzzo, Chair


  
\_\_\_\_\_  
Natalie Nutt, Vice Chair

  
\_\_\_\_\_  
Michael P. Corado

  
\_\_\_\_\_  
Carter Wyckoff

  
\_\_\_\_\_  
Richard D. Zmuda

**ATTEST:**

  
\_\_\_\_\_  
Christopher S. Christman  
Township Manager