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May 5, 2023

**SENT VIA HAND DELIVERY ONLY**

Scott A. MacNair, Esquire  
Clemons Richter & Reiss, P.C.  
2003 South Easton Road, Suite 300  
Doylestown, PA 18901

**Re: Application of Bethlehem Landfill Company**

Dear Mr. MacNair:

As you are aware, I represent St. Luke's Hospital – Anderson Campus (“St. Luke’s”) in opposition to the above referenced application seeking Conditional Use approval of the Phase V expansion of the Bethlehem Landfill (the “**Expansion**”). Please consider this as the equivalent of a motion for a directed verdict on behalf of St. Luke’s.

The Applicant has presented several witnesses and scores of Exhibits. Most importantly, for purposes of this motion, the Applicant has rested its case. As will be discussed in more detail below, because the Applicant has failed to satisfy a *prima facie* case that it is entitled to the Expansion, the Conditional Use hearings should be concluded at this juncture with a determination that the Application be denied without wasting any additional time. Concisely, since substantial portions of the area subject to the Expansion are subject to restrictive covenants explicitly prohibiting landfills and other activities proposed by the Applicant and those restrictions have not been removed or eliminated. Applicant lacks the legal authority to pursue approval and the Township lacks the authority to grant approval.

**1. Factual Background**

The Expansion proposes 117.4 acres of lateral expansion and 26.74 acres atop a previously permitted and lined disposal area. The total expansion area measures approximately 189 acres (the “**Site**”). The Site is a portion of what is proposed to be a single consolidated 503.46-acre parcel. The majority of the Site is encumbered by Scenic and Conservation Easements (the “**Restrictive Covenant**” or “**Restrictive Covenants**”) entered into between the City of Bethlehem<sup>1</sup> (the “**City**”) and Lower Saucon Township

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<sup>1</sup> Applicant is the successor in interest to the City of Bethlehem.

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(the “Township”). See Exhibit “A”. Pertinent provisions within the Restrictive Covenants<sup>2</sup> include an explicit statement that:

The City recognizes the area as identified above is zoned “RA” and will only perform those activities permitted in such zoning, and in accordance with any amendments by which the City or its successors are obligated to comply in accordance with the provisions of the Municipalities Planning Code and applicable state law. The City further agrees it will not engage in any landfill activities on the property. The City and the Township recognize, however that the City retains the right and permission to undertake groundwater [sic] testing activities and water abatement activities on the property.

Restrictive Covenants ¶3. The Restrictive Covenants continue, stating:

The restrictions and easements shall constitute a covenant running with all of the property described herein and shall be binding upon the City and all other persons and parties claiming through the City herein, and for the benefit of and limitation upon all future owners of said land and premises, this declaration of restrictions being designed for the purposes of securing the preservation of the Delaware and Lehigh Canal National Heritage Corridor and State Heritage Park; and during such operation of the Landfill to as great a degree as possible, to preserve the original character of and scenic nature of the land.

Restrictive Covenants ¶8

The Restrictive Covenants remain of record, and no legal proceedings have been brought to remove them from the chain of title. Applicant has requested that the Township release or waive the Restrictive Covenants in Notes 1 and 2 on Sheet 2 of 12 of the “Bethlehem Landfill Phase V Expansion Conditional Use Application Plan of Bethlehem Landfill Company” dated January 6, 2023, which was included with the Application. However, the Township cannot unilaterally take that action.

## 2. Argument

An applicant for conditional use approval has the initial burden to make out a prima facie case. Joseph v. North Whitehall Tp. Bd. of Sup’rs 16 A.3d 1209, 1215. This burden includes establishing compliance with the specific, objective criteria of the zoning ordinance as well as establishing a right to build on the subject property in the first place. In this case, the Application must be denied because Applicant failed to establish a prima facie case that they have any right to build on the pertinent portions of the Site. The

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<sup>2</sup> The language of the Restrictive Covenants are substantially the same but only one is quoted here for brevity. Copies of the full documents have been introduced as Exhibits.

Restrictive Covenants facially exclude the proposed landfill, and the Township has no ability to approve the Application without approval under the Donated and Dedicated Property Act.

i. The Restrictive Covenants Prohibit the Expansion

The Restrictive Covenants are applicable to Applicant and expressly prohibit the Expansion. A “restrictive covenant” is a restriction in an instrument relating to real estate by which the parties pledge that something will not be done.” Market Square Properties Development, LLC v. TGRG, LLP 257 A.3d 716 (Pa. Super. 2021). “A restrictive covenant is deemed to run with the land when either the liability to perform it or the right to take advantage of it passes to subsequent purchasers of the land.” DeSanno v. Earle, 274 Pa. 265 (1922). A third party may enforce the terms of a restrictive covenant when the intention of the parties, as determined by the surrounding circumstances, indicates an intention for the restriction to inure to the benefit of a third party. Fey v. Swick, 454 A.2d 551, 554 (Pa. Super. 1982). An individual seeking to remove a restrictive covenant from the chain of title or otherwise develop land in violation of a restrictive covenant must file an action in Quiet Title and prove that the original purpose of the restriction no longer serves a purpose. Vernon Tp. Volunteer Fire Dept., Inc. v. Connor 579 Pa. 364 (2004).

The language of the Restrictive Covenants unambiguously establishes a restriction on the Site for scenic and conservation purposes and even more specifically prohibits landfill activities. See ¶2, 3 of the Restrictive Covenants. The Restrictive Covenants are further clear that the restrictions run with the land for the purpose of assuring preservation of the original character and scenic nature of the land so long as the landfill is in operation. Id. at ¶8. Applicant cannot construct the Expansion without violating the express terms of the Restrictive Covenants. To the extent that Applicant will argue that there is no one with standing to enforce the Restrictive Covenants and prohibit the Expansion, preserving scenic views and conserving land was clearly intended to benefit the public at a large, including neighbors, and they would both be appropriate third-party beneficiaries. See Fey, supra.

ii. The Township Cannot Approve the Application because there has been no Judicial Approval to Approve the Application or Remove the Restrictive Covenants as Required by the Donated or Dedicated Property Act

The Donated or Dedicated Property Act, 53 P.S. §3381 *et. seq.* (the “Act”), controls the disposition of property controlled by a political subdivision which are dedicated to a public use, stating in pertinent part:

All lands or buildings heretofore or hereafter donated to a political subdivision for use as a public facility, or dedicated to the public use or offered for dedication to such use... shall be deemed to be held by such political subdivision, as trustee, for the benefit of the public with full legal title in the said trustee. Id. at 3382.

The Act further states that a municipality has a duty to ensure that lands dedicated to the public are used for the purposes for which they were dedicated or donated except when there is an order of court stating otherwise.<sup>3</sup> Id. at 3383; White v. Township of Upper St. Clair 700 A.2d 188 (Pa. Cmwlth. 2002).<sup>4</sup> This duty is not discretionary. Id. at 194.

Consider more fully White, where a municipality entered into a lease agreement with a communications company to allow the construction of a 350' communication tower on .428 acres of a public park *which was dedicated for recreation, conservation, and historic purposes*. Id. at 194. Objectors sought injunctive relief, arguing that the municipality violated the Act by failing to obtain approval from the Orphans Court to change the use of the park. Id. The Commonwealth Court agreed and held that the township had a mandatory duty to maintain the public park in accordance with the purpose of the dedication. The court reasoned that the municipality does not have authority to consent to the use of public land for any purpose other than the dedicated purposes no matter how "exigent the circumstances."<sup>5</sup> Id. at 195. In fact, the court reasoned, it is a municipality's obligation to defend the dedicated purpose. Id.

Just as was the case in White, the Township here is without authority to approve the Application because doing so would consent to a change of use of land which the Township has committed to the public trust through the Restrictive Covenants. The Township is also without authority to grant the Applicant's request to "release/terminate" the Restrictive Covenants without Orphans' Court approval. The Township, before it can agree that a developer can remove protected trees and construct a landfill on top of lands it previously protected by a scenic and conservation easement, must obtain approval from the Orphans' Court pursuant to the Act. In fact, as trustee of the land by way of the Restrictive Covenants, the Township has an obligation to oppose the Expansion. Without Orphans' Court approval the Township is without jurisdiction to grant the Application, and any approval would be *void ab initio*. The failure to present evidence of the Orphans' Court approval is fatal to the Application.

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<sup>3</sup> The Act requires a municipality disposing of or assenting to a change of use of public lands to first seek Orphans Court Approval. 53 Pa. §3383, 3384.

<sup>4</sup> The Supreme Court of Pennsylvania has interpreted the Act to protect lands, though not expressly dedicated to a municipality for public use, that have been dedicated to the public through the actions of the municipality. In this case, the Restrictive Covenants are clearly intended to benefit the public.

<sup>5</sup> In White, the municipality argued that the communications tower was necessary because it lacked emergency communication infrastructure.

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Further, any assertion that compliance with the Act is an appropriate condition of approval is inconsistent with Pennsylvania Law. Where an applicant does not demonstrate *with evidence* (rather than promises or beliefs) that it meets the requirements of the ordinance, the application should be denied. See Elizabethtown/Mt. Joy Associates, L.P., 934 A.2d 759; Keystone Chem. Co., Inc. v. Zoning Hearing Bd. of Butler Twp., 494 A.2d 1158 (Pa. Commw. Ct. 1985), Appeal of Baird, 537 A.2d 976 (Pa. Commw. Ct. 1988). “Evidence 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.” Edgmont Twp. v. Springton Lake Montessori Sch., Inc., 622 A.2d 418, 419 (Pa. Commw. Ct. 1993). Furthermore, “[a] self-serving declaration of a future intent to comply [with a zoning ordinance] is not sufficient to establish compliance with the criteria contained in the ordinance.” *Id.* at 420. The proper function of conditions is to reduce the adverse impact of a use allowed under a special exception, not to enable the applicant to meet his burden of showing that the use which he seeks is one allowed by the special exception. Elizabethtown/Mt. Joy Assocs., L.P. v. Mount Joy Twp. Zoning Hearing Bd., 934 at 768–69.

St. Luke’s must emphasize that the issues articulated within this memorandum are not technicalities and/or legal theory, the exhibits entered by the Applicant demonstrate that the construction of the landfill in the areas subject to the Restrictive Covenant will have a devastating impact on the scenic views of properties surrounding the Expansion including the St. Luke’s Hospital – Anderson Campus. This impact is shown in Applicant’s own photographic simulations. See Exhibit BLC 105 (Photo Sets #3 and #4). The Restrictive Covenants were put in place to protect these very site views and the proposed landfill represents a direct repudiation of their intent and purpose.

For the above stated reasons, the Conditional Use Application of Bethlehem Landfill Company must be denied without any further proceedings.

Very truly yours,



Joseph A. Bubba

cc: Maryanne Garber, Esq. (*Via hand-delivery and/or email*)  
Gary Asteak, Esq. (*Via hand-delivery and/or email*)  
Michael Corriere, Esq. (*Via hand-delivery and/or email*)  
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