

BEFORE THE
MALVERN BOROUGH COUNCIL
CHESTER COUNTY, PENNSYLVANIA

IN RE: :
 :
237 KING PARTNERS, LLC :
 :
FOR CONDITIONAL USE APPROVAL :
PURSUANT TO MALVERN ZONING :
ORDINANCE SECTIONS 1501 (C-4 USE :
REGULATIONS); 2425 (MULTI USE :
DEVELOPMENT); 2910 (CONDITIONAL :
USES) AND RELATED ORDINANCE :
STANDARDS :

DECISION

This is an application by 237 King Partners, LLC (“King Partners”) for conditional use approval pursuant to Sections 1501 (C-4 Use Regulations) of the Malvern Borough Zoning Code (the “Code,” “Zoning Ordinance” or “Ordinance”); Section 2425 (Multi Use Development); Section 2910 (Conditional Uses), and related Ordinance standards to provide for a multi-use development and revitalization project in the Borough of Malvern (the “Borough”). The Application relates to Tax Parcel UPI Nos. 2-4-148; 2-4-150; 2-4-151; 2-4-152; 2-4-153; 2-4-158; 2-4-159; 2-4-160; 2-4-161; and 2-4-162 (the “Property”) on the north side of East King Street, extending to the Willistown Township line.

Prior to the hearings before Borough Council and as required by Section 2910.C.1 of the Malvern Borough Zoning Ordinance, the Planning Commission conducted a Public Information Meeting on March 17, 2010. Hearings before Borough Council were held on following dates: April 20, 2010; June 1, 2010; June 28, 2010; and July 6, 2010.

Present at the hearings were all members of the Malvern Borough Council. To the extent that any Council member missed an individual hearing, the parties to the proceedings agree that a missing Council member may review the transcript of proceedings and fully participate in any decision. Also present at the hearings was Borough Solicitor, Wendy W. McLean, Esquire, as was Malvern Borough Planning Commission Solicitor, Fronefield Crawford, Jr., Esquire (made a party on June 1, 2010), Mayor Gerard J. McGlone, and Township Manager Sandra Kelley. The Applicant, 237 King Partners, LLC, was represented by Andrew D.H. Rau, Esquire.

All members of the Malvern Borough Council are familiar with the Application, testimony and exhibits presented. After reviewing all of the hearing information received, the following Findings of Fact, Discussion, Conclusions of Law and Order are issued by the Malvern Borough Council.

FINDINGS OF FACT

1. On or about February 9, 2010, 237 King Partners, LLC filed with Malvern Borough an application for conditional use approval (the "Application") pursuant to Zoning Ordinance Sections 1501 (C-4 Use Regulations); 2425 (Multi Use Development); 2910 (Conditional Uses) and related Ordinance standards to permit a multi-use development and revitalization project in the C-4 High Intensity Commercial District. (Exhibit A-6)
2. The Application followed a legislative petition process that culminated in Ordinance 2009-3, enacted on April 21, 2009, which facilitated the multi-use development project currently contemplated. (Exhibit A-8).
3. The Parties to the proceeding consist of the Borough Planning Commission, and the Applicant.

4. The Property consists of approximately 3.917 acres in the Borough on the north side of East King Street, including tax parcels UPI Nos. 2-4-148; 2-4-150; 2-4-151; 2-4-152; 2-4-153; 2-4-158; 2-4-159; 2-4-160; 2-4-161; and 2-4-162. To the east of the Borough line with Willistown Township, there are three additional tax parcels, UPI Nos. 54-1-27; 54-1-28; and 54-1-29 (the “Willistown Property”).

5. The Applicant or its predecessors acquired legal title to the Property and the Willistown Property over time, culminating in the current assembly of land all held by King Partners. This includes the CNS Flooring property, UPI No. 2-4-158, which connects the two main portions of the Property. (Exhibits A-4; A-5)

6. In addition, King Partners has entered into a cross-easement agreement providing for access and circulation among King Partners and certain nearby property owners with land adjoining the Property. (Exhibit A-5)

7. The hearing was duly convened subject to proper notices and procedure, and continued to dates certain throughout the course of the proceedings. (Exhibits A-1; A-2; and A-3)

8. During the hearings, the following exhibits were submitted into the record:

BOROUGH COUNCIL EXHIBITS

- B-1 Proof of Publication
- B-2 List of those to whom notice was sent

APPLICANT EXHIBITS

- A-1 Legal advertisement submission to Daily Local News
- A-2 Proof of publication
- A-3 Online confirmation from Pennsylvania Public Notices of legal advertisements in Daily Local News placed Sunday, April 4, 2010 and Sunday, April 11, 2010

A-4	Excerpts from property deeds
A-5	Agreement of cross-easement
A-6	Conditional Use Application of 237 King Partners, LLC dated February 9, 2010
A-7	Conditional Use Plan, prepared by Chester Valley Engineers, dated January 27, 2010, 19 plan sheets
A-7a	Chester Valley Engineers Site Rendering
A-8	Borough of Malvern Ordinance No. 2009-3, Multi-Use Development Zoning Ordinance amendments of April 21, 2009
A-9	Heffner Architects conceptual drawings
A-9A	Large elevation
A-9B	Cornerstone Terrace photos
A-9C	Photo depictions of other communities
A-10	C.V. of Brett H. MacKay, RLA, AICP, LEEDAP
A-11	Conditional Use Application review letter prepared by E.B. Walsh & Associates dated March 12, 2010
A-12	Response letter of Chester Valley Engineers dated March 29, 2010 to E.B. Walsh & Associates March 12, 2010 review letter
A-13	Malvern Borough SLDO Appendix A-8, Sample Walkway Plan
A-14	C.V. of Dennis F. Glackin, AICP, PP
A-15	Glackin Thomas Panzak Parking Analysis dated April 16, 2010
A-16	C.V. of Andreas Heinrich, PE, PTOE
A-17	Traffic Study/Analysis of Andreas Heinrich dated July 24, 2008

- A-18 Letter to Malvern Borough Manager dated June 1, 2010 responding to issues raised in unsigned May 15, 2010 Woody Van Sciver letter to Planning Commission
- A-19 Chester Valley Engineers Truck Diagrams dated 6/1/10
- A-20 Glackin Thomas Panzak May 14, 2010 updated Fiscal Impact Study
- A-21 May 18, 2010 letter from Woody Van Sciver to Planning Commission
- A-22 Applicant's response letter dated July 2, 2010 to Malvern Borough to issues raised in Planning Commission report dated 6/29/10

PLANNING COMMISSION EXHIBITS

- PC-1 October 14, 2008 Task Force report
- PC-2 June 1, 2010 Traffic Planning & Design report
- PC-3 Thomas Comitta resume
- PC-4 Thomas Comitta Report, dated June 1, 2010, revised June 4, 2010 with addendum dated June 15, 2010
- PC-5 Planning Commission Report

9. The Malvern Borough Zoning Ordinance, Zoning Map, and Subdivision and Land Development Ordinance are incorporated herein by reference as though fully set forth herein.

10. The parcels comprising the Property were previously occupied by assorted industrial, warehouse, retail, service and residential uses housed in older buildings and/or consisting of open air uses.

11. The Applicant proposes two (2) main buildings in Malvern each consisting of four (4) levels, with parking, with a total of approximately 190 residential units on the upper floors, and

permitted commercial, office or retail space on the first floors. (Exhibit A-7)

12. The dwelling unit proposal is consistent with 2425.E of the Ordinance requiring that no more than 50% of the residential dwelling units shall have less than two bedrooms. A mix of studio, one bedroom and two bedroom units is proposed. (Exhibit A-7)

13. Also consistent with 2425.E, at least 10% of the total building area is to be used for first floor retail or office area, approximately 25,390 square feet, or about 10.6%. (Exhibit A-7)

14. Section 2425.C of the Ordinance allows for a range of uses including business or professional office or post office uses; restaurant/tavern; retail uses including, but not limited to, personal service shops; banks; indoor recreation facilities; as well as parking garages, parking lots or in-building parking facilities designed to serve a multi-use development or developments.

15. Restaurant or tavern uses may include an outdoor café component as authorized by the Ordinance.

16. For the mix of uses as they are configured on the proposed site plan, the Malvern Borough Zoning Ordinance requires a total of 391 parking spaces on the tract within the Borough. (Exhibit A-15, p. 2)

17. If the restaurant square footage is increased to 9,400 s.f. (as opposed to the 5,000 presently shown), and the other retail uses were correspondingly reduced, the parking requirement would be 427 spaces. (Exhibit A-15, p. 2)

18. The plans propose 330 spaces within the parking structures on the tract. (Exhibit A-15, p. 2).

19. In “Building A” (which is at the western end of the tract, across from Church Street) the upper deck will have approximately 72 spaces and the lower deck will have approximately 86 spaces, for a total of 158. (Exhibit A-7)

20. In "Building B" (which is at the eastern end of the tract, across from Ruthland Avenue) the upper deck will have approximately 92 spaces and the lower deck will have approximately 80 spaces, for a total of 172. (Exhibit A-7)
21. The upper decks will be on the same level as the retail shops.
22. Based on information presented to them by the Applicant the Planning Commission, in its report to Borough Council, that "Employees of the commercial establishments will also have access to the parking garage." Exhibit PC-5, page 3.
23. The plans also propose a parking lot, to be located in Willistown, and containing approximately 90 spaces, approximately 25 of which would be needed to meet the parking requirements for the office building under the Willistown Zoning regulations.
24. Approximately 59 of the 90 Willistown spaces would be made exclusively available to the patrons of the Malvern uses.
25. The other 31 (approximate) spaces would probably be available for patron use after the business hours of the Willistown office building.
26. Appropriate easements and deed restrictions would be put in place to insure the availability of the Willistown spaces.
27. The plan proposes to create approximately 17 new on-street parallel parking spaces.
28. The plan also indicates that approximately 6 existing on-street parallel parking spaces on the north side of King Street will be eliminated. (Exhibit PC-4 p. 2.1)
29. Because of height constraints and turning radii, only small trucks will be able to enter the parking structures.
30. Along the side streets near the Property (Church, Ruthland, Green, Raspberry in particular) there are residences that have little or no off-street parking.

31. Many of the properties on the south side of King Street, both residential and commercial, have little or no off-street parking.

32. The municipal parking lot at the corner of King and Church streets has 12 spaces.

33. There is no other “public” parking lot in close proximity to the Property.

34. Dennis Glackin performed a shared parking analysis that follows the Urban Land Use Institute methodology and which indicates that, due to the residences and the businesses having different peak usage times, the proposed number of spaces is adequate. (Exhibit A-15)

35. Thomas A. Committa testified credibly that, if the retail uses are successful, there is a risk that patrons of the Project will park along the residential streets, thereby displacing the residents from their accustomed parking places.

36. Eli Kahn and David Della Porta, principals with King Partners, as well as Brett MacKay of Chester Valley Engineers, who was accepted as an expert in project management, landscape architecture and LEED design, all testified as to the general conceptual design parameters of the Project.

37. Consistent with Section 2525.E.3 concerning building design, the Property would exhibit the following design components:

A. The King Street façade Buildings A and B will have windows on each floor, compatible with existing fenestration patterns along King Street.

B. The first floor spaces along King Street will be designed as windowed store fronts to allow views into the building or of displays.

C. There will be no use of vinyl siding on the King Street elevations.

38. In accordance with 2525.H as to infrastructure improvements, the Applicant proposes sidewalks, street trees, street furniture, decorative crosswalks and paving treatments along the

Property frontage, and community contributions as detailed in Exhibit A-22, sub-exhibit A.

39. The Applicant also intends to bury overhead utility lines along the Property frontage.

40. Between the western edge of the Property and the corner of Bridge and King Streets, there are additional utility lines along King Street in front of the Sheffield complex. Burial of these lines would improve the aesthetics in the vicinity of the Project and would improve the accessibility of the sidewalk from the key intersection of Bridge and King to the Property.

41. In accordance with Section 2425.G.2 the Applicant is pursuing “green” material systems and techniques, although that does not guarantee a LEED certification.

42. Mr. MacKay testified as to the Project’s conformance with the C-4 High Intensity Commercial District/Multi-Use Development Option zoning data including minimum tract area, minimum lot width, maximum front build-to line setbacks, minimum side yards, minimum rear yards, maximum building area, maximum impervious coverage and maximum building height.

43. The Project is intended as a single phase of construction.

44. Stormwater management, while conceptual, will be in accordance with Borough Ordinances as well as DEP regulations and requirements of the Chester County Conservation District.

45. Outdoor lighting, loading and trash collection will also be in accordance with Borough Ordinances.

46. The Applicant is analyzing the best means of providing sanitary sewer service to the Property in accordance with all applicable regulation, but it is anticipated that installation of new and/or replacement piping will be necessary, as well as possible upgrades at the Malvern Borough pump station.

47. The Applicant has reserved the right to identify any waiver needs at the time of land

development.

48. Mr. MacKay also testified that the proposed improvements will be consistent with the street improvement guidelines of Subdivision and Land Development Appendix A-8. (See Exhibit A-13).

49. Mr. MacKay testified that the street tree intervals along the Property frontage will be in conformance with 2525.E.2.h. Street planting on the south side of King Street is not feasible.

50. Mr. MacKay also testified that, in his opinion, the Application is appropriate and consistent as to the character of the neighborhood, building harmonious groupings of structures, service to the public interest, consistency with the services and utilities in the Borough, environmental sensitivity, safe and adequate road access, traffic circulation, stormwater and screening.

51. Chester Valley Engineers also presented at hearing an initial conceptual plan for truck loading and unloading. (Exhibit A-19).

52. The Applicant subsequently presented a supplemental exhibit (see Exhibit A-22, sub-exhibit B), which provides for the operation of a K-turn in the Building B loading zone area. This would enable trucks to enter and exit this loading area in a forward motion.

53. The K-turn proposal for the Building B loading zone area is sufficient to serve the larger vehicle deliveries for both Building A and Building B, therefore eliminating the need for the two separate loading areas originally proposed.

54. Mr. Glackin's firm, Glackin Thomas Panzak, also provided Borough Council with an updated Fiscal Impact Study, dated May 14, 2010, which concluded a positive set of net fiscal impacts to Malvern Borough, Willistown Township and the Great Valley School District. The total predicted net fiscal impact is a positive \$323,069.00 per year. (Exhibit A-20).

55. Traffic engineer Andreas Heinrich testified for the Applicant as a licensed civil engineer and certified as a professional traffic operations engineer.

56. Mr. Heinrich was accepted by Borough Council as an expert in traffic engineering, design and planning.

57. Mr. Heinrich testified that his traffic analysis shows the typical challenges of a downtown environment, in which road widening, addition of turning lanes, or additional signalization, could create issues not consistent with an easily accessible downtown. Such problems would include loss of on-street parking, increased congestion from traffic light timing and loss of pedestrian access. (Exhibit A-17).

58. The proximity of the site to the train station, as well as the significant parking being offered as part of the development will also have positive results which dilute the traffic impacts at issue.

59. At the July 6, 2010 hearing the Planning Commission presented testimony of Thomas Committa and Chris Mongeau.

60. Mr. Committa was accepted as an expert in land planning by Borough Council.

61. Mr. Committa testified that his “over arching view is that I think the overall proposal is good for the Borough. Takes a derelict site, gives new life,” and that his job was to raise any issues and fashion conditions that may improve the plan. July 6, 2010 N.T. 10.

62. Mr. Committa also testified that many of his conceptual ideas could not be fully resolved or considered until the time detailed land development plans were submitted.

63. Mr. Committa described the Project as an asset to the fabric of the Borough, but also had a series of suggestions that would affect various aspects of the plan, including, but not limited to, concerning parking, pedestrian access, architectural issues and facades, screening and green

design, and the like. (See Exhibit PC-4).

64. The Planning Commission incorporated some of Mr. Committa's recommendations in its report, entered into evidence as Exhibit PC-5.

65. Mr. Mongeau testified on behalf of the Planning Commission as its Chairman.

66. The Planning Commission Exhibit PC-5 details Mr. Mongeau's testimony.

67. The Applicant responded to the Planning Commission report through additional testimony of Mr. Della Porta and Mr. Kahn, as well as by submitting Exhibit A-22, which is a response to the 18 recommendations of the Planning Commission.

68. The Borough Engineer, EB Walsh & Associates, submitted a written report reviewing the Application, and recommendations contained in that report were followed in the course of the proceedings. (Exhibit A-11)

69. The Borough's traffic consultant, Traffic Planning and Design, Inc., submitted a written report regarding the proposal, and recommendations contained in that report were followed in the proceedings. (Exhibit PC-2)

70. The Fire Chief of the Malvern Fire Department reviewed the plans and gave oral comments to the Planning Commission and Applicant prior to the hearings, and also submitted a letter following the close of the hearings.

71. The buildings will comply with all applicable fire safety regulations and will have sprinkler systems.

72. Stabilized ground surfaces will be provided at the corners of the buildings so that emergency vehicles will be able to get part way behind the buildings if necessary for evacuation or fire suppression.

73. Other than a pool and possible fitness center, the proposal does not include any

improvements for recreation and includes no recreation or open space benefits to the general public.

74. The Planning Commission relied upon assurances by the Applicant in the course of the Task Force review process that the Applicant would “discuss and agree to reasonable financial contributions for community, traffic and infrastructure purposes...”. (Exhibit PC-5, page 7)

75. The Planning Commission, due to the statements made by Applicant, did not prepare a “fee in lieu” ordinance as provided by Section 503(11) of the Pennsylvania Municipalities Planning Code. (Exhibit PC-5, page 8)

76. The Planning Commission recommended that the Applicant pay a fee in lieu of \$2,500.00 per dwelling unit in three installments. (Exhibit PC-5, page 8)

77. The Applicant is willing to make a cash contribution to the Borough to fund open space, recreation and/or pedestrian improvements to be used as the Borough sees fit, but not in the amount contemplated by the Planning Commission recommendation.

DISCUSSION

A conditional use provision in an ordinance represents a legislative determination by the municipality that the use is consistent with the zoning of the municipality. It may only be denied where the adverse impact upon the public interest exceeds that which might be expected of a similar development under normal circumstances. See, e.g., Brentwood Borough v. Cooper, 431 A.2d 1177 (Pa. Cmwlth. 1981). The Borough Council finds that the Applicant has presented satisfactory evidence and has met the burden of persuasion that the use satisfies the objective requirements of the Ordinance. In re: Appeal of Cutler Group, Inc., 880 A.2d 39, 43 n.2 (Pa. Cmwlth. 2005), citing Manor Healthcare Corp. v. Lower Moreland Township Zoning Hearing Board, 590 A.2d 65 (Pa. Cmwlth. 1991). Once the Applicant met its initial objective burdens, as

it does here, the burden shifts to the protestants, if any, “to present evidence and persuade the governing body that the proposed use will have a generally detrimental effect on health, safety and welfare or will conflict with the expressions of general policy contained in the ordinance.” Id. Further, any evidence provided by objectors or protestants “must show a high probability that the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community.” Greaton Properties, Inc. v. Lower Merion Township, 796 A.2d 1038, 1046 (Pa. Cmwlth. 2002). In the instant case, the only other party to the proceeding was the Borough Planning Commission, and it would be more accurate to describe the Planning Commission as an interested party, rather than as a protestant.

Therefore in the Order that follows the Borough Council awards an approval of the conditional use, subject to conditions responsive to various concerns regarding adequacy of parking and loading, pedestrian safety, the lack of public recreational opportunities and other concerns reflected in the record. Pursuant to the Municipalities Planning Code, these conditions are limited to reasonable conditions and safeguards necessary to implement the purposes of the MPC vis a vis the Malvern Ordinances. (53 P.S. §10913.2).

CONCLUSIONS OF LAW

1. The Applicant, 237 King Partners, LLC, has standing to make the Application.
2. The proceedings were duly noticed and advertised.
3. The Applicant met the evidence burden as well as the burden of persuasion to show that the conditional use proposal complies with the terms of the Malvern Borough Zoning Ordinances which expressly govern such a grant.
4. No evidence was presented by protestants that would shift the burden of proof to the Applicant to prove that the proposal will be injurious to the public health, safety and general welfare.
5. To the extent that there are potential adverse impacts of the proposal, they can be mitigated by the imposition of appropriate conditions, as described below.
6. The Application shall therefore be properly approved according to law.

ORDER

AND NOW, this ___ day of October, 2010, the Malvern Borough Council hereby approves the Application, subject to the following conditions:

PARKING AND LOADING:

1. To reduce overflow parking onto residential streets, the following parking conditions shall apply:

a. Building A. The upper level parking structure of Building A shall be available in an unreserved manner for residents of the Applicant's project (the "East King Street Buildings"), and visitors to the residents of the East King Street Buildings. During business hours the upper level of the Building A parking structure shall also be available for employees, customers and visitors to the commercial and retail uses of the East King Street Buildings.

b. Building B. Applicant will allow approximately twenty (20) parking spaces in Building B to be made available in an unreserved manner for employees of the commercial and retail uses in the East King Street Buildings. The final Building B unreserved employee parking space number shall be determined in land development, but Applicant will not be required to provide more than twenty (20) spaces.

c. Willistown Lot. The Applicant shall make approximately fifty-nine (59) spaces (adjustable subject to land development design) of the Willistown lot available for employees, customers and visitors to the commercial and retail uses of the East King Street Buildings. The Applicant shall impose an easement or covenant over the applicable portions of the Willistown Property in order to ensure the parking and loading uses described herein.

d. The Applicant retains the right to enforce parking management rules and

regulations consistent with all parking conditions contained herein.

2. To facilitate the use of the upper level parking by commercial patrons, appropriate signage directing motorists into and out of the structure shall be provided. Safe, clear, pedestrian pathways with appropriate signage shall be provided for ingress and egress into both buildings.

3. All loading spaces located within the Borough, including the space to be provided in the middle loading area, must comply with the applicable Borough ordinances. The Applicant shall include a provision in tenant lease or condominium documents limiting moving and delivery truck sizes to 45.5 feet in length.

4. In lieu of the westernmost loading space shown on the plans, truck loading and unloading for the Malvern buildings will be permitted in the Willistown lot. However, no dedicated loading space is required in the Willistown lot. Moving and delivery trucks shall enter and exit the Willistown lot in forward movements. The Applicant shall include a provision in tenant lease or condominium documents limiting moving and delivery trucks to the size limitations necessary to achieve this forward entry and exit design standard.

5. On-site management shall be provided for parking supervision to facilitate efficient operation of the parking as to residents and users of the buildings. In addition, Applicant's on-site management shall implement delivery schedules and loading/unloading management for move-in/move-out times, trash pickup and commercial vehicle deliveries and will endeavor to minimize truck stopping and parking in King Street for deliveries.

6. The Applicant shall comply with ADA requirements.

7. The Applicant may be able to meet the 180-square-feet-per-space parking stall requirement of the Ordinances. However, to the extent the Applicant needs a waiver or other

area and bulk relief permitted by Section 2425 of the Ordinance to provide for spaces of 9 x 18 feet, such relief is herein granted.

8. Truck parking movements into Building B shall be in accordance with Exhibit A-22, comment No. 8 and sub exhibit B. A 44.5 foot long truck shall be able to enter the Building B loading zone area and through the operation of a K-turn, enter and exit the Building B loading zone in a forward position. This K-turn loading area shall be sufficient to serve both Buildings A and B, eliminating the original dual “back-in” loading zone areas initially proposed at Exhibit A-19, Sheet 1 of 4.

9. The Borough may conduct post-occupancy parking studies or implement possible remediation for parking issues after construction, and such studies or improvements shall be funded from the fund described in Condition 16 herein, or otherwise shall be funded by the Borough.

PEDESTRIAN SAFETY

10. To accommodate the anticipated increase in pedestrian traffic, the Ruthland and Church Avenue intersections shall be improved by the Applicant with pedestrian safety features consistent with the plans presented. In addition to the per dwelling unit contribution described in Condition 16, the Applicant shall provide the Borough with \$20,000 at the time of issuance of the first occupancy permit, which sum may be used by the Borough for other off-site pedestrian safety improvements, or other purposes consistent with Condition 16.

UTILITIES/ STREET OPENINGS

11. Overhead utilities on the north side of King Street shall be buried by the Applicant along the entire frontage of the Project. Should the Borough elect to conduct concurrent offsite infrastructure improvements using funds from Condition 16, the Applicant shall cooperate in

coordinating scheduling with the Borough, to the extent it does not interfere with the Applicant's project construction timing.

12. Applicant shall be responsible for all sanitary sewer improvements required by DEP or other regulatory agency to serve the project, including, if applicable, upgrading or replacing the pump station or any other portion of the collection and conveyance system. Applicant is reviewing options that would not require pump station upgrades or replacement.

13. Any street opened for utility work, sidewalk work, extensions, etc. shall be repaired and paved according to the specifications in Chapter 179, Article III "Street Excavations" of the Malvern Borough Code of Ordinances. If both longitudinal and transverse openings are made, the Borough Manager may require Applicant to overlay both traffic lanes if the present serviceability of the street has been impaired by the openings, as provided in Section 179-17.L(3).

OTHER

14. When the commercial spaces change from one use to another, a Zoning Permit shall be required pursuant to Section 2906 of the Borough Zoning Ordinance. Nothing in this Decision shall be deemed to eliminate the need for Certificates of Occupancy or any other applicable permit or occupancy approval. Individual uses permitted as part of a Multi-Use Development will not require individual Conditional Use approvals. However, a substantial change from the existing plans (for example, changing from multiple retail units to one large, intense retail use, or any other change in use which would substantially increase the parking demand beyond what is contemplated by this approval) may require a modification of this Conditional Use.

15. As outlined in Exhibit PC-4, Applicant shall provide street furniture, wayfinding aids, bicycle racks, outdoor waste receptacles and other appropriate amenities. The specifications as

to the number and placement of such amenities will be determined in cooperation with the Planning Commission during land development.

16. Applicant shall contribute \$1800.00 per dwelling unit to the Borough for use for traffic, pedestrian safety, off-site infrastructure, emergency services and/or recreation improvements. Based on 190 units, the total contribution is to be \$342,000, which number shall be adjusted based upon the final number of units constructed. The Applicant shall pay the final calculated sum in three equal installments: 1/3 at the time of issuance of the first occupancy permit; 1/3 at the one year anniversary of the issuance of the first occupancy permit; and 1/3 at the two year anniversary of the issuance of the first occupancy permit. The Applicant shall secure such payments as part of the Financial Security Agreement with the Borough at the time of land development.

17. Applicant shall comply with all applicable fire, safety and building codes.

18. The Borough may cooperate with the Applicant in applying for any mutually agreed-to grant or loan through governmental entities to secure funding to facilitate the project, provided such grant or loan program would be in the Borough's interests and would not interfere with Borough projects or needs.

19. The Applicant shall have the right to provide for a fitness or recreation facility on the site which is available internally to the users of Building A and B as a residential amenity, so long as such space is not part of the street level retail/commercial space of either building. Indoor recreation facilities are also permitted for public use pursuant to the Ordinance, and a fitness facility, yoga or dance studio, etc., shall be permitted along with any other use meeting this definition on the street level of either building.

20. As to vinyl siding, the Applicant shall provide muted or earth tone colors and high quality vinyl allowing for some leeway in specifications. The Applicant will provide architectural elevations and further comply with the Borough's building permit and occupancy permit requirements which require the submission of plans and specifications showing all materials being used for the Project.

21. The Applicant shall use no vinyl siding on the south façade of Buildings A or B which front King Street. Further, there shall be no vinyl siding used on the east façade of the east building ("B") nor on the west façade of the west building ("A"). There shall be no vinyl siding utilized in the front (south) half of the west façade of the east building (B) or on the front (south) half of the east side of the west building (A). As to the remaining facades on which the use of vinyl siding is permitted as indicated herein, such façade shall use a maximum of 80% of the high quality vinyl.

22. The Applicant will submit applications for green design certification. While certification is not assured, the Applicant shall pursue either a "LEED-ND Facility" or a "National Green Housing Facility" which Applicant may select in its discretion. Best efforts shall be made to obtain such certification, but project approval is not contingent upon certification.

23. The Applicant's final land development plan shall be substantially consistent with the plans and exhibits as submitted in the record as well as the testimony of the Applicant and the Applicant's witnesses as set forth in the conditional use hearings. Borough Council shall retain the authority to approve such modifications in the development plan which the Borough believes will be in the public interest during the land development review process, without reconvening any additional conditional use hearing on such modifications, including but not limited to such relief permitted by Section 2425.F.1.h.

24. Not only the Applicant, but its successors and assigns shall be bound and subject to this Decision and Order.

25. The Applicant will reimburse the Borough for all fees incurred by the Borough for review by its professional consultants, the costs of hearings including the court reporter, transcripts and representation by counsel for the Borough and for the Planning Commission (except to the extent that those costs have been covered by the application fees and/or previous reimbursements).

26. The Applicant shall express to Council delivered to the Borough Manager within 10 days of the Applicant's receipt of this Decision, its full and complete consent to the conditions specified herein above or the Application for conditional use approval is denied; the Council expressly finding and concluding that the Application, in the absence of compliance with the said conditions, is inconsistent with the standards, criteria, purposes and policies codified in the Malvern Borough Zoning Ordinance.

APPROVED by Malvern Borough Council, this ____ day of October 2010, by a vote of _____ to _____.

MALVERN BOROUGH COUNCIL

By: _____
Woody J. VanSciver, President

By: _____
Catherine O. Raymond, Vice President

By: _____
Sean E. Lynch, Member

By: _____
William D. Macaleer, Member

By: _____
Duane J. McCrory, Member

By: _____
Richard K. Sponenbergh, Member

By: _____
Zeyn B. Uzman