

**BEFORE THE ZONING HEARING BOARD OF EXETER TOWNSHIP,
BERKS COUNTY, PENNSYLVANIA**

IN RE: APPLICATION OF THE EXETER
TOWNSHIP SCHOOL DISTRICT FOR THE
CONSTRUCTION OF A NEW
TRANSPORTATION FACILITY

HEARING DATE: Commenced June 24, 2015,
continued by request to August 25, 2015

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

The Exeter Township School District (the “District”) submitted an Application (as that term is defined below) to the Exeter Township Zoning Hearing Board (the “Board”) seeking relief from the Exeter Township Zoning Ordinance (the “Ordinance”) in the form of a special exception to construct a district-wide public school bus storage and maintenance facility at 5000 Boyertown Pike in Exeter Township. On June 24, 2015, and August 25, 2015, the Board held duly-noticed public hearings pursuant to the Pennsylvania Municipalities Planning Code, 53 P.S. §§ 10101, *et seq.* (the “MPC”), the Ordinance, and the By-Laws of the Board.

Having considered the evidence and testimony presented, the Board voted unanimously, 3-0,¹ to deny the Application, finding that the District failed to establish that the proposed facility constitutes an accessory use to the subject property. Furthermore, even if the District established that the proposed facility constitutes an accessory use, which it does not, the Board is concerned that the District did not present sufficient evidence to permit the Board to determine how the proposed facility would affect the character of the neighborhood, the conservation of property values, or the health and safety of residents or workers located on adjacent properties and in the general neighborhood.

In support of the foregoing determination, the Board makes the following findings of fact and conclusions of law, and enters the following decision:

¹ Since the vote, Lisa Vanderlaan has resigned from the Board and been appointed to the Exeter Township Board of Supervisors. Accordingly, this opinion is authored and issued by Dean R. Batson and William “Chip” White.

I. FINDINGS OF FACT

1. The applicant, the District, is a public school district with an address of 200 Elm Street, Reading, Berks County, Pennsylvania 19606. [See N.T., 6/24/15, Exh. 1].

2. The subject property of this Application, defined below, is located at 5000 Boyertown Pike, Reading, Berks County, Pennsylvania 19606, and is specifically identified on Berks County assessment records by tax parcel identification number 43-5336-14-34-9895 (the “Property”). [Id.].

3. The Property is owned by the District and presently houses the District’s Owatin Creek Elementary School (“Owatin Creek Elementary”). [Id.].

4. The zoning classification for the Property is “R - Rural District” pursuant to Section 390-13 of the Ordinance. [Id.].

5. On April 29, 2015, the District submitted an Appeal Petition (the “Appeal Petition”) seeking to construct a public school transportation facility for District buses (the “Proposed Bus Facility”) at the Property to “serve the [District] for current and future needs.” [Id.].

6. In the Appeal Petition, the District requested a special exception as an accessory use pursuant to Sections 390-13 and 390.30 of the Ordinance or, in the alternative, a variance. [Id.].

7. On May 8, 2015, the District submitted an Addendum to the Appeal Petition (the “Addendum”) (together with the Appeal Petition, the “Application”) providing greater detail with respect to the improvements to be built on the Property, a description of operations, together with additional plans and drawings. [See N.T., 6/24/15, Exh. 2].

8. In the Addendum, the District formally withdrew its request for a variance. [Id.].

9. The Proposed Bus Facility would consist of the following improvements, among others:

- (a) a maintenance building with four garage bays, an office for the transportation department, sanitary facilities for service staff and bus drivers, and a training room;
- (b) a fueling station containing two double wall steel fuel storage tanks - a 12,000 gallon diesel storage tank and a 6,000 gallon gasoline storage tank - installed aboveground with a canopy to protect the fuel distribution equipment;
- (c) an oil/water separator system; and
- (d) parking area for transportation vehicles and employees.

[Id.].

10. The Proposed Bus Facility would utilize both public sewer and water services, as well as a single access point from Route 562/Boyertown Pike. [Id.].

11. The District asserted the following description of the proposed operations at the Proposed Bus Facility:

- (a) During the school year, approximately 48 transportation vehicles would depart from the Proposed Bus Facility at approximately 6:00 a.m. (returning at 9:00 a.m.), and again at approximately 2:00 p.m. (returning at 5:00 p.m.);
- (b) During the fall, winter, and spring athletic seasons, an average of two vehicles would depart the Proposed Bus Facility per day for athletic event transportation (approximately 435 trips over a period of 220 days). The departure and arrival times would vary, but the majority of weekday trips would depart between 2:00 and 3:00 p.m., and return after 6:00 p.m. When athletic teams are in competitions on a weekend, a limited number of trips may depart as early as 5:00 a.m. and return by 12:00 a.m.; and
- (c) During the extended school year, transportation for students in the District's extended school year program is provided from the last week of June until the third week of August. Approximately 13 vehicles would transport students, with the majority of vehicles departing at approximately 7:00 a.m. (returning at 9:00 a.m.), and again at approximately 10:30 a.m. (returning at 12:00 p.m.).

[Id.].

12. On June 24, 2015, the Board held a duly-noticed and posted public hearing on the Application at the Exeter Public Library (the “First Hearing”). [See N.T., 6/24/15, Exhs. 3-6].

13. At the First Hearing, the District presented sworn testimonial evidence from the following witnesses: (1) the President of the Exeter Township Board of School Directors, Robert Quinter (“Mr. Quinter”); (2) the District’s architect, Justin Istenes (“Mr. Istenes”); (3) the District’s sub-consultant and landscape designer, Aristides Otero (“Mr. Otero”); (4) the District’s traffic engineer, James Dimmerling; and (5) the District’s Director of Facilities, Kenneth Pitts. [See N.T., 6/24/15, generally].

14. The Board also accepted sworn testimonial evidence from Exeter Township Zoning Officer, Cheryl Franckowiak, and Vice-Chairman of the Exeter Township Planning Commission, John Bittig, as well as statements from owners of adjacent parcels and the general public. [Id.].

15. During his direct examination, Mr. Quinter testified on behalf of the District that the District provides bus transportation for approximately 90 percent of its students, which amounts to 3,690 seats. [Id. at p. 23].

16. Mr. Quinter further testified that the District’s transportation fleet consists of 50 buses and 10 vans. [Id. at p. 24].

17. In response to Board questioning, Mr. Quinter testified on behalf of the District that Proposed Bus Facility is intended to serve the District’s entire student population:

Chairman: Well, I think it’s pretty clear that the --- this [Proposed Bus Facility] is designed and intended to serve the entire District; is that correct?

Mr. Quinter: It is, sir.

[Id. at p. 42].

18. This was confirmed by the District’s architect, Mr. Istenes:

Chairman: When you evaluated sites and evaluated this site, specifically, did you always intend for this to be a District-wide transportation center?

Mr. Istenes: When we were hired, the intent was for the project to be District-wide. . . . To have all the buses in one location, to have maintenance there, to have ample parking for their staff all [in] one location.

Chairman: Okay, but did the District ever ask you to look at the proposal that would’ve been a transportation facility dedicated to vehicles that were solely to be used for Owatin Creek Elementary?

Mr. Istenes: Not solely for Owatin Creek [Elementary].

[Id. at pp. 99-100].

19. Mr. Istenes later further confirmed that the Proposed Bus Facility is intended to be an “accessory use of the District” as a whole. [Id. at pp. 134-135].

20. According to Mr. Quinter’s testimony, Owatin Creek Elementary has a census of 600 to 700 students and approximately 575 to 625 of these students are bused. [Id. at p. 42].

21. At the conclusion of the First Hearing, the Board presented the District with an opportunity to provide a written submission addressing, among other things, how the Proposed Bus Facility met the definition of “accessory use”² under the Ordinance. [Id. at pp. 230-231].

22. Further, the Board asked the District to address the following two cases with specific application to the legal issues before the Board concerning the meaning of “accessory use”: Mitchell v. Zoning Hrg. Bd. of the Borough of Mount Penn, 838 A.2d 819 (Pa. Commw. Ct. 2004); and Easton

² “[A] subordinate use of a portion of a lot, or of a building thereon, which is customarily incidental to the main or principal use of the land or a building on it.” See Ordinance § 390-6.

Area Sch. Dist. v. Palmer Tp. Zoning Hrg. Bd., No. 578-CD-2009, 2009 WL 9102369 (Pa. Commw. Ct. Dec. 16, 2009) (collectively, the “Cases”). [Id. at pp. 237-238].

23. On July 15, 2015, the District submitted a Brief in support of its Application (the “Brief”), together with supporting Affidavits from the District’s Supervisor of Transportation, Richard Wegman (“Mr. Wegman”), and Mr. Otero. [See Brief, attached as Exhibit A].

24. The District also submitted an enclosure letter requesting that the Board conduct a second hearing to permit the District to present additional evidence concerning the matters set forth in the Affidavits. [Id.].

25. In connection with its request for a second hearing, the District agreed, in writing, to waive any deadlines set forth in Section 10908 of the MPC, including, but not limited to, 53 P.S. §§ 10908(1.2), (9). [See N.T., 8/25/15, Exh. 8].

26. On August 25, 2015, the Board conducted a second duly-noticed and posted public hearing of the Application at the Exeter Township Municipal Building (the “Second Hearing”) (together with the First Hearing, the “Hearing”). [Id. at Exhs. 9-12].

27. At the Second Hearing, the District presented testimonial evidence from Messrs. Wegman and Otero, who testified about, among other things, transportation facilities at other public school districts in Berks County. [See N.T., 8/25/15, generally].

28. The District did not specifically address the Cases at the Hearing or in the Brief. [See N.T., 6/24/15; see also N.T., 8/25/15; Exhibit A].

II. CONCLUSIONS OF LAW

29. The Board’s role is to review the Application to ensure that the facts, circumstances, and conditions exist and comply with the standards of the Ordinance and warrant approval of the

Application. See Broussard v. Zoning Bd. of Adjustment of City of Pittsburgh, 907 A.2d 494, 499 (Pa. 2006).

30. Section 390-13(B) of the Ordinance (Uses Permitted by Right), provides that a landowner may use land and buildings located in the Rural District zoning classification for the following purposes, and no others, unless a special exception or conditional use is granted: (1) single family detached dwelling; (2) woodland or game preserve, wildlife sanctuary, or similar conservation use; (3) municipal use; (4) no impact home based business subject to § 390-39; (5) agriculture, horticulture, animal husbandry and dairy farming, except intensive agriculture activities, as defined in § 390-6, and subject to § 390-32; (6) open space/conservation development; (7) conventional development (single family residences) of less than 10 acres; (8) forestry activities including, but not limited to, timber harvesting per Section 629 [sic]; (9) roadside stands for the sale of farm products grown on the premises per § 390-32A(8); (10) accessory uses and structures to the above uses when on the same lot as the permitted use per §§ 390-29 and 390-30; (11) yard sale per § 390-64; and (12) home occupation subject to § 390-40.

31. Section 390-13(C) (R - Rural District) of the Ordinance identifies seven uses expressly permitted by special exception: (1) places of worship; (2) state-licensed schools; (3) outdoor recreation; (4) fire companies; (5) campgrounds; (6) group homes; and (7) “accessory uses and structures to the above-permitted uses when on the same lot as the permitted use per §§ 390-29 and 390-30.” See Ordinance, § 390-13(C).

32. The review of a request for a special exception is subject to specific standards and criteria, and an applicant for special exception must demonstrate compliance with the following criteria, as well as any other criteria specified elsewhere in the Ordinance for the proposed use in question:

- (a) the proposed use must be specifically authorized as a “Special Exception Use” in zoning district R - Rural District;
- (b) the special exception shall only be granted subject to any other applicable conditions and safeguards required by the Ordinance;
- (c) the use shall not “adversely affect the character of the general neighborhood, or the conservation of property values, or the health and safety of residents or workers on adjacent properties and in the general neighborhood;”
- (d) the use shall be “of such size and so located and laid out in relation to the access streets that vehicular and pedestrian traffic to and from such use will not create undue congestion or hazards prejudicial to the general neighborhood;”
- (e) services and utilities shall be made available to adequately service the proposed use; and
- (f) the special exception shall be consistent with the Township Plan.

See Ordinance, § 390-96(H)(1).

33. If the criteria for a special exception are satisfied, a special exception is “expressly permitted absent a showing of a detrimental effect on the community.” Freedom Healthcare Servs. v. Zoning Hearing Bd. of City of New Castle, 983 A.2d 1286, 1291 (Pa. Commw. Ct. 2009).

34. With respect to accessory use, Section 390-6 (Terms Defined) of the Ordinance defines this as “a subordinate use of a portion of a lot, or of a building thereon, which is customarily incidental to the main or principal use of the land or a building on it.” See Ordinance § 390-6.

35. Accessory use questions are intensely fact dependent determinations that concern whether or not a particular secondary or subordinate use is appropriately associated with the particular principal use in the factual situation involved. Hess v. Warwick Tp. Zoning Hearing Bd., 77 A.2d 1216, 1224 (Pa. Commw. Ct. 2009).

36. The applicant has the duty to present evidence and the burden of persuading the board that the proposed use satisfies the Ordinance's requirements for a special exception. Freedom Healthcare Servs., 983 A.2d at 1291.

37. Section 390-13 of the Ordinance does not provide for a bus transportation facility as a use permitted by right. See Ordinance, § 390-13(B).

38. The Proposed Bus Facility is not a permitted use as of right on the Property.

39. The District's Application is limited to the issue of whether the Proposed Bus Facility constitutes an accessory use to Owatin Creek Elementary. [See N.T., June 24, 2015, Exhs. 1-2].

40. The Pennsylvania Commonwealth Court, interpreting (a) facts analogous to those present here, and (b) a definition of "accessory use" nearly identical to the definition here,³ affirmed a trial court determination that a bus maintenance garage serving a school district's entire bus fleet on a property used primarily by an elementary school was not an "accessory use" to the elementary school. See Easton, 2009 WL 9102369, generally.

41. In the Easton case, from 1968-1974, the subject school district parked buses on the property that served only the elementary school located on the property. Id. at *1.

42. In 1974, however, the school district built a garage and maintenance facility in the parking area and, by 1994, the school district used the facility for the maintenance and parking of all buses used throughout the school district. Id.

43. The trial court determined that, until 1974, the school district's parking of the buses on the property was an allowable "accessory use" because the parking of buses was limited to those buses that transported students to and from the elementary school located on the property. Id. at *2.

³ The subject zoning ordinance in Easton defined "accessory use" as "[a] use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use or building." Easton, 2009 WL 9102369 at *1.

44. When the school district built the bus maintenance garage and began using the property for district-wide bus operations, however, the accessory use became a nonconforming second principal use on the property. Id.

45. The Commonwealth Court affirmed the Easton trial court's decision, concluding that the trial court correctly analyzed the case. Id. at *3.

46. In Mitchell, the Commonwealth Court arrived at the same conclusion with regard to the meaning of accessory use when reviewing similar facts and, again, nearly identical accessory use language in the relevant zoning ordinance.⁴ See Mitchell, 838 A.2d at 826.

47. In Mitchell, the Antietam School District requested a special exception to permit the establishment of an elementary school on property located in Mount Penn Borough that housed a vacant former high school building, as well as a second special exception to permit the renovation of the former high school gymnasium and auditorium as an accessory use to the elementary school. Id. at 822-24.

48. As to the proposed accessory use, the Antietam School District sought to renovate the former high school gymnasium and auditorium for use not only by the students attending the proposed elementary school, but also those attending other schools within the district. Id.

49. The Zoning Hearing Board of Mount Penn Borough granted the requested special exceptions and adjacent landowners appealed. Id. at 824.

50. On appeal, the Berks County Court of Common Pleas modified the grant of the special exception for an accessory use of the gymnasium and auditorium, limiting the use of those facilities to the students attending the elementary school located on the property only. Id.

51. On appeal, the Commonwealth Court affirmed the Berks County Court of Common Pleas, concluding that the use of the existing gymnasium and auditorium for the students attending the

⁴ The subject zoning ordinance in Mitchell defined "accessory use" as "a subordinate use of a portion of a lot which is customarily incidental to the main or principal use of the land or of a building on a lot." Mitchell, 838 A.2d at 826.

elementary school, only, was customarily incidental and secondary to the use of the property as an elementary school. Id. at 827. Thus, this use constituted an “accessory use.” Id.

52. The Commonwealth Court further determined, however, that the proposal to establish a full-size auditorium and gymnasium for use by all students within the Antietam School District was not secondary or customarily incidental to the elementary school. Id. Thus, such a use was not an “accessory use.” Id.

53. Here, the District alleges that the Proposed Bus Facility is an “accessory use” to the Property housing Owatin Creek Elementary. [Exhs. 1-2].

54. The main or principal use of the Property is as an elementary school providing elementary education to the students of Owatin Creek Elementary, which has a census of 600 to 700 students.

55. In its Application and at the Hearing, however, the District confirmed that the Proposed Bus Facility is intended to serve the entire District - i.e., its proposed use is not limited to Owatin Creek Elementary. [See N.T., 6/24/15, pp. 42, 99-100, 134-135].

56. The Proposed Bus Facility seeks to house all of the District’s 50 buses and 10 vans, which provide 3,690 seats to District students attending the District’s schools. [Id. at pp. 23-24, 42; Exhs. 1-2].

57. Students of Owatin Creek Elementary comprise only a small fraction of the students serviced by the Proposed Bus Facility. [Id. at p. 42 (confirming that 575 to 625 Owatin Creek Elementary students are bused)].

58. Thus, the District’s proposed use is not “customarily incidental to the main or principal use” of the Property and is not an accessory use within the meaning of the Ordinance. See Easton, 2009 WL 9102369 at *3; see also Mitchell, 838 A.2d at 827.

59. In its Brief, the District relies heavily on Southco, Inc. v. Concord Township, 713 A.2d 607 (Pa. 1998), for the proposition that the Proposed Bus Facility constitutes an accessory use. See Exh. A.

60. In Southco, the applicant sought to construct a Turf Club, consisting of a restaurant with off-track wagering. Southco, 713 A.2d at 608-609.

61. The Pennsylvania Supreme Court was asked, in part, to determine whether the wagering component of the proposed facility constituted an accessory use under the relevant ordinance. Id.

62. The Supreme Court determined that the wagering component of the facility was an accessory use because (a) it was dependent on, and subordinate to, the restaurant component under the Race Horse Industry Reform Act, 4 P.S. § 325.101, et seq., which did not permit a wagering facility to exist without a restaurant component, and (b) the wagering component constituted an entertainment activity akin to other forms of entertainment provided in township restaurants. Id. at 613-614.

63. Therefore, the Southco case concerned a proposed use intended to service or benefit the subject property only. Id.

64. As discussed above, however, here, the District intends to use the Proposed Bus Facility to service or benefit all properties within the District that contain a school – not the subject Property alone. [See N.T., 6/24/15, pp. 42, 99-100, 134-135].

65. For the District's proposed use to constitute an accessory use, the Board would have to find that constructing a facility that houses and services a transportation fleet providing 3,690 seats to students across the District is customarily incidental and subordinate to the provision of elementary education to Owatin Creek Elementary's 600 to 700 students. The Board cannot make this finding.

66. This case is analogous to the Mitchell and Easton cases and the reasoning and holding of the Southco case is clearly distinguishable.

67. Furthermore, even if the District established that the Proposed Bus Facility constitutes an accessory use, which it did not, the Board is concerned that the District did not present sufficient evidence to permit the Board to determine how the proposed improvements would affect the character of the neighborhood, the conservation of property values, or the health and safety of residents or workers located on adjacent properties and in the general neighborhood.

68. For example, the District's architect could not sufficiently address concerns of adjacent landowners regarding the dangers and potential health risks associated with the proposed fueling station. [See N.T., 6/24/15, pp. 72-82].

69. Accordingly, the District failed to meet its burden to prove that it is entitled to a special exception.

DECISION

For the reasons set forth in detail above, the Board finds that the District failed to meet its burden of establishing that it is entitled to a special exception to construct the Proposed Bus Facility at the Property. The Application is, therefore, denied.

The Findings of Fact, Conclusions of Law and Decision set forth herein are rendered by the Zoning Hearing Board members whose signatures appear on their individual signature pages.

Dated this 28th day of September, 2015.



Dean R. Batson, Chairman, Zoning Hearing Board



William "Chip" White, Member, Zoning Hearing Board

EXHIBIT A

LAW OFFICES
of
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Michael A. O'Pake (2010)

July 14, 2015

Samuel W. Cortes, Esquire
Fox Rothschild, LLP
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Re: Appeal of Exeter Township School District

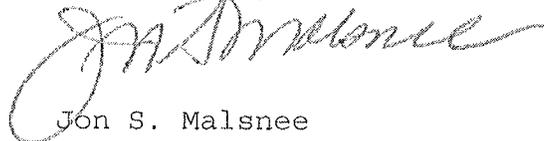
Dear Mr. Cortes:

Enclosed please find our Brief in support of our request for special exception to allow the school bus transportation facility to be constructed at the Owatin Creek site. In addition to the Brief, I am including Affidavits of Richard Wegman and Aristides Otero setting forth facts which I believe the Board could take judicial notice of, but if not, are supported by affidavits of the witnesses who could present the live testimony if called upon to do so.

If the Board is unwilling to take judicial notice of these facts, our next request would be that the Board admit these Affidavits into evidence. Alternatively, if the Board desires this evidence to be presented by live testimony, the School District will waive time requirements to allow for a second hearing.

I look forward to your advice in this regard.

Very truly yours,



Jon S. Malsnee

JSM:als
Enclosures

cc: J. Benjamin Nevius, Esq.
Dr. Beverly A. Martin, Supt.
Robert H. Quinter Jr., Bd. Pres.

ZONING HEARING BOARD OF EXETER TOWNSHIP
IN RE: APPEAL OF EXETER TOWNSHIP SCHOOL DISTRICT

APPLICANT'S BRIEF

I. BACKGROUND. The Exeter Township School District has been providing bus transportation to its students by school bus since the 1950s. The present school bus transportation facility located at Kerr and Shelbourne Roads has existed since that time (Quinter, N.T. 23). This facility is now antiquated, cannot be rehabilitated to serve as a safe modern school bus transportation facility, and needs to be replaced (see testimony of School Board President, Robert Quinter, N.T. 24, 38; Architect Justine Istenes, N.T. 59-64; Planning Commission Vice-Chairman, John Bittig (N.T. 211)). The access to Shelbourne Road has poor sight distance (Istenes, N.T. 63-64; Dimmerling, N.T. 153; Photo, Exhibit A-2). The space is inadequate to meet current zoning requirements (Istenes, N.T. 59-64). The School District has explored alternative sites for relocating the school bus transportation facility (see Quinter, N.T. 27-29), but none are feasible even if they were permissible under zoning. Because they are not located in the center of the student population (Quinter, N.T. 31-33; Exhibit A-3), their use will result in additional costs to the School District in lost State

reimbursement of approximately \$100,000 annually and the increased costs of drivers' time and wear on the buses (Quinter, N.T. 31). Furthermore, there would be the additional cost of purchasing land (the proposed Owatin Creek site is owned by the School District, Exhibit A-1). However, the Zoning Ordinance has not provided for school bus transportation facilities in any of its Zoning districts within the Township, so there is no assurance that a public school bus transportation facility is a principal use permitted anywhere within Exeter Township.

II. SPECIAL EXCEPTION. The School District is before the Zoning Hearing Board requesting a special exception to permit the use of a small portion of the Owatin Creek site (Exhibit A-1) for its school bus transportation facility. The School District is before the Zoning Hearing Board for two reasons:

a. the previous Order of the Zoning Hearing Board of December 29, 2008 requiring a special exception for any other use; specifically it provides, in pertinent part, as follows:

"3. Any further use other than the school as proposed by the Petitioner will require the filing of a petition with this Board for a special exception, including any additional schools on the property."

b. Section 390-13.C.(7) requires a special exception for accessory uses or structures located in the R-Rural District.

For reasons addressed infra, the School District believes the placement of a school bus transportation facility on the

Owatin Creek site qualifies as an accessory use. Section 390-13.C.(7) specifically recognizes that non-residential accessory buildings, structures and uses will include garages and maintenance buildings (390-30.B.(3)), and the Board's Order of December 29, 2008 recognizes that the Owatin Creek site could have further uses other than a single school. A building for maintenance and servicing of student transportation vehicles constitutes an accessory structure.

III. PROCEDURE.

a. Application. The Appeal Petition and Supplemental Addendum were filed in duplicate on the form prescribed by the Board specifying the use for which a special exception is sought and containing material required for a zoning permit and a description of operations, all as required by the procedure for application. Section 390-97. As noted, this included information required for a zoning permit under 390-83.A.(2). This was included in the School District's Application and Supplement (Exhibits 1 and 2) and testified to without contradiction by our landscape designer, Aristides Otero (N.T. 105-109).

The School District has presented uncontradicted evidence that it can meet the standards for a special exception under 390-96.H. and that it can meet the general regulations under Article 6. (See, testimony of Aristides Otero (N.T. 109-123; Istenes,

N.T. 69). Furthermore, our traffic engineer has submitted testimony that the School District can and will satisfy Section 390-96.H.(1)(d) and meet any PennDOT requirements. The requirements of PennDOT will supersede local requirements as the Boyertown Pike (Route 562) is a State road and PennDOT controls the State highway access. (Testimony of James Dimmerling (N.T. 150-157). Nevertheless, the School District can comply with Section 390.96.H.(1)(d)).

Insofar as the two fuel tanks and dispensing pumps are concerned, the decision to place them above ground was an economic decision, but also provided greater safety. The tanks will be EPA certified, meet all DEP requirements, and are more robust than underground tanks (Pitts, N.T. 179-181). The construction of the tanks will be double-walled ballistic grade metal, with overflow protection (Istenes, N.T. 69-70). Insofar as the site is concerned, it will be designed to keep any fuel from escaping the site (Istenes, N.T. 70-71; Otero, N.T. 116-121). In short, the evidence is uncontroverted that the presence of the fuel tanks and dispensing pumps will present no threat to the health and safety of the neighborhood and its occupants.

b. Accessory Use and Structure. The Pennsylvania Supreme Court case of Southco, Inc. v. Concord Township, 552 Pa. 66, 713 A.2d 607 (1998), explored the definition of "accessory use" in the context of the turf club containing a permitted restaurant

use and an off-track wagering facility. The off-track wagering facility was neither a permitted nor prohibited use in the township. 713 A.2d at 608. A majority of the Turf Club's revenues would be generated by the wagering facility. 713 A.2d at 610. The Supreme Court developed a two prong test for the Concord Township Zoning Ordinance, which Ordinance in pertinent part defines accessory use as:

"...a use conducted on the same lot as, and subordinate to, a principal use to which it is related (which use is clearly incidental to and customarily found) in connection with a particular principal use." 713 A.2d at 611.

The Exeter Township Zoning Ordinance utilizes similar language in its definitions of accessory building and accessory use at Section 390-6:

"ACCESSORY BUILDING-a building subordinate to the principal building on a lot and used for purposes customarily incidental to those of the principal building (see §§390-29 and 30).

ACCESSORY USE-a subordinate use of portion of a lot, or of a building thereto, which is customarily incidental to the main or principal use of the land or of a building on a lot."

The Zoning Ordinance in Southco described an accessory use as "subordinate" to the principal use, and as incidental to and customarily found in connection with a particular principal use (713 A.2d at 611), as does the Exeter Township Zoning Ordinance. In determining whether the wagering facility was secondary to the

restaurant facility, the court noted that the wagering facility occupied approximately 25% of the area of the building to be constructed and the restaurant 75% of the area of the building to be constructed. As Exhibit A-6 establishes (see details in takeoff of Exhibit A-6 in Supplement i, attached), in comparing the structure, the square footage of the Owatin Creek Elementary School is 106,036 square feet, or 2.8% of the site, whereas the proposed transportation garage and maintenance building would be only 12,124 square feet, or .30% of the site. Examining the use, 470,448 square feet, or 12.5% of the site, is dedicated to school use, including building, parking, athletic fields and trail, whereas 147,203 square feet, or 3.9% of the site, would be utilized by the school bus transportation facility, representing building, drive and parking. In the Southco case, the court found that square footage was an important consideration in determining which is a principal use and which is a secondary use. The court concluded that because the turf club restaurant occupied 75% of the site, it was the principal use and the off-track betting facility occupied 25% of the building and was a secondary use. It is submitted that using the Pennsylvania Supreme Court litmus test, the school bus transportation facility clearly is a secondary structure and a secondary use of the property based upon square footage. Furthermore, were it not for the principal use, that is, operating a school, there would never

be a need for a school bus facility. The Department of Education has established extensive regulations governing Pupil Transportation and reimbursement (see, 22 Pa. Code Chapter 23), much as the State has regulated wagering facilities in the Southco case. In conclusion, based upon all the criteria in Southco, the school bus transportation facility would be a secondary structure and a secondary use and, thus, satisfy the first prong of the Southco accessory use test.

As for the customarily incidental prong of the accessory use test, the Supreme Court has concluded:

"...an accessory use may exist even where there is no evidence that a majority, or even a substantial number, of similar properties are engaged in similar accessory use." Ibid.

Therefore, as the courts held in the case of Thomas v. Zoning Hearing Board, 121 Pa. Cmwlth. 393, 550 A.2d 1045 (1988), horse stables are a permitted accessory use in a low density residential district even though other stables are not common, and in Klein v. the Township of Macungie, 39 Pa. Cmwlth. 81, 395 A.2d 609 (1978), tennis courts constitute a permitted accessory use even though a majority or even a substantial number of residences within the community did not contain the courts. Ibid.

It is not uncommon for schools in Berks County to have all their student transportation vehicles stored and

serviced at one site on property adjacent schools. One need only travel Route 724 West into Shillington to see where Governor Mifflin has its school bus facilities adjacent to three schools. Continue west on Route 724 into Sinking Spring where Wilson School District has its Cornwall Terrace Elementary School and Junior High School adjacent to its bus facility with onsite fueling and its buses. Then continue further West on 422 and arrive at Conrad Weiser's fleet of BCIU student transportation vehicles nestled between the Middle School and the High School. As with Exeter Township School District, the school bus facilities of both Wilson and Governor Mifflin contain fuel tanks and filling stations. The Conrad Weiser location, across the street from a gas station, does not. As with Exeter Township School District's present facility, these school bus facilities have their own fuel tanks and dispensing equipment on site for economic reasons as part of the accessory use.

Exeter Township, the municipality, has its own fuel tanks and dispensing station located adjacent to its municipal building and grounds where it stores and services Township vehicles. The presence of storage and fueling and servicing of municipal vehicles at its municipal

headquarters is itself an accessory use by the Township, secondary to its principal use as a municipal facility.

Southco emphasized the importance of Section 603.1 of the Municipalities Planning Code (MPC) (53 P.S. §10603.1) when it held:

"...zoning ordinances must be liberally construed and interpreted broadly so that a landowner may have the benefit of the broadest possible use of the land." 713 A.2d 609.

All school districts today provide student transportation. The economies of scale favor all vehicles at a single centralized location (Quinter, N.T. 34-36). Locating the school bus transportation facility adjacent to an existing school further cuts costs on travel time to the buildings that are adjacent. School bus facilities are specifically allowed nowhere in Exeter Township, but to prohibit a school bus transportation facility as an accessory use and structure at the location proposed adjacent to Owatin Creek Elementary School would be adverse to the public interest. The Shelbourne/Kerr Road site is not capable of being rehabilitated and made safe (Quinter, N.T. 38) and the attendant costs of a more distant location, or outsourcing (Quinter, N.T. 37), are prohibitive.

We, therefore, request the Board grant our request for a special exception to allow the school bus

transportation facility at the proposed Owatin Creek
location.

Respectfully submitted,

JON S. MALSNEE, ESQUIRE, P.C.

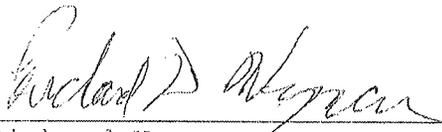
By 
Jon S. Malsnee, Esquire
Attorney for Applicant
Exeter Township School District

Owatin Creek E.S. (Property: 86.16 acres)			
	Square Feet	Acerage	% of site
Building	*106,036	2.43	2.80%
	*includes all floors		
Elementary School Site Use	**470,448	10.8	12.50%
	**Building, Parking, Athletic Fields, Trail		
Proposed Transportation Facility			
	Square Feet	Acerage	% of site
Building	12,124	0.27	0.30%
Bus Facility Site Use	^147,203	3.37	3.90%
	^Building, Drive and Parking		

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF BERKS :

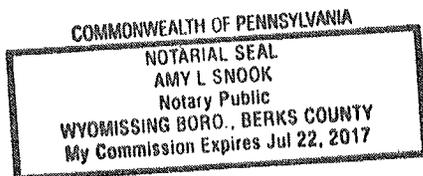
AFFIDAVIT

I, Richard Wegman, being duly sworn according to law, depose and say that I am the Supervisor of Transportation for the Exeter Township School District. In such capacity, I am generally aware of parking and servicing of buses on school property within the County. The only other district which operates its own bus fleet besides Exeter is Wilson School District which parks all of its buses at a centralized location on the Wilson School District property adjacent to Southern Middle School and Cornwall Terrace Elementary School. Other schools such as Governor Mifflin and Conrad Weiser park all their buses on school property where there are schools. Both Wilson's and Governor Mifflin's school bus transportation facilities have fuel tanks and a fueling station. Governor Mifflin has three schools on the site where it has its transportation facility.


Richard Wegman

Sworn and Subscribed Before Me
This 14th day of July, 2015.


Notary Public



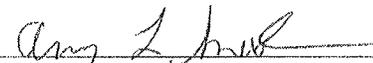
COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF BERKS :

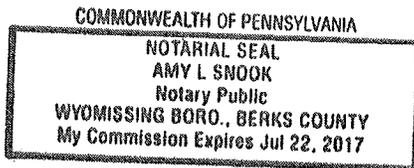
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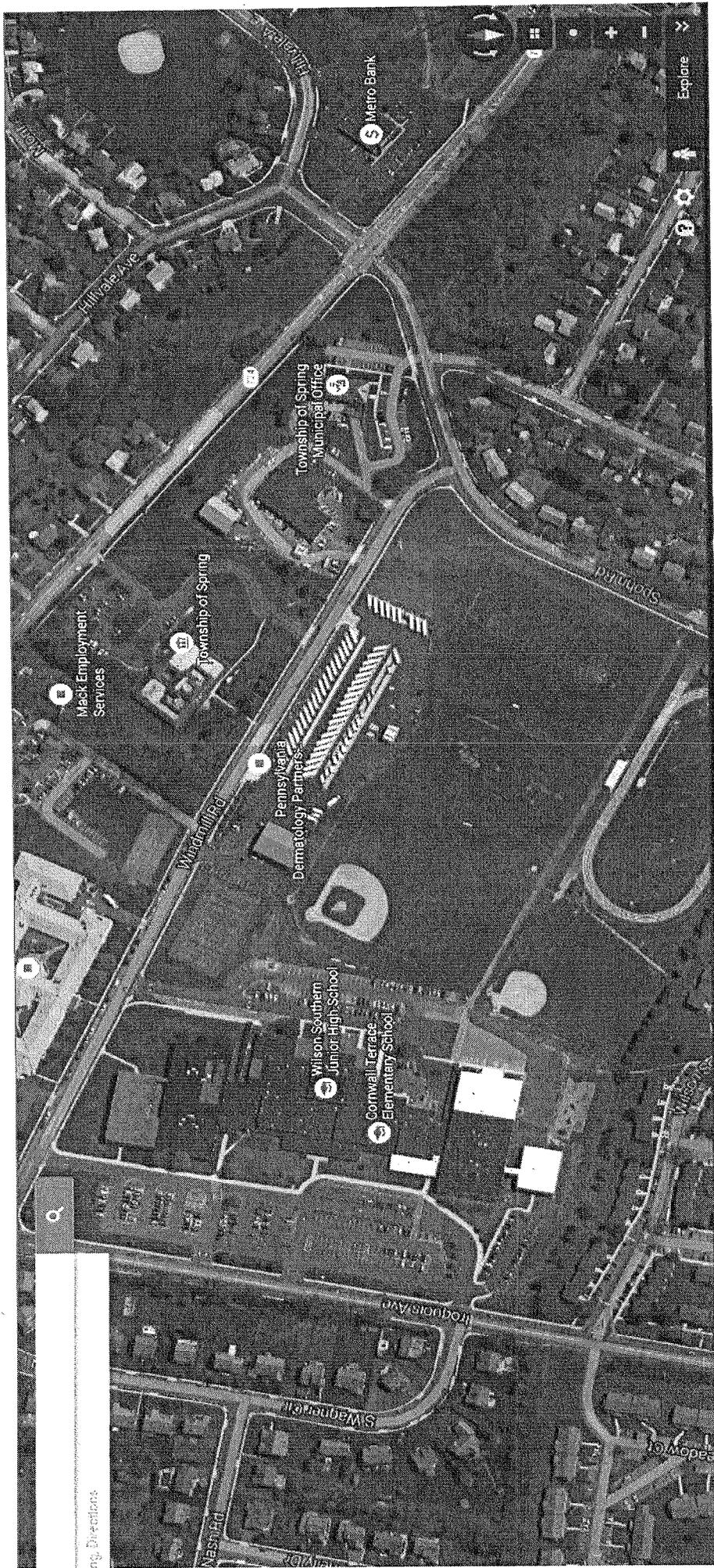
I, Aristides Otero, being duly sworn according to law, depose and say that I am a landscape designer employed by Stackhouse Bensinger, Inc. Stackhouse Bensinger has provided engineering services to Wilson School District and is familiar with the District-wide bus facility with service building and onsite fueling located at a site it shares with Southern Middle School. Governor Mifflin has district-wide facility on the same property as three schools. It also has onsite fueling with 10,000 gallon tanks (monitored per DEP audits). The service building has three bays for light transportation work and one wash bay. It also has two site maintenance bays and an office. Attached to this statement are copies of aerial photographs of the Wilson and Governor Mifflin sites, and Conrad Weiser site.

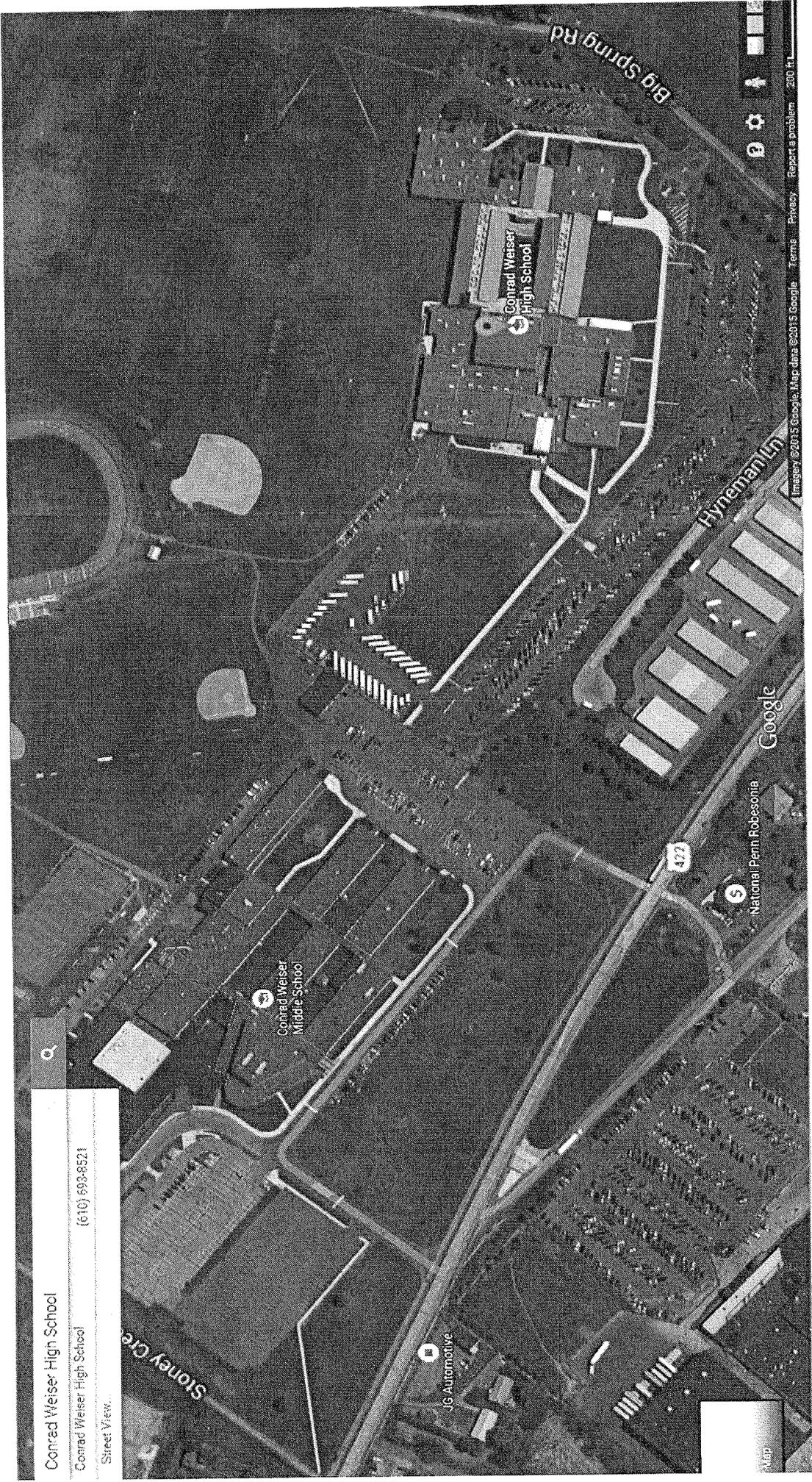

Aristides Otero

Sworn and Subscribed Before Me
This 14th day of July, 2015.


Notary Public







Conrad Weiser High School
Conrad Weiser High School
(610) 693-8521
Street View

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