

*Agenda
Nov. 14, 2011*

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October 20, 2011

HAND DELIVERY

Board of Supervisors
New Garden Township
299 Starr Road
Landenberg, PA 19350



RE: PREIT-White Clay Point Shopping Center; SALDO Waiver Request Pursuant to Section 6 of Settlement Agreement Requesting Waiver of Subdivision to Permit Condominium

Dear Board of Supervisors:

On behalf of PREIT, I hereby request a waiver of subdivision pursuant to Section 6(A) of the September 10, 2007 Settlement Agreement to permit the formation of a condominium on PREIT's Property (as defined in the Settlement Agreement). In connection with PREIT's waiver request, I enclose the following:

- Seven (7) full size and seven (7) 11"x17" copies of a plan entitled "Overall Development Plan – Condominium Plan" prepared by Chester Valley Engineers, Inc. dated October 10, 2007, last revised October 14, 2011 ("**Condo Plan**"); and
- An electronic copy of the Condo Plan on a CD-Rom.

Pursuant to Section 6(A) of the Settlement Agreement, the Board of Supervisors ("**Board**") agreed that it would approve the Preliminary Plans if the plans depicted the subdivision and development of the Property in accordance with the "Standards" notwithstanding that the Preliminary Plans do not comply with every provision of the Township Subdivision and Land Development Ordinance ("**SALDO**").

Section 6(A) of the Settlement Agreement defines the "Standards" as the "Concept Plans and Materials, Dimensional Criteria, Development Conditions and the Applicable SALDO Regulations [sic]." Section 6(A) of the Settlement Agreement further defines "Applicable SALDO Requirements" in part as the provisions of the SALDO unless "the SALDO provisions that are deviated from causes an undue hardship."

The Board also acknowledged in Section 6(A) that “it is virtually impossible at this stage of the design of the subdivision and development of the Property to identify every provision of the SALDO with which it is not practical for the Preliminary Plans to comply.”

In brief, the Uniform Condominium Act (“Act”) regulates the creation and operation of condominiums which are defined as “real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership by the owners of those portions.” 68 Pa.C.S. § 3103. A condominium is created by the execution of a declaration by all persons whose interests in the real estate will be transferred to unit owners. 68 Pa.C.S. § 3201. The declaration is recorded in the same manner as a deed and the creation of a condominium alone does not constitute a conveyance. *Cunius v. Board of Assessment Appeals of Chester County*, 976 A.2d 635, 637 (2009). The creation of a condominium does not constitute a subdivision of property for purposes of the application and approval process set forth in the MPC. *Cunius*, A.2d at 641.

At the time that PREIT and the Board entered into the Settlement Agreement, Pennsylvania law did not require a subdivision approval in order to create a condominium form of ownership on a property and to convey condominium units. As a result, the Settlement Agreement is silent on the formation of a condominium on the Property since the “law of the land” at the time the Settlement Agreement was executed did not consider the creation of a condominium to be subject to subdivision process under the Pennsylvania Municipalities Planning Code (“MPC”). Therefore, at the time the Settlement Agreement was executed, PREIT did not need any form of Township approval to create a condominium on the Property and to convey condominium units.

Subsequent to the execution of the Settlement Agreement, the Commonwealth Court issued its opinion in the *Shaffer v. ZHB of Chanceford Township*, 964 A.2d 23 (2008), *affirmed*, 605 Pa. 267, 989 A.2d 5 (2010), holding that the division of a property into units and subsequent conveyance of a unit without municipal approval was an unlawful subdivision and land development. *Shaffer*, 964 A.2d at 28. In essence, the Commonwealth Court held that municipal consideration of a subdivision or land development plan is required in order to create a condominium and to convey a condominium unit.

Here, PREIT is proposing to create a condominium on the Property for ownership and financing purposes only. As depicted on the Condo Plan, the condominium is proposed to consist of ten (10) separate units at this time as follows:

- Unit #1 consists of the strip of in-line stores (Retail A through and including Retail F) in the Retail Center together with common parking and site improvements;
- Units ##1A, 1B and 1C are the proposed outparcel restaurants/retail stores (Restaurant A through and including Restaurant C) in front of the strip of in-line stores in the Retail Center;

- Unit #2 is the proposed Wal-Mart (Retail G) together with associated parking and site improvements;
- Unit #3 consists of the common parking and site improvements;
- Unit #3A consists of the freestanding building labeled as Retail H;
- Unit #3B consists of the freestanding building labeled as Retail I;
- Unit #3C consists of the Hayden House;
- Unit #4 consists of the future Town Center together with common parking and site improvements; and
- Unit #5 consists of the proposed Wawa (Retail J) together with associated parking and site improvements.

With the exception of Unit #5 (Wawa), which exists on a separately subdivided lot, Units ##1, 1A, 1B, 1C, 2, 3, 3A, 3B, 3C and 4 will all remain on a single lot that will be formed as a result of the approved lot consolidation of the former Pias, M&J Mushrooms, LP and Kaolin Mushroom Farms, Inc. properties. Thus, the Property will still be developed as one (1) contiguous lot and will operate no differently than if one entity owned the entire Property. Furthermore, the formation of a condominium on the Property will not alter the site plan layout and there will be no visible difference in the outward appearance of the proposed development. All condominium units will still be bound by the terms of the Settlement Agreement.

PREIT is entitled to a waiver of the subdivision process to permit the condominium because it would exact an undue hardship upon PREIT to require a formal subdivision approval for each condominium unit. A subdivision of each condominium unit would require compliance with the area and bulk regulations set forth under Section N.(1) of the Settlement Agreement, which is unreasonable and impracticable. Those regulations never contemplated the creation of condominium units and imposing such regulations would prohibit the creation of workable condominium units consistent with the approved site plan.

For example, the regulations require each condominium unit to have: a minimum unit area of 3 acres; a minimum street frontage of 150 feet; minimum front yard setbacks of 75 feet; minimum side/rear yard setbacks of 50 feet; a maximum building coverage of 35%; and, a maximum unit coverage of 65%. PREIT cannot comply with these regulations in forming condominium units while still developing the Property consistent with the site plan that was agreed to under the Settlement Agreement.

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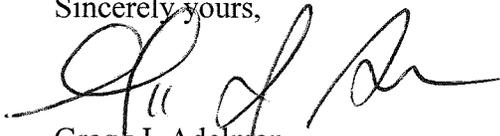
Applying the regulations under Section N.(1) of the Settlement Agreement as a condition precedent to forming a condominium would unduly restrict PREIT's legal right and ability to determine the ownership status of the Retail and Town Centers. The future ownership of the Retail and Town Centers was not restricted in any manner under the Settlement Agreement, and therefore, using the *Shaffer* decision as a way to prevent or prohibit the formation of a condominium on the Property could only be considered as an effort to unilaterally amend the Settlement Agreement to restrict PREIT's form of ownership of the Retail and Town Centers.

For the above reasons, PREIT is entitled to a waiver of subdivision pursuant to Section 6(A) of the Settlement Agreement to permit the formation of a condominium on PREIT's Property consistent with the enclosed Condo Plan because requiring a formal subdivision approval in order to form a condominium on the Property would exact an undue hardship. In fact, requiring a subdivision approval to form a condominium on the Property would interfere with PREIT's right to develop the Property as agreed to under the Settlement Agreement.

Please schedule consideration of PREIT's waiver request for the Board of Supervisors' November 14, 2011 meeting and confirm for me that the waiver request will be on the Board's November 14, 2011 agenda.

Thank you.

Sincerely yours,



Gregg I. Adelman

/enclosures

cc: Dan Fox, Township Manager (via email)
Neil Land, Esquire (via email)
Nate Cline, P.E. (via email)

(S) As reflected on the Concept Plans and materials, the areas devoted to stormwater basins will not be considered impervious coverage.

(T) Construction of improvements or disturbance of areas of steep slopes shall be permitted to the extent necessary to permit the development of the Property in accordance with the Concept Plans.

(U) Outdoor retail sale of garden goods or related product shall not be permitted in the parking area.

(V) PREIT shall provide reasonable security services for the Town Center and Retail Center during regular business hours. Such reasonable security services shall commence no later than the date on which 50% of the total square footage of the Retail Center and Town Center is occupied.

6. **PREPARATION OF PRELIMINARY PLANS.** Within one hundred and twenty (120) days after the issuance of the Order, PREIT shall cause CVE to prepare preliminary plans for the development of the Retail Center on the Property, and subdivision of the Property (such plans individually and collectively referred to herein as the “**Preliminary Plans**”) to the Board and Township Engineer in accordance with this Settlement Agreement.

(A) The Preliminary Plans shall depict (i) the subdivision and development of the portion of the Property to be developed for the Retail Center and the Age-Restricted Community in accordance with this Settlement Agreement and the layout depicted on the Concept Plans and Materials, (ii) the subdivision and development of the portion of the Property to be developed for the Town Center in accordance with (a) the layout of Town Center Option A, (b) the layout of Town Center Option B or (c) the narrative description set forth as Town Center Option C (collectively, the “**Layout**”); (iii) this Settlement

Agreement and all other portions of the Concept Plans and Materials; (iv) the Dimensional Criteria, (v) the Development Conditions and (vi) the applicable provisions of the SALDO (“**Applicable SALDO Requirements**”). For purposes of this Agreement the term “Applicable SALDO Requirements” shall mean the provisions of the SALDO, unless (vii) a provision or provisions of the SALDO is (are) replaced with an alternative(s) chosen by CVE which provide(s) a solution to the issue addressed by the replaced SALDO provision(s) which solution(s) is (are) equal or better than the solution intended by the replaced SALDO provision(s), or (viii) the SALDO provision(s) that is (are) deviated from causes an undue hardship. (The Concept Plans and Materials, Dimensional Criteria, Development Conditions, and the Applicable SALDO Regulations are sometimes hereinafter collectively referred to as the “**Standards**”). The Board acknowledges that it is virtually impossible at this stage of the design of the subdivision and development of the Property to identify every provision of the SALDO with which it is not practical for the Preliminary Plans to comply. Accordingly, the Board has agreed that if the Preliminary Plans depict the subdivision and development of the Property in accordance with the Standards, the Board will approve the Preliminary Plans even though they do not comply with every provision of the SALDO.

(B) If the Preliminary Plans depict the subdivision and development of the Property in accordance with the Standards, the Board will approve the Preliminary Plans even though they do not comply with every provision of the SALDO. The parties have identified the following SALDO provisions for which waivers are hereby approved for the Town Center and Retail Center only:

Section 613.2.B.1 as to the construction of common private driveways (The plans to be hereafter developed and approved may