

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Jerome Joseph and North Whitehall | : | |
| for Sustainable Development, | : | |
| Appellants | : | |
| | : | No. 1661 C.D. 2009 |
| v. | : | Argued: March 16, 2010 |
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| North Whitehall Township Board of | : | |
| Supervisors and North Whitehall | : | |
| Township | : | |
| | : | |
| v. | : | |
| | : | |
| Wal-Mart Stores East, L.P. | : | |

**BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: May 21, 2010

Jerome Joseph (Joseph) and North Whitehall for Sustainable Development (citizens' group) (collectively Objectors) appeal from an order of the Court of Common Pleas of Lehigh County (trial court). The trial court denied Objectors' appeal of the decision of the North Whitehall Board of Supervisors (Supervisors), which granted preliminary subdivision approval to Wal-Mart Stores East, L.P. (Developer). We affirm the trial court.

Facts and Procedural History

Prior to the subdivision application now on appeal to this Court, Western Lehigh Valley Corporation (Former Owner) owned a tract of land that

appears to have consisted of five lots—Lots 1, 1A, 2, 2A, and 3 (the Original Tract). In August 2005, Developer entered into a purchase agreement with Former Owner for the sale by Former Owner to Developer of the area consisting of Lots 1A, 2A, and 3. In order to effectuate the sale, Former Owner submitted to the Supervisors a final minor subdivision plan, seeking to subdivide the five initial lots into three lots. (Reproduced Record (R.R.) 772a.)¹ The plan proposed the consolidation of Lots 1A, 2A, and 3 into a new Lot 3 (new Lot 3 or the Property), which is the property at issue in this appeal. (R.R. 772a.)²

The plan for the Original Tract, in addition to proposing a subdivision, also indicated that part of Grist Mill Road, which ran through the center of the Original Tract in a generally east-west direction, bisecting Lots 1A and 2A, would be vacated at the point where it intersected with Lots 1A and 2A, such that those two lots would no longer be separated by a road. The 2005 plan also depicts part of another road, Old Packhouse Road, as “relocated.” The plan appears to relocate Old Packhouse Road to an undetermined place, but it appears that the relocation tentatively would be just to the north of and abut the eastern boundary of the new Lot 3 of the proposed subdivision. The plan indicated that Lots 1, 2, and 3 were non-building lots. The Supervisors approved the plan and accepted the plan for

¹ This item in the Reproduced Record is identified as “Sheet 1 of 3” of the 2005 subdivision plan that Former Owner submitted to the Supervisors. The other sheets of the 2005 subdivision plan are not included in the Reproduced Record.

² See plan Site Data, No. 2. The “Site Data” section of the plan is located along the right side of the plan, just above the area on the sheet providing for the approving signatures of the Township and County Planning Commissions. The Site Data section includes various notes relating to such matters as lot sizes, legal locations, and zoning details applicable to the zoning districts at issue.

recording on October 19, 2005. No party ever sought to challenge this subdivision approval.³

On September 20, 2006, Former Owner and North Whitehall Township (Township) entered into an agreement for the vacation of part of Grist Mill Road as described above, and the parties recorded the agreement and accompanying agreements with the Office of the Recorder of Deeds. (R.R. 120a-28a.) In their brief to the trial court, the Objectors assert that the boundary or division between Lots 1A and 2A remained after the 2005 subdivision, in part, because Former Owner had not vacated Grist Mill Road at the time of the 2005 subdivision and the Supervisors did not make vacation of Grist Mill Road a condition of approval. Moreover, no party or entity submitted any subsequent plan for lot consolidation that would have consolidated the lots and formally eliminated Grist Mill Road through a subdivision process. In November 2006, Former Owner conveyed to the Pennsylvania Department of Transportation (DOT) the required right-of-way for the relocation of Old Packhouse Road. The deed (1) notes that the Commonwealth had filed a plan with the Recorder of Deeds, indicating its authorization to condemn property for a road identified in the deed, and (2) indicates that DOT and Former Owner agreed to a conveyance in fee simple in lieu of condemnation. (R.R. 104a.)⁴

³ A document entitled declaration of easements, dated December 14, 2006, provides that the residual land remaining following the 2005 subdivision (apparently coming from the original Lots 1 and 2) would be subject to an easement in favor of Developer for any reasonable easement request (such as underground pipes, sewage, swales, etc.) that would not materially interfere with Former Owner's use of those lots.

⁴ See R.R. 110a-17a for a description of the property transferred.

In December 2006, Former Owner conveyed to Developer the Property, consisting now of approximately forty acres as a result of the consolidation of Lots 1A, 2A, and 3. (R.R. 100a.) Developer filed a preliminary subdivision application on or about August 8, 2007, seeking to subdivide the Property into five commercial lots. Specifically, the proposal sought to subdivide the Property into Lots 1 through 5, with Lots 1 through 4 intended for commercial purposes and Lot 5 intended for the location of a Wal-Mart store.⁵ (R.R. 756a-57a.)⁶

Proposed Lot 5 consists of approximately 30.86 acres. A 1.76-acre portion of the proposed lot is located in an AR (Agricultural Residential) district. The remainder is located in a PC (Planned Commercial) district. The Plan Sheet, however, indicates that “[t]he portion of the subject property zoned [AR] ... shall only be used for those uses permitted in that district under the ... Township Zoning Ordinance or otherwise permitted by law.” (R.R. 757a; located under “zoning data” section.) The plan Sheet indicates such uses as stormwater pipe location, outfalls, detention basins, swales, or catch basins. *Id.* On September 3, 2008, following a series of hearings before the Township Planning Commission and the Supervisors, the Supervisors approved the application subject to certain conditions.

⁵ 2007 Subdivision plan sheet – Sub 1 and 2007 Subdivision plan sheet – Sub 3.

⁶ These plan sheets are captioned “*Final Major Subdivision Plans for North Whitehall Commercial Center.*” Objectors, however, appear to refer to these as the plans Developer submitted in the course of its preliminary subdivision approval process, and, consequently, there appears to be no dispute that these are to be regarded as, and were voted upon by the Supervisors as, preliminary plans.

According to Objectors, the Supervisors followed up this verbal approval by sending copies of the draft meeting minutes to Developer. The minutes indicated that the approval was for the preliminary subdivision plan and that the Supervisors approved the plan subject to the following conditions: (1) compliance with recommendations contained in a letter of the General Planning Engineer; (2) compliance with recommendations contained in a letter from the Sewage Enforcement Officer; (3) compliance with recommendations contained in a letter from the Zoning Officer; (4) compliance with recommendations contained in a letter from the Traffic Engineer; (5) compliance with recommendations made at a Planning Commission meeting; (6) compliance with provisions in the Planning Administrator's checklist; (7) correction of zoning district data on the cover sheet and all sheets of the plan to reflect the labeling of the AR district; (8) submission of all traffic impact information for each lot under the subdivision and land development plan; and (9) provision of sanitary sewage treatment as proposed through Lehigh County Authority (LCA) in accordance with a provider letter previously received.

Objectors then appealed to the trial court. Objectors asserted that the Supervisors had erred in approving the preliminary subdivision plan for the following reasons: (1) the Township's Subdivision and Land Development Ordinance (SALDO) requires an applicant to submit a traffic impact study as a prerequisite to such approval; (2) the Supervisors erroneously approved the subdivision based upon the misapprehension that the subdivision/consolidation of the previously bisected Lots 1A and 2A was lawful; (3) the initial plan's failure to identify properly the part of the Property located in the AR district required the Supervisors to reject the plan rather than approve it conditioned upon correction to

the plan;⁷ (4) the plan failed to satisfy the requirements of the SALDO relating to sewer and water; and (5) the Township's intervention before the trial court was improper.⁸

With regard to the traffic impact study issue, the trial court agreed with the Supervisors' conclusion that the SALDO does not require an applicant to perform and submit such studies until a developer/owner seeks land development approval. The trial court opined that, as a matter of statutory construction, the court should give deference to the Supervisors, and that in reading the SALDO as a whole, the Supervisors' interpretation made sense. In particular, the trial court was persuaded by the fact that the SALDO discusses traffic study regulations in the contexts of *projects*.

With regard to the legality of the subdivision approval in light of the earlier 2005 subdivision, vacation of Grist Mill Road, and relocation/conveyance of Old Packhouse Road, the trial court rejected Objectors' arguments regarding whether the Supervisors erred in approving the plan. The Objectors' general argument appeared to be that the Supervisors should not have approved the plan until DOT obtained approval for the placement of Old Packhouse Road through or near the subdivision. The trial court, however, viewed the issue as whether Developer had to seek subdivision approval and whether DOT could acquire the property for the road through agreement rather than condemnation proceedings.

⁷ Objectors asserted in their appeal to the trial court that a planned commercial development is not an appropriate use on the part of the tract zoned AR. Objectors also contended that the approval resulted in an unlawful zoning map amendment.

⁸ This is not an issue before this Court.

The trial court concluded that a landowner who desires to convey land to DOT does not have a burden to seek approval under a SALDO.

As to the issue relating to the Supervisors' approval of the plan where it failed to depict properly the AR-PC district boundary on the Property, Objectors asserted that the Supervisors could not simply grant approval subject to the condition that Developer revise the plan with the depiction of the boundary. Objectors contended that the Supervisors, by permitting this resolution, essentially are permitting Developer to designate where the *legal* boundary is, and that by doing so, the Supervisors improperly enabled the establishment of a *legal* boundary between the districts (suggesting an abrogation of their legislative function, *i.e.*, re-zoning). The trial court rejected this argument, referring to a decision of this Court holding that, where a preliminary subdivision plan fails to comply with the substantive requirements of the SALDO, the governing body has the discretion to reject the plan or approve it with conditions, as the governing body did in this case.

As to the final issue of Developer's alleged failure to comply with the SALDO requirements relating to the location and other details regarding the sewer and water systems/provisions, the trial court acknowledged that the plan did not comply with the SALDO, but noted again that a governing body has the discretion either to approve such a plan with conditions that, if satisfied, would result in compliance, or reject a plan. Thus, the trial court again rejected Objectors' argument because the Supervisors had the discretion to reject a plan or approve it with conditions.

Objectors appealed to this Court,⁹ raising the following issues: (1) whether the Township’s SALDO requires an applicant for a subdivision to perform a traffic impact analysis under Section 5.03Q of the SALDO and comply with the requirements relating to traffic impact included in Appendix E of the SALDO; (2) whether the Supervisors erred in granting preliminary plan approval because the plan used a prior “de facto” lot-line consolidation and a separate subdivision that were not part of the planning and review process; (3) whether the Supervisors erred in granting preliminary approval because the plan fails to depict the part of the Property that is zoned AR and does not provide exact boundaries of that district; and (4) whether the Supervisors erred in granting conditional approval because the plan does not include details relating to the location and method of sewer and water functions.

Discussion

A. Traffic Impact Study Requirements

Objectors first argue that the Supervisors erred in approving the preliminary subdivision plan because Developer did not provide a Traffic Impact Study. Objectors assert that the SALDO requires a developer to perform and submit a Traffic Impact Study as part of the preliminary subdivision plan for the commercial subdivision at issue here.

Section 2.02 of the SALDO defines the term “preliminary plan” as “[a] tentative formal subdivision . . . plan including all required supplementary data showing the proposed street and lot layout as a basis for subdivision consideration

⁹ This Court’s standard of review of a trial court’s order affirming a Board of Supervisors’ land use appeal is limited to considering whether the governing body committed an error of law or abused its discretion. *Weiser v. Latimore Township*, 960 A.2d 924 (Pa. Cmwlth. 2008), *allocatur den.*, 601 Pa. 705, 973 A.2d 1008 (2009).

prior to preparation of the Final Plan.” (R.R. 570a.) A Final Plan is “[a] complete and exact subdivision, including all required supplementary data, prepared for official recording as required by statute, to define property lines and proposed streets and other improvements, including modifications thereof as may be represented by deed restrictions and/or easements.” (*Id.*) Finally, the SALDO defines the term “subdivision” as “[t]he division or redivision of a lot, tract or parcel of land by any means into two (2) or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future . . . of . . . building or lot development.” (R.R. 575a.)

Article 5 of the SALDO addresses preliminary plans for subdivisions and land developments. Section 5.03 relates to preliminary plan requirements and provides that “[a]ll of the following information and materials listed in this section are required parts of preliminary plans for any land development and any subdivision.” (R.R. 590a.) This section includes a checklist of various items that applicants must submit. A paragraph identified by an asterisk above the checklist directs applicants to “[p]lace checkmarks in the appropriate columns below, except: 1) insert ‘NA’ in the ‘Not Submitted’ column if not applicable and 2) insert ‘W’ in the ‘Not Submitted’ column if a waiver is requested from the requirement.” (*Id.*)

Subsection Q of the checklist includes a list of “supporting documents and additional information.” (R.R. 603a.) Number 7 on this list is “Traffic Impact Analysis and Report (see Appendix E).” (R.R. 605a.) Section E.01 of Appendix E, “Traffic Impact Requirements,” provides, in part, as follows:

All subdivision and land development *projects* shall be evaluated to determine the impact of traffic which they generate on the Township’s overall highway system.

This requirement shall apply to all new subdivisions *or* land developments proposed and to any expansion of an existing land development which is proposed after the effective date of this ordinance. The level of traffic impact shall be determined based on the estimated “Trip Ends” generated by the *proposed uses* in the subdivision or land development. “Trip Ends” shall be defined as the estimated total number of motor vehicle trips entering and leaving a specific land use or uses located in subdivision or land development per day. These “Trip Ends” will be determined based on the estimated “Trip Generation Rates” for various types of land uses set forth in the latest edition of the publication entitled “Trip Generation, An Informational Report.”

Information in the above publication such as local similar development counts may be used to estimate the ADT if the Township Engineer ... considers such information as providing a more applicable estimate of the “Trip Ends Per Day” for the specific *uses proposed*.

(R.R. 692a (emphasis added).)

The SALDO defines the term “ADT” as “Average Daily Traffic...The Average number of motor vehicles per day that pass over a given point.” (R.R. 559a.) ADT is pertinent in resolving the question of whether a subdivision or land development will result in a Major or Minor Traffic Impact, as indicated in Section E.02:

E.02 DETERMINATION OF MAJOR/MINOR TRAFFIC IMPACT.

A. Major Traffic Impact. Any proposed subdivision which has an estimated ADT in excess of five hundred (one single family residence = 10 ADT) and all land developments and expansions of land developments, regardless of estimated ADT, shall be considered to have a “Major Traffic Impact”, and shall be treated hereafter as a “Major Traffic Project”. A Major Traffic Impact study ... shall be prepared for every Major Traffic Impact Project, unless the Supervisors determine that a study is not required. In lieu of the study, the Supervisors shall

request a monetary contribution to the township Traffic Impact Study Account.

B. Minor Traffic Impact. Any proposed subdivision which has an estimated ADT of five hundred or less shall be considered to have a 'Minor Traffic Impact', in which event the owner/developer of the proposed subdivision shall contribute \$200.00 per lot to the Township Traffic Impact Study Account. The Supervisors shall have the discretion to require a Minor Traffic Impact project to comply with the requirements of a Major Traffic Impact project, in lieu of the said contribution, if the Supervisors determine that traffic generation in the vicinity of the proposed subdivision warrants such a study.

(R.R. 692-93a.)

By its terms, this provision describing the determination of Major/Minor Traffic Impact refers to subdivisions that have an estimated ADT of greater than 500. By referencing ADT in terms of the number of single-family dwellings, we believe that this provision, in referring to "subdivision," applies only to residential subdivisions. The remainder of this provision applies only to land developments, and does not apply to this subdivision application.

In this case, the subject preliminary subdivision proposal is not one that seeks approval to construct a residential subdivision. Hence, Developer could not determine an estimate of ADTs based upon a number of proposed residential dwellings. Moreover, Section E.01 not only refers to subdivision and land development *projects*, but also requires studies to be based on "estimates of 'Trip Ends' generated by the proposed *use*." (Emphasis added.) These references support the trial court's interpretation of the SALDO's preliminary subdivision traffic study requirements. Furthermore, Section E.02 also includes a reference to the use of the "Trip Generation Report" that specifically notes the use of

information in that resource of “local similar *development*.” We believe this reference to *development* also supports the trial court’s interpretation.

Based upon (1) the equation contained in Section E.02.A for calculation of estimated ADTs by reference to the number of proposed residential dwellings, (2) the reference in Section E.01 to “local similar development,” (3) the fact that Section E.02 inferentially refers only to proposed residential subdivisions and land *developments* and expansions of land developments, and (4) the references in E.02 to *projects* and “Trip Ends” based on proposed *uses*, we cannot agree with Objectors that the Supervisors erred by not requiring Developer to submit a Traffic Impact Study. We believe that the Supervisors and the trial court reasonably construed the SALDO as providing that these requirements are not applicable to a non-residential subdivision where the proposed use has yet to be legally established.

Although Objectors complain that the trial court improperly relied upon the use of the phrase in the Appendix “[a]ll subdivision and land development *projects*,” the trial court’s interpretation is reasonable and practical because: (1) the Supervisors will have to address traffic impact when Developer submits its plan for development of the property; (2) a study at this time is not meaningful because Developer could elect to proceed with a use other than the one it is tentatively proposing; and (3) the check-list that refers to compliance with the traffic study provisions in the Appendix indicates that not all provisions listed may be applicable in a particular preliminary subdivision or land development plan.

In reaching our conclusion, we are also mindful of the deference courts should exercise when reviewing a governing body’s interpretation of ordinances it enacts and applies. *Tink-Wig Mountain Lake Forest Property*

Owners Ass'n v. Lackawaxen Twp. Zoning Hearing Bd., 986 A.2d 935 (Pa. Cmwlth. 2009). We perceive the Supervisors' interpretation of the SALDO not to require Developer in this case to submit a traffic impact study as perfectly reasonable, given the fact that Developer, under Appendix E, would be required to submit such a study when it submits a land development plan. Objectors have not persuasively argued that their interpretation is correct, especially where the actual use of a property has not formally been submitted as part of a subdivision application. We cannot presume that Developer has a definitive plan for the Property for any particular project or use at the preliminary subdivision phase. As Developer notes, it could alter its intentions as to the use of the Property which would make the performance of a traffic impact study meaningless at this stage of the development process.¹⁰

B. Prior De-Facto Lot Line Consolidation

Objectors assert that the 2005 subdivision of the tract was not lawful and that, consequently, the Supervisors erred in approving this subdivision. Objectors contend that no subdivision plan reflects final approval for consolidation of the former Lots 1A and 2A as shown in the 2005 plan and that the 2005 plan does not show a removal of the lot line between Lots 1A and 2A. Objectors

¹⁰ Objectors also contend that, in interpreting the SALDO, and specifically the definition of the term "land development," we are controlled by the definition of that term in section 107 of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10107. Objectors point out that the MPC's definition of the term includes subdivisions of land. Hence, Objectors argue that the interpretation of the Traffic Impact provisions of the SALDO should reflect that definition. We note, however, that if we were to follow this reasoning, the language of the provision that refers to both "land development" and "subdivision," would be redundant. As noted above, the governing body, in enacting the Traffic Impact provisions, included distinguishing factors that set apart subdivision plans that do not propose a "project" or "use." Accordingly, we reject this argument.

contend that, contrary to the trial court's view, consolidation did not and could not occur simply by virtue of the vacation of Grist Mill Road (by removal of a street boundary) after the recording of the 2005 subdivision plan.

Initially, we agree with Developer that Objectors cannot collaterally attack the 2005 subdivision in an attempt to challenge Developer's present subdivision plan. Objectors claim that, because Former Owner did not effectuate the vacation of Grist Mill Road until after the date of the 2005 subdivision, the two lots separated by that road were never consolidated as anticipated by the 2005 subdivision, and the post-subdivision approval vacation of the road did not accomplish consolidation. Objectors argue that, based upon their view that consolidation never occurred, the Supervisors could not approve the present subdivision plan until Developer obtains an official consolidation, through the subdivision process, that the previous subdivision anticipated. In response, Developer notes that the 2005 subdivision plan included a notation recognizing the proposed vacation of the road and it specifically noted that Lots 1A, 2A, and 3 were to be consolidated by virtue of the subdivision. Developer points out that the plan specifically indicated that the lot lines created by Grist Mill Road were to be deleted upon vacation of that section of Grist Mill Road.

We are persuaded that Objector's argument lacks merit. First, the Board of Supervisors approved the 2005 plan, which clearly indicated that Former Owner and the Township anticipated the vacation of Grist Mill Road. We see no legal impediment to the 2005 subdivision simply because the lot was bisected at the time the plan was filed by a road that was ultimately vacated. Second, even if Objectors' view had merit, we believe that the present subdivision will cure any

defect in consolidation that may have occurred with regard to the 2005 subdivision and post-subdivision vacation now that the road has been vacated.

Objectors also take issue with the representation on the 2005 plan regarding Old Packhouse Road. The plan identified the initial location of Old Packhouse Road and also depicted in a general manner an area of relocation for the road to the northern boundary of the Property. The September 20, 2006 agreement for vacation of Grist Mill Road provided that Former Owner also agreed to convey the area designated for relocation of Old Packhouse Road to the Township. Moreover, under the agreement, the Township could also direct Former Owner to convey the area to DOT. Ultimately, Former Owner conveyed the land to DOT, and DOT recorded a final plan describing the relocation of Old Packhouse Road. No party has challenged the recorded plan relating to the relocation of the road.

The relocation of Old Packhouse Road resulted in the road running through what appears on the 2005 subdivision map as part of the residual Lot 1. Objectors point to the November 21, 2006 deed by which Former Owner conveyed portions of that lot to DOT, and they contend that the conveyance created several different lots and, therefore, resulted in an unlawful subdivision of part of the former Lot 1 without formal subdivision approval. Objectors argued before the trial court that (1) the transfer by deed in lieu of condemnation did not satisfy the requirements of the Eminent Domain Code (Code)¹¹ such as to constitute a condemnation, and (2) subdivision approval reflecting the effect of the condemnation on the property was necessary.

We reject Objectors' first argument. They point to no authority precluding DOT from exercising its powers of eminent domain to acquire property

¹¹ 26 Pa. C.S. §§ 101 – 1106.

through agreements between itself and property owners. With regard to Objectors' second argument, the trial court surmised that the SALDO did not require DOT to obtain subdivision approval based upon the fact that DOT is not a party here and is not an owner of the subject lot. The trial court framed the question as whether owners of remnant lots remaining after the conveyance of the area for the road relocation were required to obtain subdivision approval before conveying the land to DOT amicably in lieu of condemnation. The trial court relied on a case arising under the Code, *Valley Township v. City of Coatesville*, 894 A.2d 885 (Pa. Cmwlth. 2006), which stands for the proposition that the Code does not require subdivision approval before or after a condemnation in order to effectuate a condemnation.

Objectors point to several decisions in which Pennsylvania courts have concluded that state agencies are subject to local land use regulation. The cases upon which Objectors rely primarily arise in the context of land *use* regulations. In light of the clear holding in *Valley Township*, however, we cannot agree with Objectors that, in the context of a condemnation, the SALDO required DOT to seek subdivision approval before accepting the property in lieu of condemnation proceedings.¹² Hence, we reject Objectors' claim that subdivision approval was required with regard to the vacation of Grist Mill Road and the condemnation of land for the relocation of Old Packhouse Road.

¹² Objectors also argue that, without the relocation of Old Packhouse Road, Developer could not proceed with its development plan under a provision of the zoning ordinance. That argument, however, has no bearing on the question of whether DOT was required to obtain subdivision approval at the time of the condemnation of the area for the relocation of Old Packhouse Road and, therefore, we will not further address this argument.

C. Land Within the AR (Agricultural Residential) District

The initial preliminary plan incorrectly depicted the entire Property as being within the PC district, because a small portion of the property actually lies within the AR district. The Supervisors directed Developer as a condition of approval to revise the plan to depict the location of the AR district on the plan. In response to Objectors' argument that this error constituted a fatal flaw, the trial court opined that the Supervisors had the discretionary power to approve the plan even when the plan did not comply with the SALDO's substantive provisions by imposing conditions requiring compliance before approving the final plan. *McGrath Constr., Inc. v. Upper Saucon Twp. Bd of Supervisors*, 952 A.2d 718 (Pa. Cmwlth. 2008), *allocatur den.*, 600 Pa. 766 , 967 A.2d 961 (2009).

Objectors argue here that the trial court erred in concluding that the Supervisors had the discretionary power to approve the plan conditionally with this flaw. The thrust of Objectors' argument is that the flaw is more than technical, and that, by depicting the boundary line inaccurately, the plan has the potential to create an alteration of the actual legal boundary line that would not be subject to review, and which would be contrary to zoning law.

Objectors contend that the act of locating a boundary line is a function described under the zoning ordinance, that approval of boundary lines is the duty of a zoning officer, and that the Supervisors' conditional approval undercuts that authority and duty. Objectors argue that, by approving the plan with conditions, the Supervisors have precluded the normal ability of a party to challenge a zoning officer's determination of boundary lines. Objectors assert that there is no means to challenge Developer's compliance or noncompliance with the Supervisors' condition, but that if the Supervisors had conditioned their approval upon

Developer's defining of the boundary subject to the zoning officer's approval, then the condition would be appropriate. In response, Developer asserts that the depiction of the AR boundary line was a technical defect that can be corrected. Developer contends, in contrast to Objectors' argument, that the depiction of a boundary line on a preliminary plan could not alter the lawful boundary of the district as established by the Township's Zoning Ordinance.

With regard to ultimate uses proposed for that part of the property located within the AR district, presumably a zoning officer would have the responsibility to review appropriate uses for the land, and the zoning officer would evaluate the actual boundaries and determine the limits of the proposed use with regard to the part of the property within the AR district. Further, as Developer points out, the depiction envisioned on the plan is simply a "graphic representation" that is not binding in future evaluations of the proposal. Finally, Objectors will have additional opportunities to challenge the depiction and actual uses for that part of the Property when the Supervisors consider the revisions to the preliminary plan as well as any land development plans Developer may propose. Accordingly, we reject this argument.

D. Sewer and Public Water

Objectors contend that the SALDO requires an applicant to include detailed construction plans or proposed sewer and public water facilities, lot lines, and any proposed easements or rights of way needed for utilities. Objectors also contend that a sewer disposal system is a necessary component of a preliminary subdivision plan and must be compatible with Township plans. Objectors point out that the trial court acknowledged that the plan did not include such information. Objectors take the position that the trial court erred in its analysis

because, by granting conditional approval, Objectors have no avenue by which to challenge the adequacy of Developer's compliance with the conditions attached to the approval.

Objectors assert that the sewage proposal contemplates either of the following methods/systems which may be operated by the LCA: (1) existing sewage treatment plant to be acquired by LCA, or (2) construction of a new treatment plant to be operated by LCA. Objectors note that LCA service is contingent upon the Pennsylvania Department of Environmental Protection (DEP) and certain agreements between LCA and Developer, and non-termination of an acquisition agreement between LCA and another entity. The plan proposes an interim solution of sewage holding tanks to handle a maximum of 8,000 gallons per day. Objectors claim that the plan does not indicate whether the tanks will be on-site, and if they are, they are not identified at a particular place on the plan. Objectors bring a similar complaint with regard to the provision of water.

In fact, the trial court recognized that Developer intends to use the public system, but that those plans are contingent upon certain approvals by DEP and agreements between Developer and other entities. The Supervisors' conditional approval of the preliminary plan requires completion and or compliance with the SALDO's sewer and water provisions. The trial court, quoting this Court's decision in *McGrath*, opined that the Supervisors had the discretionary authority to approve the plans subject to the condition that Developer satisfies the sewer and water components of SALDO plan requirements.

Developer refers us to *CACO Three, Inc. v. Board of Supervisors of Huntington Township*, 845 A.2d 991 (Pa. Cmwlth.), *allocatur den.*, 580 Pa. 707, 860 A.2d 491 (2004). In that case, this Court reversed a governing body's denial

of a subdivision application, noting that it was more reasonable to condition final approval of a plan on a developer's obtaining required permits, rather than rejecting the plan outright. Developer also relies upon *Kohr v. Lower Windsor Township Board of Supervisors*, 910 A.2d 152 (Pa. Cmwlth. 2006). That case involved a subdivision application that included indecisive proposals or deficiencies relating to the sewage proposal. This Court cited *CACO*, opining that a governing body appropriately conditioned preliminary plan approval upon the developer's obtaining all necessary permits from DEP and the Pennsylvania Public Utility Commission before the Supervisors grant final plan approval.

Based upon the above-noted authority, we disagree with Objectors' claims concerning the Supervisors' decision to approve the plan conditionally. If Developer fails to satisfy the conditions, Objectors will have an opportunity to raise a timely objection to a subsequent final plan application. Consequently, we reject this argument.

Based upon the foregoing discussion, we affirm the order of the trial court.

P. KEVIN BROBSON, Judge

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ORDER

AND NOW, this 21st day of May, 2010, the order of the Court of Common Pleas of Lehigh County is AFFIRMED.

P. KEVIN BROBSON, Judge