

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Appeal of Main Street at :
Exton, L.P. From the Decision of the :
Board of Supervisors of West :
Whiteland Township Dated :
November 3, 2005 : No. 1507 C.D. 2009
: Argued: May 17, 2010

Appeal of: Main Street at Exton, L.P. :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER

FILED: September 9, 2010

Main Street at Exton, L.P. (Main Street) appeals from an order of the Court of Common Pleas of Chester County that affirmed the decision of the Board of Supervisors of West Whiteland Township (Board) approving the preliminary land development plan submitted by West Whiteland Township (Township) for construction of a new municipal building. In approving the plan, the Board granted waivers from numerous provisions of the Subdivision and Land Development Ordinance (Land Development Ordinance) and the Stormwater Management Ordinance of 2004 (Stormwater Ordinance). Main Street argues that the Board violated the public trust and failed to protect the public health, safety and welfare in granting the waivers. Main Street further argues that the Township failed to meet the standards for modifying or waiving the ordinance requirements

and was required to obtain a variance or conditional use approval to disturb the steep slopes.

I.

Main Street is the current owner of property consisting of approximately 143 acres. The property is located on the west side of Pottstown Pike near the Route 30 and Route 100 interchange. The former property owner, Wal-Mart Stores, Inc., filed an application for preliminary land development plan approval in 1994, proposing to construct five restaurants on a portion of the property within the Limited Industrial zoning district, where such use was permitted by right. In December 1995, Wal-Mart filed another application seeking conditional use approval to construct a Wal-Mart store and another retail store on the property within the Town Center Residential zoning district. The Board denied both applications in August 1998. Wal-Mart appealed the Board's decisions to the trial court.

Subsequently, Wal-Mart entered into an agreement to sell the property to Wolfson & Verrichia Group, Inc. (Wolfson or Developer). On November 10, 1998, Wal-Mart, Wolfson and the Board entered into a Settlement Agreement, agreeing to an alternative plan to develop the property as a town center with mixed uses, such as retail stores, offices, hotels, restaurants, parking facilities, historic uses and municipal uses. The parties also agreed to overall design criteria for the town center. The Settlement Agreement provided:

(15) Buffering and Landscaping. Buffering widths shall be as shown on the Conceptual Plan. The Landscape Plan shall depict the specific treatment within the buffers. The Developer shall submit a comprehensive landscaping and buffering plan which, among other things, takes into account the views from Route 100 and

the Commerce Drive extension. The plan shall be satisfactory to and approved by the Board, said approval not to be unreasonably withheld.

....

(18) Steep Slopes. Article 12 [sic]^[1] of the Zoning Ordinance shall not be applicable to any steep slopes which can be demonstrated to be man-made slopes.

(19) The following requirements of the [Land Development Ordinance] are hereby waived:

....

(H) ... Storm Drainage. In lieu of compliance with the storm drainage requirements of ... the [Land Development Ordinance], "best management practices" shall be utilized. In designing the stormwater management system for the Proposed Development, the Developer shall consult the draft Brandywine Conservancy "guidelines" in connection with "best management practices[.]"

Background of the Settlement Agreement, ¶ M(15), (18) and (19)(H); Reproduced Record (R.R.) at 17a-19a (footnote added). It was further agreed that "Design Criteria shall supercede all requirements of the Zoning Ordinance and ... Land Development Ordinance ... which are inconsistent therewith." *Id.* at ¶ M; R.R. at 11a.

Paragraph 2.B(16) and (18) of the Terms of the Settlement Agreement provided:

(16) When final approval ... of the Final Plans ... is issued by the Board and the Final Plans are recorded, *the Developer shall convey to the Township approximately 8.9 acres of land (as is), in the location depicted on the Conceptual Plan, for the future construction of a new municipal complex (the "Municipal Lot"),* subject to the following conditions:

¹ Article 14, not Article 12, of the Zoning Ordinance regulates "steep slope conservation" areas. *See* Reproduced Record at 51a.

a. *The Township will award the contract and commence building construction of the municipal complex on the Municipal Lot within five years of the issuance of the first building permit for the Property, unless such timeframe is waived or extended by the Developer. If the Township fails to award the contract or to commence building construction of the municipal complex within the required five year period, the ownership of the Municipal Lot will automatically revert back to the Developer. ...*

b. The Township will design said municipal complex in substantial accordance with the final draft dated March 7, 1997 of the Exton Town Center Design Standards (proposed amendments to the [Land Development Ordinance]) and in keeping with the overall design of the Proposed Development. ...

....

g. The Township shall be responsible for all stormwater management facilities required to serve the Municipal Lot and shall employ "*best management practices*" to the same extent as required of Developer in the development of the Proposed Development.

....

(18) "Best management practices" will be employed in controlling the quantity and quality of stormwater discharge from the site to the extent practicable. The developer shall consult the draft Brandywine Conservancy "guidelines" for "best management practices" in designing the stormwater management facilities for the Proposed Development.

R.R. at 25a-26a and 28a-29a (emphasis added).

After obtaining the first building permit on July 25, 2001, the Developer began construction of the shopping center, known as "Main Street at Exton." It is undisputed that the five-year period, within which the Township was required to award a contract or commence construction of a municipal complex in order to avoid an automatic reversion of the title to the 8.9-acre municipal lot (Lot

No. 11) to the Developer, was to expire on July 25, 2006.² On October 20, 2005, the Township submitted an application for preliminary land development plan approval through Bohler Engineering, Inc., proposing to construct on Lot No. 11 a two-story, 12,000-square-foot municipal building and related improvements.

The preliminary development plan was reviewed by the Township's Interim Director of Planning and Zoning; the Township's engineer, Spotts, Stevens and McCoy (SSM); and the Township's historical, lighting, traffic and planning consultants. After completion of their review, the Township's Interim Director of Planning and Zoning recommended that the Planning Commission approve the preliminary development plan with revisions made to grading and stormwater management facilities and with the remaining minor design issues to be resolved at the final plan approval stage.

On November 2, 2005, the Planning Commission and the Historical Commission held a joint meeting, at which the Township's architect, Cee Jay Frederick, presented the preliminary development plan to the Commissions. Main Street's counsel claimed that Main Street was not notified of the filing of the land development application. The Township solicitor responded that the Township delivered a copy of the preliminary plan to Steve Wolfson, the principal of Main Street. *See* Transcript of the Planning and Historical Commissions' Joint Meeting at 95-96; R.R. at 567a. The Township submitted a list of waivers from the various provisions of the Land Development and Stormwater Ordinances regulating stormwater management facilities, grading, landscaping, lighting, tree surveys and

² According to the Board, the Developer refused to convey the title to the municipal lot to the Township, forcing the Township to commence an action against the Developer seeking conveyance of the title.

compensatory tree planting. The Planning and Historical Commissions recommended that the Board approve the preliminary plan with the requested waivers, except a waiver from the tree survey requirement.

At a special meeting held on November 3, 2005, the Board reviewed the reports of the Township's Interim Director of Planning and Zoning, the Township's consultants and the Planning and Historical Commissions. The Board also reviewed a memorandum prepared by the Township's Interim Director of Planning and Zoning, requesting the following waivers:

§270-20.A(1) [of the Stormwater Ordinance] – requiring infiltration of stormwater (SSM [the Township's engineer] has advised that infiltration is not advisable due to the carbonate geology of the site).

§270-20.A(3)(b) – disturbance of lands within Riparian Buffer Zone 2 (as per comments #2 and #4 of SSM review dated October 31).

§270-20.A(3)(c) – disturbance of lands within Riparian Buffer Zone[]3 (as per comments #2 and #4 of SSM review dated October 31).

§270-26.A(3)(b) – to allow interior slope of a drainage basin to be steeper than 3:1 (as per comment #1 of SSM review dated October 31).

§270-26.A(4)(d) – requiring specific construction standards for retention basins (construction details to be as directed by SSM).

§270-26.C(5) – concerns the required grade of aggregate material for construction in the storm water management facilities. (as per comment #22 of SSM review dated October 31, 2005 where Mr. Morey supported the granting of a waiver to allow what was proposed.)

§281-16.(9)(a)(2) [of the Land Development Ordinance] – inventory of trees.

§281-34.G – requiring inventory of all trees on the site that are larger than six inches DBH [the diameter at breast height] and compensation for same.

§281-35.E(3) and 281-35.F(4) – requiring buffer plantings around drainage basins (as per comment #5 of TCA [the Township's planner] review dated October 27).

§281-37.B(4) – regarding parking lot landscaping (landscaping has been provided appropriate to this atypical design, but does not meet the letter of this requirement).

§281-37.C – regarding provision of a landscaped divider strip within the parking lot (a divider strip is provided, but narrower than required).

§281-37.D – regarding landscaping surrounding the building (details will be resolved with Township and TCA for final plan; may not satisfy letter of these requirements).

§281-48.C(2)(b) – requiring cut-offs for light standards (standard provides indirect light; no cut-off is available).

§281-48.C(3)(f) – regarding issue of light trespass onto adjacent property (property in question is Commerce Boulevard, rendering this a moot issue).

Minutes of the Board's Meeting at 7; R.R. at 591a.

The Board granted all the waivers requested by the Township's Interim Director of Planning and Zoning in his memorandum, except a waiver from the tree survey requirement. The Board also granted two additional waivers requested by the Township at the Board meeting: a waiver from a historical impact survey and a waiver from Section 281-60.F of the Land Development Ordinance. Section 281-60.F requires written notification of the filing of a land development application to all property owners within 300 feet of a subject property. The Board approved the preliminary plan on the condition that the plan comply with the reports of the Township's Interim Director of Planning and Zoning, engineer and consultants. Main Street appealed the Board's decision to the trial court.

The trial court affirmed the Board's decision. The court concluded that the Township established entitlement to the requested waivers and that the

Township was not required to obtain a variance or conditional use approval to disturb the man-made steep slopes. The court stated:

Developer, having spent considerable time and money acquiring its own approvals to move forward with the Main Street at Exton project from the very same Commissions and Board that the Township breezed through in fourteen days, understandably chafes at a perceived lack of fairness. However, the decision of the Board to approve the application for preliminary land development can be reversed only for an abuse of discretion or an error of law, neither of which exist[s] here.

Trial Court's June 30, 2009 Opinion at 8. Main Street's appeal to this Court followed.³

II.

The Board argues that Main Street's challenge to the approval of the preliminary development plan was rendered moot due to the Board's subsequent unappealed approval of the final development plan in March 2006. The Board notes that the Township obtained the building permits in May 2006 and moved into the new municipal building in 2009 after substantial completion of the construction.

The Township has a three-step review process for land development plans: a sketch plan, a preliminary plan and a final plan. Section 281-7 of the Land Development Ordinance. Each plan must set forth unique and distinct information enumerated in Sections 281-15, 281-16 and 281-17. A sketch plan affords the

³ Because the trial court took no additional evidence, the relevant inquiry in this appeal is whether the Board's decision is supported by substantial evidence in the record. *Weiser v. Latimore Twp.*, 960 A.2d 924 (Pa. Cmwlth. 2008), *appeal denied*, 601 Pa. 705, 973 A.2d 1008 (2009).

applicant an opportunity to submit basic information for informal discussion before engaging in detailed engineering designs for preliminary and final plans. Section 281-9.A. A preliminary plan must demonstrate compliance with all specific, objective requirements of the subdivision and land development ordinance. *Herr v. Lancaster County Planning Comm'n*, 625 A.2d 164 (Pa. Cmwlth. 1993). A final plan must contain additional information enumerated in Section 281-17.A through I, such as street dedication offers, highway occupancy permits, engineering and traffic studies for regulatory signage and controls and data for carbonate area districts. A final plan must also incorporate any modifications and revisions required by the Board in approving the preliminary plan. Section 281-11.B(1). A preliminary plan is conditional in nature because after its approval, the developer must still comply with all the requirements to obtain final plan approval. *CACO Three, Inc. v. Bd. of Supervisors of Huntington Twp.*, 845 A.2d 991 (Pa. Cmwlth. 2004).

In *Narberth Borough v. Lower Merion Township*, 590 Pa. 630, 915 A.2d 626 (2007), the township had a three-step land development plan review process, as in this case. The board of commissioners approved the sketch plan subject to 44 conditions. This Court reversed the trial court and upheld the board's approval of the sketch plan. While an appeal from this Court's decision was pending before the Pennsylvania Supreme Court, the board approved the preliminary plan, which was affirmed by the trial court. This Court affirmed the trial court, and the Supreme Court denied an allowance of appeal. The landowner argued before the Supreme Court that the subsequent approval of the preliminary plan upheld on appeal rendered the challenge to the sketch plan moot.

The Supreme Court noted that each three-step review process contains

unique and distinct requirements. The Court rejected the landowner's argument, stating:

[I]f approval of the second or third step of a three-step approval process mooted the preceding steps without regard to those steps' unique requirements, a municipality that wished to hasten approval of a particular development could expedite review of later steps in the process to avoid an objector's right to judicial review of the prior step or steps in the process. Given that this right to review is enshrined in the MPC itself, such a ruling would be counterintuitive, and run counter to our well-established principles of statutory construction. 1 Pa.C.S. § 1922(1) ("[T]he General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.")

Id. at 640, 915 A.2d at 633. Under *Narberth Borough*, Main Street's challenge to the approval of the preliminary development plan was not rendered moot by the Board's subsequent unappealed approval of the final development plan.

III.

Main Street argues that the Board disregarded its own ordinances and failed to act in the public interest in granting the waivers and approving the preliminary plan. Main Street asserts that the Board "railroaded" the land development plan review process in order to avoid an automatic reversion of the title to the municipal lot upon expiration of the required five-year period. Main Street's Brief at 20. Main Street claims that the Board's action violated the public trust and that the Board abdicated its duty to protect the health, safety and welfare of the adjacent property owners. In support, Main Street cites Section 105 of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10105, which states that the purpose of the MPC is, *inter*

alia, "to protect and promote safety, health and morals" and "to provide for the general welfare." *See also* Section 281-1 of the Land Development Ordinance, providing that the purpose of the Ordinance is to create "conditions favorable to the health, safety, morals and general welfare of the citizens of the Township ..."

The Board argues, and the trial court determined, that Main Street waived the issue because Main Street failed to concisely state the issue in its statement filed pursuant to Pa. R.A.P. 1925(b). We agree.

In paragraph 1 of the Rule 1925(b) statement, Main Street stated:

The Court committed an error of law and/or abused its discretion in failing to determine that the Board's departure from established Township procedure and blatant disregard of its own ordinances for the sole purpose of enabling the Township to commence construction of the municipal building by July 25, 2006 constitutes a violation of the public trust and a complete abdication of the Board of Supervisor's ... duty to insure that the construction of the municipal building on Lot 11 be accomplished in a manner that protects the health, safety and welfare of adjacent property owners such as Main Street, as well as the general public.

Certified Record (C.R.), Item 18.⁴

Rule 1925(b) is intended to aid the trial court in identifying and focusing only on those issues that the parties plan to raise on appeal. *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998). A Rule 1925(b) statement must contain a sufficiently concise and coherent statement of issues to enable the trial court to identify the issues to be raised on appeal. *Jiricko v. Geico Ins. Co.*, 947 A.2d 206 (Pa. Super. 2008). Issues not included or not properly raised in the Rule 1925(b) statement are waived. Rule 1925(b)(4)(vii).

⁴ Contrary to the Board assertion, Main Street raised the same issue in its appeal to the trial court. *See* Paragraph 19 of the Notice of Appeal; R.R. at 794a.

Paragraph 1 of Main Street's Rule 1925(b) statement, standing alone, is too broad and vague to enable the court to identify any specific issue. Main Street failed to identify the specific procedure and provisions of the Ordinances that the Board allegedly violated in granting the requested waivers and approving the preliminary plan. A statement which is too vague to allow the court to identify the issues to be raised on appeal is the functional equivalent of no statement at all. *Commonwealth v. McCandless*, 880 A.2d 1262 (Pa. Super. 2005), *appeal dismissed*, 593 Pa. 657, 933 A.2d 650 (2007). Main Street, therefore, failed to preserve the issue in Paragraph 1 of the Rule 1925(b) statement. Moreover, the question of whether Main Street violated the public trust and failed to act in the public interest is related to the ultimate issue of whether the Board abused its discretion in granting the waivers from the specific procedural and substantive provisions of the Ordinances.

IV.

Main Street argues that the Board's grant of the waivers is improper under Section 512.1(b) of the MPC, added by Section 40 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10512.1(b), and Section 281-62.B of the Land Development Ordinance because the Township failed to submit a written waiver request with the application for preliminary plan approval.

The Board has authority to act upon on all applications for approval of a plat, whether preliminary or final. Section 508 of the MPC, 53 P.S. § 10508. Section 512.1(a) and (b) of the MPC provides in relevant part:

(a) The governing body ... may grant a modification of the requirements of one or more provisions if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not

be contrary to the public interest and that the purpose and intent of the ordinance is observed.

(b) All requests for a modification shall be in writing and shall accompany and be a part of the application for development. The request shall state in full the grounds and facts of unreasonableness or hardship on which the request is based, the provision or provisions of the ordinance involved and the minimum modification necessary.

Section 503(8) of the MPC, 53 P.S. § 10503(8), further provides that a subdivision and land development ordinance may include "[p]rovisions for administering waivers or modifications to the minimum standards of the ordinance in accordance with section 512.1, when the literal compliance with mandatory provisions is shown to the satisfaction of the governing body ... to be unreasonable, to cause undue hardship, or when an alternative standard can be demonstrated to provide equal or better results." Section 281-62.A and B of the Land Development Ordinance contains virtually the same language as Section 512.1(a) and (b) of the MPC.

As the trial court observed, a written waiver request "facilitates the orderly processing and consideration" of the [a]pplication." Trial Court's June 30, 2009 Opinion at 6. In this matter, however, the Supervisors had been directly involved in the new municipal building project since 1998 and were fully aware of the details of the proposed designs. The Township submitted to the Planning and Historical Commissions a written memorandum requesting waivers. Although the Township requested two additional waivers at the Board's meeting, Main Street had a full opportunity to raise its objections to all the waivers requested by the Township. Thus, Main Street was not prejudiced in any way by the Township's failure to strictly comply with Section 512.1(b) of the MPC and Section 281-62.B of the Land Development Ordinance.

V.

Main Street next argues that the Board granted the waivers without supporting evidence in the record.⁵

Section 281-21.C of the Land Development Ordinance provides that "[w]here literal compliance with the standard herein specified is clearly *impractical*, the Board may modify or adjust the standards to permit reasonable utilization of property while securing substantial conformance with the objectives of [the Land Development Ordinance]." (Emphasis added.) In granting modifications, the Board "may impose such conditions as will, in its judgment, secure substantially the objectives of the standards or requirements so modified." Section 281-62.C.

A grant of waivers from the subdivision and land development ordinance provisions requires less rigorous proof than the proof required for granting a variance from the zoning ordinance provisions. *Telvil Constr. Corp. v. Zoning Hearing Bd. of E. Pikeland Twp.*, 896 A.2d 651 (Pa. Cmwlth. 2006). Waivers may be properly granted where literal enforcement of a requirement in question will frustrate the implementation of other requirements, or where an additional requirement would offer little or no additional benefit. *Tioga Pres. Group v. Tioga County Planning Comm'n*, 970 A.2d 1200 (Pa. Cmwlth. 2009),

⁵ Main Street asserts that "the Board granted itself 'waivers' from important [Land Development Ordinance] design requirements." Main Street's Brief at 20. In so asserting, Main Street ignores that the Board acted in the capacity of a tribunal, not in an adversarial role for the Township. When a governing body is acting in the tribunal capacity, it has an additional interest of seeing that its ordinances are not violated, and it must avoid even the appearance of bias or impropriety. *K. Hovnanian Pa. Acquisitions, LLC v. Newtown Twp. Bd. of Supervisors*, 954 A.2d 718 (Pa. Cmwlth. 2008). Main Street neither objected to the Board's proceeding nor alleged that the Board exhibited bias or engaged in any act involving a conflict of interest.

appeal denied, 603 Pa. 687, 982 A.2d 1229 (2009); *Ruf v. Buckingham Twp.*, 765 A.2d 1166 (Pa. Cmwlth. 2001). Further, a municipality "may grant waivers which it deems appropriate in the interest of the township." *Valenti v. Washington Twp.*, 737 A.2d 346, 349 (Pa. Cmwlth. 1999).

A. The waiver from the notification requirement.

Main Street argues that the Board's grant of the waivers and approval of the preliminary plan is improper due to the Township's failure to comply with Section 281-60.F of the Land Development Ordinance, which requires notification of the filing of the preliminary plan approval application to all property owners within 300 feet of the subject property. Main Street, however, waived its argument due to its failure to raise it in the Rule 1925(b) statement. Moreover, the record indicates that Main Street was fully aware of the filing of the Township's application and the scheduled November 2 and 3 meetings before the Commissions and the Board. Main Street does not dispute that the Township mailed the preliminary plan to Main Street's principal, Steve Wolfson, and informed him of the time and dates of the scheduled meetings. *See* Transcript of the Board's Meeting at 168; R.R. at 765a. A copy of e-mails dated October 21 and 25, 2005 also shows that the Township's personnel and Steve Wolfson discussed the scheduled meetings. *See* R.R. at 493a-94a. Counsel appeared and represented Main Street and another adjacent property owner, Main Street Cinema, LP at the meetings. *See* R.R. at 567a and 601a. Thus, even had Main Street preserved the argument, it still lacks merit.

B. The waivers from the Stormwater Ordinance provisions.

Section 281-38 of the Land Development Ordinance incorporates the Stormwater Ordinance by reference and makes it a part of the Land Development

Ordinance. The Land Development Ordinance requires all subdivision and land development to comply with the provisions of the Stormwater Ordinance. *Id.* Section 270-11.A of the Stormwater Ordinance authorizes the Township to grant a full or partial waiver from the provisions of the Stormwater Ordinance "if the applicant demonstrates that the literal enforcement of the provision will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such waiver will not be contrary to the public interest and that the purpose and intent of [the Stormwater Ordinance] is observed." The applicant for a waiver must establish, *inter alia*, that "[t]here would be no predictable or apparent negative impact on adjoining property, either short-term or long-term." Section 270-11.A(1)(b). The applicant must present "evidence including but not limited to engineering data, geotechnical reports, soil and geological studies, etc., which adequately documents that literal enforcement of the standards ... are not achievable." Section 270-11.A(1)(c). The applicant must also demonstrate that "alternative design provisions shall achieve the objectives set forth in [the Stormwater Ordinance]." Section 270-11.A(1)(d).

1. Stormwater infiltration facilities.

Section 270-20.A(1) of the Stormwater Ordinance provides that "[t]he applicant shall first provide infiltration facilities in areas where soils are suitable for infiltration and shall direct the runoff from impervious surfaces into those infiltration facilities." The Settlement Agreement permits the Township to utilize best management practices in designing the stormwater management system, "[i]n lieu of compliance with the storm drainage requirements." Background of the

Settlement Agreement, ¶ M(19)(H); R.R. at 18a.⁶ The Township's engineer, Frederick, stated that two geological studies confirmed that the municipal lot is in the carbonated geographical area. Transcript of the Board Meeting at 89; R.R. at 686a. The Township's Interim Director of Planning and Zoning, John Weller, stated that stormwater infiltration is not advisable on the municipal lot because of its carbonated condition, which "tends to create sink holes and things of that nature." *Id.* at 122; R.R. at 719a. The Township's engineer, SSM, recommended not to infiltrate stormwater runoff due to such condition. The evidence thus supports the waiver from Section 270-20.A(1).

2. Disturbance of the riparian buffer areas.

Section 270-20.A(3)(b) and (c) of the Stormwater Ordinance restricts disturbance of a riparian buffer zone 2 (a 100-foot managed buffer zone) and a riparian buffer zone 3 (a buffer zone with varying width extending outward from the zone 2). The purpose of riparian buffer zones is to convert concentrated flow of stormwater to uniform, shallow, sleet flow to maximize filtering and physical removal of pollutants. SSM Report at 2; R.R. at 515a. The Township's

⁶ In general, the municipality's police power to protect the public interest cannot be subjected to an agreement. *Carlino v. Whitpain Investors*, 499 Pa. 498, 453 A.2d 1385 (1982). Contracts thus have no place in a zoning plan. *Id.* However, the courts have also recognized a distinction between the court-supervised settlement of a judicial proceeding and contract zoning. See *BPG Estate Investors-Straw Party II, L.P. v. Bd. of Supervisors of Newtown Twp.*, 990 A.2d 140 (Pa. Cmwlth. 2010); *Summit Twp. Taxpayers Ass'n v. Summit Twp. Bd. of Supervisors*, 411 A.2d 1263 (Pa. Cmwlth. 1980). An agreement entered into to resolve the ongoing litigation, such as the Settlement Agreement in this case, does not constitute invalid contract zoning, even if it permits deviations from the ordinance requirements. *BPG Estate Investors*. The Settlement Agreement covered the entire property initially owned by Wal-Mart, including the 8.9-acre municipal lot which was subsequently conveyed to the Township. Therefore, the terms of the Settlement Agreement apply not only to the Main Street at Exton project but also to the municipal building project.

preliminary plan showed encroachment of the riparian buffer zones by the outfall structures and parking area. The Township proposed to convert the piping outfall structures to a series of settling ponds and overflow basins to create a greater degree of sheet flow of stormwater into Valley Creek. The Township's architect stated that such a plan adopts "best management practices" and constitutes "a minimal amount of departure" from Section 270-20.A(3)(b) and (c). Transcript of the Board Meeting at 28; R.R. at 625a. The evidence presented by the Township is sufficient to establish that compliance with the riparian buffer regulations would be impractical and would frustrate the overall project and that the proposed stormwater management plan provided a reasonable alternative to the required design.

3. Slope restrictions.

Section 270-26.A(3)(b) of the Stormwater Ordinance limits interior slopes of a drainage basin to "one foot vertical in three feet horizontal except with approval of the Township." The Township proposed basin slopes to be at 2:1, rather than at 3:1. The Township's architect explained that a waiver from the slope restrictions was necessary to move the initially proposed Retention Basin No. 2 from the floodplain and that the requested waiver complied with state and federal regulations. Transcript of the Board Meeting at 22; R.R. at 619a. His explanation establishes that implementation of the other ordinance requirements would be frustrated without the waiver from the slope restrictions, supporting the grant of the waiver.

4. Materials used for the basin construction.

Section 270-26.A(4)(d) of the Stormwater Ordinance requires all basins to be constructed with "a compacted relatively impervious (Unified Soil

Classification CL-ML or CL) key trench and core" and to meet the dimensional requirements set forth therein. The Township instead "may require an impermeable liner to be installed up to one-hundred-year design water surface elevation." *Id.* The Township's engineer explained that the impermeable liner is better than the required clay core in retaining stormwater and in preventing an adverse impact on the carbonate geological area and that the proposed plan meets or exceeds the required standards. The Township thus demonstrated that the requirement in Section 270-26.A(4)(d) offers no additional benefits in the stormwater management on Lot No. 11 and that the proposed plan was substantially equivalent to the required design and provided a reasonable alternative to the requirement.

5. Materials used in the stormwater sewer construction.

Section 270-26.C(5) of the Stormwater Ordinance provides that "[h]eadwalls, endwalls, or end sections shall be required on all open pipes, shall be of concrete construction and shall be set on a minimum of 12 inches of AASHTO No. 57 (PA DOT 2B) coarse aggregate." The Township proposed to use 2A stones, instead of 2B stones, in the stormwater sewer construction. The Township's architect stated that 2A and 2B stones are "all very similar," that 2A stones are used in other parts of the project, and that the use of 2A stones was only "a slight deviation" from the requirement. Transcript of the Board Meeting at 94; R.R. at 691a. His explanation demonstrates that the proposed materials are substantially equivalent to the required materials and will not negatively impact on adjoining property, supporting the grant of the waiver.

C. The waivers from the Land Development Ordinance provisions.

1. The compensatory tree planting requirement.

Section 281-34.G(1) of the Land Development Ordinance provides that "[i]n the event that preservation of existing trees is impossible and/or relocation of improvements impractical, then compensatory planting shall be required for each mature tree to be removed." If it is impractical to locate the required number of compensatory trees, the Township may require the applicant to (1) install a portion of the required number of compensatory trees on other public lands within the Township, (2) contribute the estimated installment costs of trees to the Township or (3) install fewer, larger or more valuable compensatory trees. Section 281-34.G(6). The Township architect stated that many trees had already been removed from the municipal lot during the previous Main Street at Exton project. Requiring the Township to contribute to the "tree bank" managed by the Township itself would increase the costs of the municipal building construction project, which is not "in the interest of the township." *Valenti*, 737 A.2d at 349. Under these facts, the waiver from Section 281-34.G(1) must be upheld.

2. The landscaping requirements.

Section 281-35.E(3) of the Land Development Ordinance requires the applicant to provide 25-foot buffers at the property line, at the right-of-way line or around the stormwater management basins with shade trees, ornamental trees, evergreen trees and small shrubs. In addition, Section 281-35.F(4) requires the applicant to design basins as natural areas with 100% native plantings to promote habitat and aesthetics. The Township's landscaping plan did not include the required buffer planting, and the side slopes did not meet the criteria for naturalistic basins. The Township's plan also did not comply with Section 281-37.B(4) (planting islands in the parking lot), 281-37.C (landscaping of divider strips in the parking lot) and 281-37.D (planting between parking lots and

buildings).

The Township presented sufficient evidence to justify deviation from the landscaping requirements. The Settlement Agreement required that buffering widths to be as shown on the conceptual plan revised in 1998. Background of the Settlement Agreement, ¶ M(15); R.R. at 17a. The Settlement Agreement prohibits the Board from unreasonably withholding landscaping plan approval. *Id.* The Township's landscaping consultant stated that the required planting would not provide an effective riparian buffer and that its maintenance would be very expensive. He instead recommended a managed meadow of native grasses and wildflowers in the areas surrounding the basins and a reforestation of the areas between the buildings and the basins. The Township also proposed to place a wall to screen the parking lot, to create "a faux orchard" over the parking lot with a grove of trees, and to place divider strips with widths narrower than the required widths. Transcript of the Board Meeting at 82; R.R. at 679a. The Township architect stated that increasing the widths of the divider strips would affect the construction of the stormwater basins and that strict compliance with the landscaping requirements would result in planting the trees and shrubs under the carport and canopy of the building. The Township architect further stated that the requested waivers are consistent with "the overall package." *Id.* at 83; R.R. at 680a. The Board did not abuse its discretion in granting the waivers from the landscaping requirements.

3. The light fixture design standards.

Section 281-48.C(2)(b) of the Land Development Ordinance requires lighting fixtures to meet "IESNA [Illuminating Engineering Society of North America] full-cutoff criteria." Section 281-48.C(3)(f) provides that "[t]he amount

of illumination projected onto any nonresidential property line from another property shall not exceed 1.0 vertical footcandle measured line-of-sight from any point on the property." Only two sections on Commerce Boulevard did not comply with the lighting regulations. The Township's architect stated that higher illumination is required in the area surrounded by the shopping center for safety reasons and that the source of the light will not be seen because the triangular elements on the electric poles "reflect[] the light back down onto the ground." Transcript of the Board Meeting at 51; R.R. at 648a. The evidence demonstrates that the Township substantially complied with the lighting fixture design standards and that the noncompliance affected only a limited area, justifying the waivers from the light fixture design standards.

VI.

Finally, Main Street argues that the Township was required to obtain a variance or conditional use approval to disturb the steep slopes. The Steep Slope Conservation District consists of two areas: prohibitive slopes and precautionary slopes. Section 325-70.A of the Zoning Ordinance. Prohibitive slopes are "those of greater than 25% slope measured over three or more two-foot contour lines established from field survey." Section 325-70.A(1)(a). Precautionary slopes are "those of 15 to 25% slope" measures by the same method. Section 325-70.A(2)(a). Section 325-71.B and C list uses that are permitted by right and as a conditional use in precautionary and prohibitive slopes. The Board "may permit by conditional use the exemption of man-made slopes (e.g., man-made slopes within a street or railroad right-of-way) equal to or greater than 1,000 square feet." Section 325-70.A(1)(b) and (2)(b).

Main Street maintains that the Township was required to obtain a variance because several portions of the municipal building, parking areas and driveways are not permitted within the prohibitive or precautionary slopes. Main Street further maintains that even if the steep slopes on the municipal lot are man-made, the Township must still obtain conditional use approval to disturb them. The Board submits that the steep slopes are man-made because it was created by the stockpiling of soil during the previous Main Street at Exton project.

The Settlement Agreement provided that the provisions of the Zoning Ordinance regulating steep slopes "shall not be applicable to any steep slopes which can be demonstrated to be man-made." Background of the Settlement Agreement, ¶ M(18); R.R. at 18a. The Township's engineer stated that the steep slopes on the lot "appear[ed] to be man-made in origin." SSM's October 25 2005 Report at ¶ 14; Board's Record No. 9. Main Street's counsel conceded that the steep slopes "are manmade," and the record does not indicate otherwise. Transcript of the Board Meeting at 137; R.R. at 734a. Because the steep slopes on the municipal lot are man-made, the steep slope regulations in the Zoning Ordinance do not apply to the municipal lot under the Settlement Agreement. Hence, the Township was not required to obtain a variance or conditional use approval to disturb those steep slopes.

In conclusion, Main Street has failed to present any meritorious argument, and the Board's decision is supported by the substantial evidence in the record. Accordingly, the trial court's order is affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Appeal of Main Street at :
Exton, L.P. From the Decision of the :
Board of Supervisors of West :
Whiteland Township Dated :
November 3, 2005 : No. 1507 C.D. 2009
:

Appeal of: Main Street at Exton, L.P. :

ORDER

AND NOW, this 9th day of September, 2010, the order of the Court of Common Pleas of Chester County in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge