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**COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
LAND USE APPEAL**

IN RE: APPEAL OF
EMIL FISH
288 Melrose Avenue
Merion Station, PA 19066

DVORAH ZAUDERER
275 North Highland Avenue
Merion Station, PA 19066

THOMAS M. SCHMUHL, and
JEAN G. SCHMUHL
283 Melrose Avenue
Merion Station, PA 19066

.....

NO. 2016-12603

LOWER MERION NEIGHBORHOOD :
 COALITION LLC :
 Two Bala Plaza :
 3rd Floor, Suite 300 :
 Bala Cynwyd, PA 19004 :
 FROM THE DECISION :
 OF THE ZONING HEARING BOARD OF :
 THE TOWNSHIP OF LOWER MERION :
 75 East Lancaster Avenue :
 Ardmore, PA 19003 :

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NOTICE OF LAND USE APPEAL

Appellants, Emil Fish, Dvorah Zauderer, Thomas M. Schmuhl, Esquire, Jean G. Schmuhl and Lower Merion Neighborhood Coalition LLC appeal from the decision of the Zoning Hearing Board of Lower Merion Township and in support state:

1. Appellant, Emil Fish, is an adult individual who resides at 288 Melrose Avenue, Merion Station, Lower Merion Township, Montgomery County, Pennsylvania, 19066.
2. Appellant, Dvorah Zauderer, is an adult individual who resides at 275 North Highland Avenue, Merion Station, Lower Merion Township, Montgomery County, Pennsylvania, 19066.
3. Appellants, Thomas M. Schmuhl, Esquire, and Jean G. Schmuhl, are adult individuals, husband and wife, who reside at 283 Melrose Avenue, Merion Station, Lower Merion Township, Montgomery County, Pennsylvania 19066.
4. These individual Appellants reside and own property in close proximity to the Properties which are the subject of this Land Use Appeal.
5. Appellant Lower Merion Neighborhood Coalition LLC, is a Pennsylvania Limited Liability Company with its principal office and place of business

located at Two Bala Plaza, 3rd Floor, Suite 300, Bala Cynwyd, PA 19004. Its members include persons who reside and own property in close proximity to the Properties which are the subject of this Land Use Appeal.

6. This Appeal is from the Decision and Order dated May 19, 2016 of The Zoning Hearing Board of the Township of Lower Merion, Montgomery County, which has its office at 75 East Lancaster Avenue, Ardmore, PA 19003. A copy of the Board's Findings of Fact, Conclusions of Law, Opinion and Order is attached as Exhibit "A".

7. The properties ("the Properties") which are the subject of this appeal are located at 223 North Highland Avenue, Merion Station, Montgomery County, PA, 19066 and at 280 and 284 Melrose Avenue, Merion Station, Lower Merion Township, Montgomery County, Pennsylvania, 19066.

8. Kohelet Foundation owned 280 Melrose Avenue, Kohelet Yeshiva High School owned 223 North Highland Avenue and 284 Melrose LLC owned 284 Melrose Avenue at the time the Application was filed. (These entities are referred to collectively as "Applicants".)

9. On July 6, 2015, Kohelet Foundation filed an application with the Zoning Hearing Board for a special exception to expand an existing educational institution serving grades 9 to 12, located at the 223 North Highland Avenue address, and to extend that use to two adjacent properties, 280 and 284 Melrose Avenue, and to expand the educational program to include grades K to 8.

10. On September 3, 2015 deeds were executed conveying the Properties to Kohelet Yeshiva High School.

11. Each of the properties is zoned R-1 Residence District.

12. Licensed educational institutions are permitted in the R-1 Residence District by special exception under Lower Merion Township Zoning Ordinance Section 155-11(S)(1)(e), subject to the criteria in Section 155-11(Y)

13. Appellants appeared in person and by counsel at the hearings before the Zoning Hearing Board, objected to the Application, and submitted Proposed Findings of Fact and Conclusions of law, including argument, explaining why the use proposed by the Application did not meet the criteria of the Zoning Ordinance and had adverse impacts on the public health, safety and welfare.

14. The Zoning Hearing Board held ten public hearings over a six month period: September 3, 2015, September 24, 2015, October 22, 2015, November 12, 2015, January 7, 2016, January 28, 2016, February 8, 2016, February 22, 2016, February 25, 2016 and March 7, 2016.

15. The Decision and Order of the Zoning Hearing Board was arbitrary, capricious, an abuse of discretion, not based on substantial evidence and contrary to law because:

a. It authorizes a Special Exception when the Applicants failed to establish the proposed uses will meet all the criteria in Section 155-11(Y) as described below.

b. Section 155-11(Y)(1) requires Applicants to demonstrate that the proposed use will not alter the Level of Service in adjoining streets or create unsafe traffic conditions and that

“The traffic generated by the proposed use,

shall not result in a Level of Service lower than C, or if the Level of Service is already C or below, shall not alter such Level of Service for adjacent streets and/or nearest intersections thereof.”

c. The proposed expansion will include 180 additional students in new grades K-8. The existing high school was approved for 180 students in 2010. The expansion will require 74 staff, over the 63 staff previously approved for the high school.

d. The Zoning Hearing Board's findings concerning the traffic Level of Service was not supported by substantial evidence because the Board relied on a hybrid method of trip generation involving both the ITE K-8 Private School Standard together with a trip generation extrapolation for the high school, was unreliable because of the study using Highway Capacity Software based on the Highway Capacity Manual 2010 (“HCM 2010”) which showed that during the morning and afternoon peak periods the Level of Service dropped from Level C or above to Level D, in violation of Section 155-11(Y)(1).

e. All three traffic engineers who testified agreed the HCM 2010 was the proper basis for traffic studies.

f. The hybrid method of trip generation relied on by the Board examined the 9-12 trip generation in a vacuum, without taking into account the synergistic effects of placing all the grades together and lacks the objectivity of the ITE standard.

g. The Board directed Applicants' traffic engineer to address de-conflicting student pedestrians with traffic in the driveways, but he failed to do so.

h. HCM 2010 states for a school, with its unique peaking characteristics, the expected Peak Hour Factor is under 0.8. Applicant's second study showed a morning Peak Hour Factor of 0.38 and an afternoon factor of 0.43, meaning there is extreme peaking occurring.

i. Applicants did not use the Peak Hour Factor found in its traffic study and adopted by the Board. Actual flow rates for the peak 15 minutes again confirmed a Level of Service D.

j. The proposed expansion will adversely impact traffic conditions in the surrounding area: peak hour a.m. trips will increase by 261 vehicles, peak hour p.m. trips will increase by 174 vehicles, equaling five and eight times the existing traffic volumes.

k. The Applicants' traffic study was first submitted based on flawed facts, counting the traffic at the end of the day on a day when the school let out at 12:30 p.m. While this study was withdrawn, the serious flaws in this initial study offered by Applicants were misleading to the Board and the community and showed the lack of reliability of Applicants' study.

l. The only credible engineering testimony showed the Level of Service at the exit drive onto Old Lancaster Road was an E.

m. The Zoning Hearing Board's finding that the 9-12 students and the K-8 students arrive and depart at different times was not supported by substantial evidence.

n. The Board's Order then directed a different arrival/departure time for the high school students, and failed to order any arrival/departure times for

the K-8 students.

o. The Zoning Hearing Board ignored the failure of the Applicant to provide a traffic study on the effects of the early dismissal time on Fridays for approximately five months of the year, which coincide with the Friday dismissal time of the neighboring French International School.

p. The Board's Findings failed to account for the adult learning classes, some of which are held during school hours.

q. The Zoning Code Section 155-11(Y)(6) provides:

"Buffering. Landscaped buffer areas (including a wall, fence, suitable planting or combination thereof if approved by the Township) incorporating a variety of deciduous and evergreen trees and shrubs shall be provided along all property lines in compliance with the following:

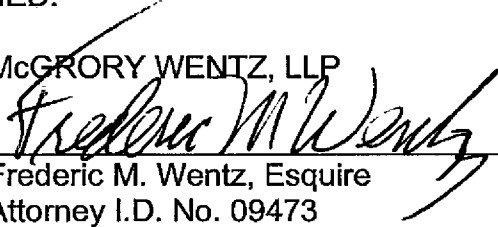
(a) Buffer areas shall be a minimum of 20 feet in width along the side or rear property lines with an additional one foot in width added for every 1,000 square feet (or portion thereof) of new or expanded floor area in excess of 7,000 square feet of habitable floor area, with a maximum buffer requirement of 50 feet. . . ."

r. Although the Zoning Hearing Board directed a 50 foot buffer on the side and rear property lines it nevertheless, and in violation of this Zoning Code provision, allowed playground equipment within the buffer along Melrose Avenue.

s. It was predicated on the expert testimony of Applicants' traffic engineer, Robert G. Richardson, P.E., who was protected from meaningful cross-examination by the Board, which terminated cross-examination of him about promises on his firm's website to obtain project approval, when the Board's Chair

asked him if his oath meant he was telling the truth.

WHEREFORE, Appellants pray that this Court reverse the Decision and Order of the Zoning Hearing Board of Lower Merion Township, and direct that the Application for Special Exception be DENIED.

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