

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Coventry Park LLC, a Pennsylvania :
Limited Liability Company :
 :
v. :
 :
Robinson Township Board of :
Commissioners, : No. 1672 C.D. 2009
Appellant : Argued: April 19, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: August 18, 2010

The Robinson Township Board of Commissioners (Board) appeals from the order of the Court of Common Pleas of Allegheny County (common pleas court) which reversed the Board’s denial of Coventry Park, LLC’s Stafford Park Final Phase I Subdivision Plan (Final Plan).

Stafford Park Preliminary Plan- Phase I

Coventry Park, LLC (Coventry Park) is the owner of a 42-acre parcel of property located along Clever Road, Robinson Township, Pennsylvania. On May 15, 2007, Coventry Park submitted to Robinson Township (Township) a Preliminary Subdivision Plan application to construct a 66-lot residential development to be known as “Stafford Park.” The Preliminary Plan included a cul-de-sac at the end of Stafford Drive which was less than 900 feet in length when measured from the intersection of Windsor Drive.

The Board denied approval of the Preliminary Plan on November 14, 2008, and notified Coventry Park by fax dated January 15, 2008. Coventry Park filed a protective land use appeal and an action in mandamus seeking a “deemed approval” of the Preliminary Plan based on the untimely issuance of the Township’s written decision. The common pleas court found that the Preliminary Plan was deemed approved pursuant to Section 508(3) of the Municipalities Planning Code (MPC), 53 P.S. §10508(3).¹

This Court affirmed the “deemed approval” on June 16, 2009, in an unpublished memorandum opinion at 2215 C.D. 2008.²

¹ Act of July 31, 1968, P.L. 805, *as amended*. Pursuant to Section 508(3) of the MPC, 53 P.S. §10508(3):

Failure of the governing body or agency to render a decision and communicate it to the applicant within the time and in the manner required herein shall be deemed an approval of the application in terms as presented, unless the applicant has agreed in writing to an extension of time or change in the prescribed manner of presentation of communication of the decision, in which case, failure to meet the extended time or change in manner of presentation of communication shall have like effect. (Emphasis added).

² The parties were previously before this Court in several appeals from determinations of the Township’s Zoning Hearing Board (ZHB) regarding a different plan, called “Coventry Park.” In Coventry Park I, Coventry Park filed an application for a variance to relocate a stream located on Coventry Park’s property. The ZHB denied the request for a variance. The common pleas court reversed the ZHB’s ruling that a variance was required because the stream had been classified as “ephemeral” and such streams need not be relocated under the Township’s Floodplain Ordinance. This Court reversed and remanded in an unpublished memorandum opinion at No. 2542 C.D. 2005, finding that the common pleas court had made a necessary finding of fact without taking additional evidence.

On remand, the ZHB found that the stream was an “intermittent” stream and denied the variance. The common pleas court affirmed and concluded that nothing on the Property made development in conformance with the Ordinance impossible, for example placing the entrance in another location that would not interfere with the stream. This Court affirmed in an unpublished opinion at Nos. 673 and 674 C.D. 2007 (Coventry Park II).

Stafford Park Final Plan – Phase I

During the pendency of the Preliminary Plan appeal, Coventry Park filed its Final Plan for Phase I of Stafford Park. By letter dated October 22, 2008, Remington & Vernick, the Township’s engineer, issued four comments to the Final Plan: (1) the Plan did not depict future phases or an estimate of public improvements for Phase II in violation of the Section 402.6 of the Township’s Subdivision and Land Development Ordinance (SALDO)³; (2) the Final Plan was substantially different from the Preliminary Plan because the Final Plan included a non-conforming cul-de-sac in that it exceeded the permissible length by 850 feet; (3) the intermittent stream depicted on the Preliminary Plan was not on the Final Plan and the proposed roadways and lots were shown within 50 feet of the intermittent stream; and (4) the proposed cul-de-sac, which was 1750 feet from Clever Road (the only “open end” depicted on the Plan), was in violation of Section 804 of the SALDO which requires that a cul-de-sac may not exceed 900 feet in length. Letter from Remington & Vernick, October 22, 2008, at 2-3; Reproduced Record (R.R.) at 68a-69a.

On November 5, 2008, Coventry Park appeared before the Board and presented evidence that the Final Plan was “identical” to the Preliminary Plan. The Board disagreed that the Plan was identical because the Preliminary Plan was not

³ Section 406.2 of the Robinson Township SALDO provides:

In the case where development of a subdivision of land development is projected over a period of years, the Township authorizes submission of Final Applications by sections or phases of development, subject to such requirements or guarantees for public improvements in future sections or phases of the development which are essential for the protection of the public welfare and any existing or proposed section or phase of the plan.

submitted as a “phased plan.” The Board also summarily rejected Coventry Park’s position that the cul-de-sac was the same one that was approved in the Preliminary Plan. And, in any event, the length of the cul-de-sac should be measured from the nearest intersection (Windsor Road), as the Board did in 19 other instances, and not from the nearest “open road” which was Clever Road. The Board also rejected Coventry Park’s position that the stream on the property was an ephemeral stream based on information Coventry Park obtained from their consultant, the Army Corps of Engineers and the DEP that the stream located on the property was ephemeral and not intermittent. Finally, the Board rejected Coventry Park’s argument that (1) there was never a determination *in this matter* that there was an intermittent stream on the property. The only rulings in this regard were made in the prior Coventry Park Application, and based on out-of-date information which was since corrected, and (2) if there was an intermittent stream on the Property, its location had never been determined.

The Planning Commission recommended disapproval of the Final Plan to the Board. On November 14, 2008, the Board voted to deny the Final Plan. Coventry Park filed a land use appeal in the common pleas court.

The common pleas reversed the Board’s November 14, 2008, denial of the Preliminary Plan because “a review of the record indicated that the Final Plan is identical to the [deemed approved] Preliminary Plan.” Common Pleas Court Opinion, August 12, 2009, at 3. The Common Pleas Court concluded with regard to the stream that “Sadly, the issue of whether there is an ephemeral or intermittent stream and where it is located will be litigated again. However, prior litigation over the stream does not entitle the Commissioners to reject this Final Plan at this time.” Common Pleas Court Opinion, August 12, 2009, at 3.

Section 508(4) of the MPC

Pursuant to Section 508(4)(i) of the MPC, “[w]hen a preliminary application has been duly approved, the applicant shall be entitled to final approval in accordance with the terms of the approved preliminary application. 53 P.S. §10508(4)(i). (Emphasis added).

In Graham v. Zoning Hearing Board of Upper Allen Township, 520 Pa. 526, 555 A.2d 79 (1989), our Supreme Court clearly stated with respect to Section 508(4) of the MPC that:

Once a preliminary plan has been approved, the application is entitled to final approval in accordance with the original preliminary application. Thus, final approval of a subdivision plan is automatic unless the final plan is different from the preliminary plan.

Graham, 520 Pa. at 532, 555 A.2d at 81.

Here, the common pleas court determined based on its review of the record that the Final Phase I Plan and the Preliminary Plan were “identical” and therefore, approval of the Phase I Final Plan was required pursuant to Section 508(4) of the MPC, 53 P.S. §10508(4).

On appeal⁴, the Board argues that the common pleas court erred because there were substantial differences between the Preliminary Plan and Final Plan that rendered automatic approval erroneous.

⁴ Where the trial court takes no additional evidence, this Court’s scope of review in a land use appeal is limited to determining whether the local governing body committed an error of law **(Footnote continued on next page...)**

Specifically, the Board contends that the common pleas court, in finding that the Preliminary Plan and Final Plan were “identical,” overlooked the fact that the Preliminary Plan, unlike the Final Plan, did not propose a phased development. The Board asserts that the Preliminary Plan was not submitted or deemed approved as a “phased plan.” The Preliminary Plan was titled and reviewed and deemed approved as the “Stafford Park Preliminary Subdivision Plan.” According to the Board, “there was absolutely nothing on the deemed approved Preliminary Plan that remotely suggested that the Plan was to be developed in phases, thereby triggering the provisions of the Ordinance [SALDO] applicable to phased developments.” Board’s Brief at 11.

Coventry Park counters that the Preliminary Plan expressly provided that it was proposed to be constructed in two phases. Specifically, it points out that the Project Narrative for the Stafford Park Preliminary Plan dated May 14, 2007, stated that “**[t]he plan will be developed in 2 phases with the first phase to be constructed in 2008.**” Appendix C to Coventry Park’s Brief at 15a (Emphasis added). The Preliminary Plan also specifically identified those improvements which would be constructed as part of each of the two phases of development. The Preliminary Plan identified the lots to be created thereby with designations in the 100’s (Phase I) and the 200’s (Phase II).

This Court has reviewed the record, the transcript of the Board of Commissioners Meeting and the portions of the Preliminary Plan referenced by

(continued...)

or an abuse of discretion. Zajdel v. Board of Supervisors of Peters Township, 925 A.2d 215 (Pa. Cmwlth. 2007).

Coventry Park. Initially, this Court notes that contrary to the Board's position, the Preliminary Plan did, in fact, state that it would "be developed in 2 phases."⁵ At the Township Planning Commission Meeting on November 5, 2008, counsel for Coventry Park pointed out "the preliminary plan as deemed approved by the October 21, 2008, Order of the Court of Common Pleas identifies that there will be a development in two phases for the Stafford Park Plan." Hearing Transcript (H.T.), November 5, 2008, at 5; R.R. at 106a. The Board had no retort.

Coventry Park's counsel also demonstrated, by comparison and overlays, that the two Plans were identical. Thus, the facts here are different from those presented in Wynnewood Company v. Board of Supervisors of Whitemarsh Township, 24 Pa. D. & C.3d 216 (1980), affirmed, 455 A.2d 742 (Pa. Cmwlth. 1983). In that case, a preliminary subdivision plan was approved, but the final subdivision plan was denied because of defects in the plan identified by township staff. The final plan revealed substantial differences in the contour of the land that were not apparent on the preliminary plan. The trial court affirmed the township's disapproval, explaining as follows:

First, the landowner's revised final plan does not conform to its preliminary plan. The landowner's preliminary plan gave the impression that the subject area could be easily developed. However, when the revised final plan was presented, dramatic differences in contour were revealed for the first time. In fact, the differences were sufficiently significant to suggest that the landowner may have been attempting to mislead the board. Second, the revised final plan described numerous other defects including ones relating to on-lot grading and the existence of excessively steep slopes. These defects were not present nor

⁵ The Court is puzzled by the Board's failure to address this either in this appeal or in the underlying proceedings.

discoverable in the landowner's preliminary plan by virtue of the fact that greater detail is required for final plans.

Wynnewood, 24 Pa. D. & C.3d at 218 (Emphasis added).

Here, both Plans had the exact same contours and the same lot lines, the same 66 lots with the same lot numbers, the same cul-de-sacs, the same road right of ways, and streets. H.T. at 6-7; R.R. at 107a-108a. Therefore, this Court must agree with the common pleas court that the Board's position that the Preliminary and Final Plans were "substantially different" was flawed.

Having erroneously determined that the Preliminary and Final Plans were substantially different, the Board went on to re-examine the subdivision plan under the SALDO as though it had not been previously approved. The Board concluded that the Final Plan violated the SALDO because: (1) Coventry Park failed to depict, in violation of Section 406.2 of the SALDO, any future sections or phases that would require guarantees for public improvements and an estimate of the cost of public improvements for the phase not being constructed; and (2) the length of the cul-de-sac exceeded 900 feet from the nearest open road (entrance to the Plan) in violation of Section 804.7 of the SALDO.

In Annand v. Board of Supervisors, 634 A.2d 1159 (Pa. Cmwlth. 1993), a landowner with a deemed approved preliminary subdivision plan faced final plan rejection for the stated reason that it did not conform to the township's zoning ordinance. This Court held that once a preliminary plan is deemed approved, the township may not re-evaluate those aspects of the plan governed by the SALDO, and explained:

[T]he Township erred in rejecting the final plan after the preliminary plan had been deemed approved. **To be approved, the final plan needed only to be the same plan as the deemed-approved preliminary plan with the additional engineering details required by the subdivision ordinance.** The final plan met this requirement and it should have been approved by the Board of Supervisors.

Annand, 634 A.2d at 1161 (Emphasis added).

In the present controversy, the Stafford Drive cul-de-sac on the Final Plan was the same as depicted on the approved Preliminary Plan. The cul-de-sac had the same name, the same measurements, and the same layout. Previously, the Township engineers never took issue with the length of the cul-de-sac during the review of the Preliminary Plan. In any event, the Preliminary Plan was deemed approved “in terms as presented.” See Section 508(3) of the MPC, 53 P.S. §10508(3). The Board erred when it revisited the matter and took issue for the first time with the beginning point for the length of the cul-de-sac and maintained it should be measured from the nearest open road. With regard to the “failure to depict future sections or phases that require guarantees for public improvements” this Court finds that this too was a SALDO requirement that was not reviewable once the Preliminary Plan was approved. In any event, there were no essential improvements identified in the Phase I Preliminary Plan or the Final Plan that were necessary for Phase II. H.T., at 5; R.R. at 106a.

Finally, regarding the Board’s denial of the Final Plan because of the existence of an intermittent or ephemeral stream on the property, this Court must agree with the common pleas court.

The Board's previous denial of the variance for the stream, upon which it relied, was for a **prior or different plan** known as the "Coventry Park Plan." In that separate action, Coventry Park had applied for a variance under the Township's Floodplain Ordinance. This Court's prior rulings on that application do not preclude approval of the Stafford Park Final Phase 1 Plan. As Coventry Park points out the Stafford Park Plan incorporated significant changes from the prior "Coventry Park Plan" for which the ZHB denied a variance. For example, the prior plan had a different access road, there was a different road configuration, and the number of lots was different. All of these changes bar the application of issue preclusion. DuBois Dutch, LLC v. Sandy Township Board of Supervisors, 940 A.2d 576 (Pa. Cmwlth. 2007).

Here, there is no evidence in the record that the new development, Stafford Park, interfered with any stream on the Property, that there was an intermittent stream on the Property or its location. These are issues for another time.

For the foregoing reasons, the common pleas court is affirmed.

BERNARD L. McGINLEY, Judge

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Limited Liability Company	:	
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v.	:	
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Robinson Township Board of	:	
Commissioners,	:	No. 1672 C.D. 2009
Appellant	:	

ORDER

AND NOW, this 18th day of August, 2010, the Order of the Court of Common Pleas of Allegheny County in the above-captioned matter is hereby affirmed.

BERNARD L. MCGINLEY, Judge