IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Laura B. Kohr and Leon P. Haller, Esq., Trustee for the Estate of Ronald C. Kohr	:	
v.	:	No. 1631 C.D. 2009
Lower Windsor Township Board of Supervisors	:	
Appeal of: Ronald C. Kohr, Jr. and Katherine E. Trefry, executors of The Estate of Laura B. Kohr	:	
Laura B. Kohr and Leon P. Haller, Esq., Trustee for the Estate of Ronald C. Kohr	:	
v.	:	No. 1689 C.D. 2009
	:	Argued: June 24, 2010
Lower Windsor Township Board of Supervisors, Appellant	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: July 13, 2010

Ronald C. Kohr, Jr. and Katherine E. Trefry, Executors of the Estate of Laura B. Kohr (Landowner), appeal from an order of the Court of Common

Pleas of York County (trial court) denying its land development appeal because the access drives in the plans were "minor streets" and not "driveways" under the Lower Windsor Township's (Township) Subdivision and Land Development Ordinance (SALDO). The Lower Windsor Township Board of Supervisors (Board) has filed a cross-appeal from that same order denying its motion to quash Landowner's appeal for lack of standing. For the reasons that follow, we affirm in part and reverse in part the trial court's order.

Related matters to this court were previously before our Court, and it is necessary to review them in order to deal with the current issues at hand. In *Kohr v. Lower Windsor Township Board of Supervisors*, 910 A.2d 152 (Pa. Cmwlth. 2006) (*Kohr 1)*, Landowner owned 900 acres of land known as Lauxmont Farm in York County, Pennsylvania. It sought to eventually develop three subdivision plans, and in November 2002, it filed with the Township preliminary subdivision plans for developments known as Lakeside West, Lakeside East and Lakeside East Townhouses. Lakeside West consisted of 145 acres to be subdivided into 143 single-family residence lots; Lakeside East consisted of 87 acres to be subdivided into 110 single-family lots, and Lakeside East Townhouses were designated as multi-family dwellings. It also intended to utilize a portion of its property to develop townhouses in various phases in an area close to these developments referred to as Lauxmont Farm. At issue in this appeal is phase VII, a/k/a Section VII, of Lauxmont Farm.

Landowner submitted preliminary subdivision plans to the Board for three of the four developments and land development plans for the fourth (Section

VII), and after several revisions, the Board notified Landowner by letter dated December 29, 2003, that all four of the preliminary plans were rejected. The Board provided numerous reasons for the denial, but relevant to this appeal, the Board stated that it voted to deny approval of the preliminary subdivision plan of the Lakeside East Townhouse development because:

> 6. The internal streets are called "Access Drives" on the plan, which is not a defined term in the Ordinance. We believe that these internal roads are actually private streets. Section 505b permits private streets so long as they are built to Township specifications. Section 505a requires that minor streets have a right-of-way of 50'. The ones shown on the plan have a width of only 34'. Section 506e requires that the minimum distance between intersections of minor streets is 350'. Some 11 intersection pairs shown on the plan are closer together than 350'.

(Reproduced Record at 34a.) Notably, at the time of the Board's decision, the Township's zoning ordinance was pending.[1] On January 28, 2004, Landowner filed three separate appeals with the trial court at Nos. 2003-SU-002721, 22 and 23-08 from the denial of the preliminary subdivision plans for Lakeside West, Lakeside East and the Lakeside East Townhouses developments.

[1] Noting that the ordinance was pending on the date of Landowner's submission of its plan, the Board cited *Department of General Services v. Cumberland Township*, 795 A.2d 440 (Pa. Cmwlth. 2002), for the proposition that if a plan proposed a development for a use that was not permitted by ordinance, it should be rejected.

In three separate orders dated September 2, 2005, the trial court reversed the Board's decisions finding that it should have granted preliminary subdivision approval. It discussed several areas of concern that the Board had regarding the subdivision, particularly regarding a sewage facility, but again, relevant to the present case, it discussed the issue of the designation of the roadways as access drives, private streets or minor streets. It noted that in paragraph 6 of the Board's denial letter, the Board cited two violations: the first was a failure of the access drives to meet the minimum right-of-way and cartway width requirements of Section 505a of the Township (Subdivision and Land Development Ordinance SALDO), and the second was a failure to meet the requirements of Section 506e regarding the distance between intersections.[2] The trial court stated that the threshold issue regarding the two cited violations was the proper designation of the roadways. It ultimately concluded that the violations were moot based on its determination that the designation of "roadways" as "access drives" was reasonable, and the Board abused its discretion when it interpreted roadways to be "private streets."[3]

---

[2] The trial court discussed in great detail the Board's concerns with the Landowner's choice of sewage disposal plans. The trial court also stated that the Board's processing of the application was in bad faith and it denied the petition for a hearing to present additional testimony because the same materials were relied upon by the Board in denying the approval of the proposed subdivisions.

[3] The trial court stated:

> The threshold issue with respect to the two cited violations is the proper designation of the roadways. If they are not either private or minor streets then the two cited violations are moot. Section 203 of the Lower Windsor Township Subdivision & Land Development Ordinance, entitled "Specific Words and Phrases", gives us the following definition of driveway: "[a] minor vehicular

(Footnote continued on next page…)

(continued…)

> right-of-way providing access between a street and a parking area or garage within a lot or property." That same section defines a minor street as "[a] street which is used primarily for access to the abutting property." Section 203, which defines minor street as a subsection of the definition for roads, never defines the term "private street."
>
> Not wishing to dwell on a picayune point, but in the interest of precision, we note that the term private streets is not actually used in the Ordinance. Rather, the term is "private road", and it is the subject of section 505c, not section 505b. This section does indeed require that private roads must meet the specifications laid out in section 505a. However, it should be noted that, by context, it appears that the term is used to refer to unimproved roads and the major concern is the proliferation of such private roads and the maintenance of such by the landowners. In any event, after originally stating that they consider the access roads to be private streets, the Township proceeds to refer to them as minor roads when referencing the purported violations of the Ordinance. Thus, we must address the threshold question of whether the roadways in question are driveways or minor roads.
>
> The Kohrs refer to the roadways in question as driveways. By the definition quoted above, and making reference to Sheets 1A and 2A of the Preliminary Plan, it is perfectly reasonable to regard the roadways as being vehicular right-of-ways providing access between the street and the various unit parking areas within the Townhouses lot. For the sake of completeness, we note that the term "lot" is defined in section 203 as a "parcel of land considered as a unit…for a principal use…[i]t may be…occupied by a group of structures that are united by a common interest or use." The Township's interpretation that the roadways are minor streets, and thus that they are streets used primarily for access to the abutting property, is a somewhat more strained description of the roadways.
>
> …Resolving the doubt in the favor of the landowner, we find that the designation of the roadways as "access drives" is reasonable, and that the Township abused its discretion when it interpreted the roadways to be "private streets" and failed to discuss this

(Footnote continued on next page…)

The Township appealed the trial court's decision to this Court. It did not raise the access drives issue, but only the sewage disposal issue. We affirmed all three of the trial court's decisions only discussing the sewage disposal issue.[4] The Township did not appeal our decision.

In the matter presently before us, Landowner filed a separate but timely appeal with the trial court on January 28, 2004, for the Lauxmont Farm Section VII development but at a different docket number – No. 2004-SU-00281-Y08. It alleged, *inter alia*, that the Board's sixth reason for denying its preliminary land development plan as it related to Section VII was "its conclusion that the proposed driveways violate Sections 505a, 505b and 506c of the Subdivision Ordinance" and that it acted in bad faith by denying its subdivision plan. Landowner argued that: a) the Board's conclusion that the access drives were private streets was legally and factually incorrect; b) its interpretation of Sections 505a and 506e and the definition of "Driveway" were legally and factually incorrect; c) the access drives provided access to individual garages and parking areas; d) the property was being developed as one lot under the Pennsylvania

(continued…)

> interpretation with the Kohrs in sufficient time to allow them to modify the plans.
>
> (Trial court's September 7, 2005 opinion at 36-39.)

[4] We also stated in our order that "The orders dated September 16, 2005 where the trial court denied reconsideration are unappealable and stricken (Nos. 2033 C.D. 2005, 2034 C.D. 2005 and 2037 C.D. 2005). Landowners' petition for additional evidence is unappealable and stricken (No. 2119 CD. 2005)."

Uniform Planned Community Act, 68 Pa. C.S. §35101; and e) as the Landowner, it had the legal right to choose whether to employ an internal driveway system or a system of private streets to serve its multiple-family units, and it legally chose to use the former. For some unknown reason, the trial court did not hear the appeal regarding the Lauxmont Farm Section VII development with the other appeals.

While our decision was pending, Landowner filed bankruptcy and the County of York (County) filed a declaration of taking, effectively acquiring title to the subject property through eminent domain. Landowner filed preliminary objections, but by Settlement Agreement dated October 8, 2008, Landowner and the County agreed to terminate the condemnation action. Therefore, Landowner continued to retain ownership of its property. A trial court order dated October 8, 2008, approved the Settlement Agreement.

After the bankruptcy proceeding was concluded and Landowner's land development appeal regarding the Lauxmont Farm Section VII development came up on the trial court's docket in 2009, the Township filed a motion to quash Landowner's appeal. It argued that its appeal had become moot due to the County's ownership of the property during the condemnation action. Landowner filed a response contending that it always retained ownership. It then filed a concise statement of matters complained of on appeal arguing that the only issue relative to Section VII (the 21.5 acres that it was developing on which it was going to build 78 townhouse units) was regarding the access roads being driveways, and that was already addressed by the September 2, 2005 trial court opinion. By order

dated July 21, 2009, the trial court denied both Landowner's appeal and the Township's motion to quash the appeal.

The trial court first addressed the Township's argument discussing it in terms of standing because the Township contended that Landowner had lost ownership interest in its property once the County filed a declaration of taking in November 2005, and Landowner had no standing. The trial court disagreed, stating that although Landowner had filed preliminary objections to the declaration of taking, the County had failed to ever take possession. Further, Landowner and the County entered into a Settlement Agreement indicating that Landowner did not lose its interest in its property.

As to Landowner's contention that the access drives were driveways, the trial court stated that it could not rely upon the 2005 court opinion because "the instant Plan differs significantly from the Lakeside Plans. As such, the Court finds that the Board committed neither a manifest abuse of discretion nor an error of law in concluding that Access Drives A and B exist as 'minor streets'…[U]nlike the access drives evaluated within the 2005 Opinion, Access Drives A and B connect with larger non-Plan roads situated outside the purview of the development, as opposed to merely connecting with other access drives and cul-de-sacs within the development. A combination of the above serves to support the Township's identification of the access drives as 'minor streets.'" (Trial court's July 22, 2009 opinion at 9-10, 12.) For this reason, as well as the fact that Landowner was made aware of the Board's interpretation concerning the access drives, including the resulting technical violations by way of a denial letter dated May 14, 2003, the trial

court denied its appeal. Landowner then appealed to this Court and the Township cross-appealed the denial of its motion to quash.[5]

I.

In its cross-appeal, the Township argues that the trial court erred in denying its motion to quash because Landowner lost standing in 2005 when the County filed its declaration of taking causing its appeal to become moot. The Township relies on *Gwynedd Properties v. Board of Supervisors of Lower Gwynedd Township,* 635 A.2d 714 (Pa. Cmwlth. 1993), for the proposition that once a declaration of taking is filed under the Eminent Domain Code, 26 Pa. C.S. §§101-1106, the condemnee ceases to be a landowner under the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended,* 53 P.S. §§10101-11201. Further, a settlement agreement does not revest title where, as here, it was never recorded. However, *Gwynedd* is not applicable to this case because there was no settlement agreement. Rather, that case strictly involved a township filing a declaration of taking and a landowner filing preliminary objections. Unlike *Gwynedd*, this case involves parties who signed a Settlement Agreement stating that the eminent domain transaction never occurred and Landowner always retained ownership. The County did not merely transfer title back to Landowner because there was no proper condemnation. The County admitted that it never had the authority to condemn the property which was agreed to in the Settlement

[5] Our scope of review of the trial court's order where it accepts additional evidence is whether it committed an error of law or an abuse of discretion in its findings of fact and legal conclusions. *Coal Gas Recover, L.P. v. Franklin Township Zoning Hearing Board,* 944 A.2d 832 (Pa. Cmwlth. 2008.)

Agreement and affirmed by the trial court. Accordingly, we deny the Township's cross-appeal and find that that the trial court properly denied its motion to quash.

II.

Landowner first contends that the trial court erred as a matter of law when it failed to apply the "law of the case" doctrine when it determined that the mechanism for internal circulation employed by Landowner in the Township consisted of streets and not driveways. Landowner explains that in 2005, the trial court had to determine whether the subdivision plan for development of townhouses in the Lakeside East plan consisted of streets or driveways under the SALDO. The trial court determined that Landowner was using driveways and was not violating the SALDO. It argues that because this Court issued an order affirming the trial court's 2003 decision, *albeit* only discussing the sewage system issue, we affirmed the issue regarding the driveways as well, and the trial court in its 2009 decision erred by not following the "law of the case" doctrine.

The Township, however, contends that the "law of the case" doctrine does not apply because 1) the argument regarding the streets was never presented to the trial court in 2003; 2) the appeals that were presented to the trial court in 2003 and this matter are separate cases; and 3) the procedural history leading to the other appeals and this appeal are distinguishable because Landowner was put on notice based on the decision in the 2003 appeal that the Township viewed the access roads as "minor streets" and not as "driveways." Finally, the 2003 appeals dealt with different properties and different plans for those properties and were docketed separately from this case.

The "law of the case" doctrine refers to the concept that a court involved in the later phase of a case should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter. *Commonwealth v. Starr*, 541 Pa. 564, 664 A.2d 1326 (1995). "Among the related but distinct rules which make up the law of the case doctrine are that: (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) *upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same court;* and (3) upon transfer of a matter between trial judges of a coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court." 541 Pa. at 574, 664 A.2d at 1331. (Emphasis added.) The law of the case doctrine serves to insure uniformity of decisions, to protect the settled expectations of the parties, to maintain consistency during the course of a single case, to effectuate the proper and streamlined administration of justice, and to bring litigation to an end.

In this case, there was one Board decision for the three subdivision plans and the one land development plan that were submitted. However, regarding the three subdivision developments known as Lakeside West, Lakeside East and Lakeside East Townhouses, the trial court issued three separate orders which were consolidated for one appeal to this Court. There was only one decision by this Court. The trial court's 2003 decisions and orders and this Court's 2005 decision affirming the trial court's orders only applied to the three subdivision developments named above. Although we affirmed the trial court's decision, which did address the access drives, our 2005 decision did not address any issue

relative to access drives but only the issue regarding the sewage system. Because our 2005 decision did not address access drives and because Lauxmont Farm Section VII is a separate property from the other developments, the prior trial court decisions and our decision in the 2005 appeal are not the "law of the case" on the access drives in the appeal now before us.

In the alternative, Landowner argues that because the enumerated reasons for the denial in this appeal are exactly the same as that in the 2003 appeal, the SALDO and the sections of the SALDO in this appeal are identical to those in the 2003 appeal, and the parties to this appeal are identical to the parties in the 2003 appeal, the trial court in this appeal should have followed the doctrine of *stare decisis* and found that the access drives in the Lauxmont Farm Section VII development are driveways and the cited violations of the SALDO are moot.

"The rule of *stare decisis* declares that for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." *Commonwealth v. Tilghman*, 543 Pa. 578, 588 n.9, 673 A.2d 898, 903 n.9 (1996). "*Stare decisis* binds us to follow decisions of our own court until they are either overruled or compelling reasons persuade us otherwise." *State Farm Mutual Automobile Insurance Company v. Department of Insurance*, 720 A.2d 1071, 1073 (Pa. Cmwlth. 1998). This also is not a case where *stare decisis* applies because while subdivisions were involved in the 2003 appeals and a land development is involved in this appeal, the issue is not the same. The issue before this Court in

2005 was related to a sewage system and the issue now before us is related to access roads. The facts simply are not the same.

III.

As to the merits of this appeal, Landowner argues that the trial court erred when it found that that internal circulation system used to access the town homes were "minor streets" instead of "driveways." It states that the design of Section VII is a land development plan with one lot and with an internal circulation system comprised of "driveways." Because it is a land development plan rather than a subdivision, the definition of "minor streets" does not apply.

Under the Township's SALDO, "land development" is defined as follows:

> (1) The improvement of *one lot* or two or more contiguous lots, tracts or parcels of land for any purpose involving (a) *a group of two or more buildings*, or (b) the division of allocation of land or space between or among two or more existing or prospective occupants by means of, *or for the purpose of streets*, common areas, leaseholds, condominiums, building groups or other features; (2) a subdivision. (Emphasis added.)[6]

[6] The SALDO defines a "subdivision" as:

> The division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose whether immediate or future of lease, transfer of ownership, or building or lot development; provided however that the division of land for agricultural purposes into parcels of more than ten (10) acres not involving any new street or easement of access shall be exempted.

(Footnote continued on next page…)

(Reproduced Record at item 14, II-4.) The SALDO defines "lot" as:

> A parcel of land considered as a unit (1) for a principal use and/or (2) from the standpoint of ownership. It may be vacant, devoted to a certain use, occupied by a structure or occupied by a group of structures that are united by a common interest or use. (Reproduced Record at 37a.)

Landowner alleges that its land development plan proposes the development of one lot with multiple buildings, but not for the purposes of streets as stated in the SALDO and as the trial court believed was relevant.

We agree with Landowner that by definition, the plan it submitted was a land development plan because it involves one lot for one principal use. However, what it means with regard to "streets" is, to say the least, ambiguous. The definitions of minor street, driveway, and lot do not add any clarity. "Minor street" is defined as "[a] street which is used primarily for access to the abutting properties." (Reproduced Record at 39a.) This definition considers access to the properties. Under this definition, if we were to consider each townhouse unit a separate property, then the access roads would fall within the definition of minor streets. "Driveway" is defined as "[a] minor vehicular right-of-way providing access *between a street and a parking area or garage* within a *lot or property.*"

(continued…)

(Reproduced Record at 40a.) No division or redivision is involved in the plan at issue.

(Reproduced Record at 36a.) Under this definition, if the end point of a driveway has to be a public road, because the internal access roads provide access to a public street, they are not "minor streets." While the access roads allow access to abutting townhomes, they are not minor roads because those townhomes are not on abutting lots or property but are on the same lot or property. The roads in question, though, do fall within the definition of driveway because they provide access from or to a public road.

Accordingly, for the reasons stated above, we affirm the trial court's order denying the Township's motion to quash on standing but reverse as to the denial of Landowner's subdivision appeal regarding the Lauxmont Farm Section VII development.

_____

DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Laura B. Kohr and Leon P. Haller, Esq., Trustee for the Estate of Ronald C. Kohr	:	
v.	:	No. 1631 C.D. 2009
Lower Windsor Township Board of Supervisors	:	
Appeal of: Ronald C. Kohr, Jr. and Katherine E. Trefry, executors of The Estate of Laura B. Kohr	:	
Laura B. Kohr and Leon P. Haller, Esq., Trustee for the Estate of Ronald C. Kohr	:	
v.	:	No. 1689 C.D. 2009
Lower Windsor Township Board of Supervisors, Appellant	:	

O R D E R

AND NOW, this 13th day of July, 2010, the order of the Court of Common Pleas of York County, dated July 21, 2009, is reversed as to the denial of Landowner's subdivision appeal regarding the Lauxmont Farm Section VII development. Its order denying the Township's motion to quash is affirmed.

_____

DAN PELLEGRINI, JUDGE