

UPPER MERION TOWNSHIP BOARD OF SUPERVISORS  
JUNE 14, 2012

The Board of Supervisors of Upper Merion Township met for a Business Meeting on Thursday, June 14, 2012, in Freedom Hall, in the Township Building in King of Prussia. The meeting was called to order at 7:30 p.m., followed by a pledge to the flag.

ROLL CALL:

Supervisors present were: Greg Philips, Greg Waks, Erika Spott, Bill Jenaway, and Carole Kenney. Also present were: Ron Wagenmann, Township Manager; Joseph McGrory, Township Solicitor; Judith A. Vicchio, Assistant Township Manager, and Angela Caramenico, Assistant to the Township Manager.

CHAIRPERSON'S COMMENTS:

Chairperson Spott commented on an executive session held prior to the business meeting during which litigation matters were discussed.

NEW BUSINESS

DISCUSSION AND POSSIBLE SETTLEMENT OF THE HANKIN FAMILY PARTNERSHIP, ET AL, VERSUS UPPER MERION TOWNSHIP, AT AL

Joseph McGrory, Township Solicitor, provided an overview of the two basic claims associated with the potential settlement of the Hankin Family Partnership, et al, versus Upper Merion Township, et al, as well as the highlights of the negotiations as they stand in the settlement agreement.

The first claim is an inverse condemnation claim pending in the Court of Common Pleas. The developer of the golf course claimed that through the use of zoning, the developer was deprived of using the property in the manner intended for development, and that they effectively had their property taken from them; thereby inversely condemning their property without just compensation.

The larger claim is a civil rights claim. Mr. McGrory explained that a property right is a civil right and when people are deprived of being able to properly develop their property, they can sue under U.S.C. § 1983 and claim that their civil rights have been violated. In a civil rights case if a jury were to award even one dollar in damages included with that is an automatic payment of 100 percent of attorney fees associated with pursuing the claim.

Mr. McGrory indicated these two claims have been pending and were put on hold when the township went through the zoning case. The developer of the Valley Forge Golf Course challenged the ordinance saying it was exclusionary zoning under the new theory of law called "reverse spot zoning." The Zoning Hearing Board denied that challenge; and the Court of Common Pleas supported the Zoning Hearing Board's position. The Commonwealth Court, with a panel of three judges, supported the Zoning Hearing Board; and then, the Pennsylvania Supreme Court agreed to hear the case. Only five of seven of the judges voted on the case and three of the five judges created a new theory of law called "reverse spot zoning." Mr. McGrory pointed out although it was only three out of seven judges; it still carries the weight of the Supreme Court. The judges ruled the plans submitted with the zoning challenge have to be granted by the municipality.

After that decision came down, prior boards have negotiated with the developer what Mr. McGrory referenced as Plan C. Plan C is a more intense kind of development, but a kind of development that in many aspects is more desirable than Plan A or B were with the original submission. Prior Boards then entered into a settlement stipulation granting permission to the developer to

construct Plan C. When all that was settled, the civil rights case was not addressed. It was noted in the settlement document that the developer will get rid of the civil rights case and the inverse condemnation case, but the courts ruled the developer did not have the power to do that because it was the seller of the property, not the developer that controlled those cases. So those cases reactivated in approximately 2008 and have been in active litigation since then with John Gonzalez representing the township. While Realen is part of the caption, they have been on the sidelines. The case is scheduled for a jury trial on July 5, 2012.

Mr. McGrory stated settlement negotiations were sparked at a more intense level the end of last year and since he was appointed Solicitor this year some creative ways to settle this matter have been developed without causing the township great harm. The overall dollar amount of the proposed settlement is \$13 million dollars (\$12 million from Realen and \$1 million from the township) and paid to Hankin. Hankin had two experts in the case, one expert valued their claim at \$300 million, the other expert valued their claim at \$250 million. In denying the summary judgment, the judge determined that this information will be submitted for a jury to hear the potential claims of \$300 million and \$250 million. This had the potential for a catastrophic impact on the municipality.

More intense negotiations began and the plaintiff was willing to accept \$13 million with several various conditions. Through another series of negotiations, the township was able to raise \$12 million from Realen, leaving \$1 million from the township going toward settlement. Mr. McGrory pointed out the \$1 million from the township is coming out of a reserve and not from an operating account. It is not affecting township cash flow or tax rates. The other \$12 million is more involved as to how it is structured. Out of the \$12 million, \$6 million of it is given to Hankin outright with no conditions. Out of the remaining \$6 million, \$2.6 million is prepayment for sewer capacity for many years into the future. With the approval of the Upper Merion Municipal Utility Authority, the \$2.6 million can be applied toward proceeds of the settlement. The remaining \$3.4 million is also a prepayment of various fees that are generated from this development, such as building permit fees, mercantile tax, transfer tax, real estate tax, etc.

The settlement will generate significant positive fiscal impact on the community and will not put any drain on the operating costs of the township. It does not require taxes to be increased and litigation is avoided that potentially could have had a catastrophic outcome.

Mr. McGrory noted the township does not have insurance for this claim and is all private money from the developer and reserve township funds to offset these claims. There are also some minor nuances to the settlement agreement, mostly requiring zoning relief.

When Plan C was approved previously in 2008, it stipulated an extra 1,000 houses can be built if the applicant relinquishes 150,000 square feet of non-residential development. This agreement would amend that agreement to allow Realen to keep 150,000 square feet of non-residential development. This agreement also amends the prior agreement by permitting some of the residential units, as an option if Realen so desires, to become converted to non-residential. Some of the houses could be converted under a ratio to non-residential square footage which would have an even greater positive fiscal impact because there would be fewer children in the school district, a greater tax revenue through mercantile and real estate taxes and various other added benefits of non-residential development.

Mr. McGrory stated agreeing to the settlement is the first of many steps as there are court approvals that are required and many actions out of the township's control that need to be done. For example, Hankin has to petition the Orphans Court in the Court of Common Pleas to approve the \$13 million settlement and they have to convince a judge that \$13 million is an appropriate number to settle this case. There are other nuances of the litigation that cannot be shared with the public at this time, because potentially there could still be a

jury trial on July 5.

Mr. McGrory discussed some drawbacks presented with this negotiation as it stands right now. One drawback was the lack of timing. A judicial conference was held earlier this week during which the \$13 million offer was coming off the table. Mr. McGrory asked the judge for 60 more days so that greater public input could be engaged on the proposed settlement as well as additional time to resolve differently some other legal issues. The judge denied that request and held firm on the July 5 jury date, and offered to do everything to promote a settlement between now and then, but would not change the date. With the limited time left to act, every effort was made to get the word out to the communications media to educate the public.

Mrs. Spott asked for assurance that all parties are in agreement. Mr. McGrory responded in the affirmative and said all parties were on a conference call with the judge earlier this week and all parties agreed to the proposed terms of the agreement. He stated he has in his possession a signed agreement from Realen agreeing to these specific terms and a proposed Order in wording acceptable with the attorneys relevant to that particular Order. In addition, both the Transportation Authority and the Upper Merion Municipal Utility Authority are in agreement and signed appropriate documentation.

Assuming all the judicial requirements are successfully met, Mrs. Spott asked if this agreement provides a conclusion to this litigation and places the township in a position to move forward and begin to realize some of the benefits that would come with this property. Mr. McGrory responded this will be a global settlement of both claims that have been made and claims that have not been asserted yet. The release part of this case is being handled by additional counsel to come up with language that covers all claims asserted or unasserted or anything else that may come up in the future.

Mrs. Spott summarized the agreement stipulates \$1 million from the contingency reserves of the township, \$12 million from Realen and of that \$6 million will be cash from Realen and of the remaining \$6 million, \$3.4 million will be in the form of prepayments against taxes, fees, etc. and \$2.6 million for the purchase of future sewer capacity. Mr. McGrory confirmed, "that is correct in rough numbers."

Mrs. Spott emphasized the township is trading in catastrophic liability in return for moving forward with the property and attaining revenues which have been estimated would exceed \$300 million over the next 25 years.

Mrs. Spott asked for a motion for the settlement of Hankin Family Partnership, et al versus Upper Merion Township, et al with the terms and conditions as described by the Township Solicitor.

Mr. Jenaway stated based upon the presentation of Mr. McGrory and the Chairperson's additional comments, it is clear that this is the right thing to do at this time and is in the best interests of Upper Merion Township residents and the business community. He made the motion to accept the settlement agreement of the Hankin Family Partnership, et al, versus Upper Merion Township, et al.

Mr. Philips seconded the motion.

For the benefit of the general public, Mr. Jenaway reinforced a couple points. He stated that a judicial committee was held this past week which placed this settlement agreement on an accelerated time frame and as such there was little time to make a decision to negotiate a settlement or not. As was stated by the Township Solicitor, without quick action the settlement would be pulled and the risk gets higher. Mr. Jenaway pointed out the \$1 million of township funds represents an investment with the potential return of \$300 million over the next 25 years. Looking at this from a variety of viewpoints, Mr. Jenaway stated this is the best course of action for Upper Merion Township to move forward with the settlement agreement.

Mr. Waks stated not only will the resolution of this matter benefit the township's revenue long term, but it will be especially beneficial for the school district revenue long term. He said this settlement holds the promise of bringing in far more revenue to the school district over 25 to 30 years than it will cost to educate any children moving into that property over the next 25 or 30 years. Mr. Waks also thanked the Township Solicitor for his hard work and skill in the settlement negotiations.

Mrs. Kenney added her concurrence to her colleagues' comments and also thanked Mr. McGrory for his creativity and counsel on the settlement agreement.

Mr. Philips joined his colleagues in expressing appreciation for the Solicitor's work in achieving this settlement and making "lemonade out of lemons." He emphasized the important point for the public to understand is that the township does not have insurance to cover this and if plaintiffs were successful in their claims of \$300 million, the township would have been in an untenable fiscal position. This settlement will incur an investment of \$1 million as opposed to an outlay of hundreds of millions of dollars to recoup through taxes and other revenue measures.

Mrs. Spott concluded by saying this settlement is in the best interests of Upper Merion and is not about politics or partisanship, but it is about working together to do the right thing for the township and to secure its future.

Board Action:

It was moved by Mr. Jenaway, seconded by Mr. Philips, all voting "Aye to approve the settlement of Hankin Family Partnership, et al, versus Upper Merion Township, et al with the terms and conditions as set forth by the Township Solicitor. None opposed. Motion approved 5-0.

ADDITIONAL BUSINESS

UPCOMING EVENTS IN TOWNSHIP

Mrs. Spott announced a number of Township meetings and events.

ADJOURNMENT:

There being no further business to come before the Board, it was moved by Mr. Waks, seconded by Mrs. Kenney, all voting "Aye" to adjourn the meeting. None opposed. Motion approved 5-0. Adjournment occurred at 8:00 p.m.

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RONALD G. WAGENMANN  
SECRETARY-TREASURER  
TOWNSHIP MANAGER

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Minutes Approved:  
Minutes Entered