

Land Development Ordinance (SALDO).¹ (Reproduced Record (R.R.) at 17a – 19a.) The Township’s engineer also determined that Developer’s final plan did not comply with the Schuylkill Watershed Act Stormwater Management Ordinance with regard to the development of a detention basin, the ownership and maintenance responsibility for the basin, and the preparation of an operations and maintenance manual. (R.R. at 19a-20a.)

Following submission of the final subdivision plan, Developer, on July 26, 2006, October 26, 2006, and October 15, 2007, requested extensions of time for review of its plan. The Board granted those requests. The 2007 extension was scheduled to expire on May 30, 2008, and, on April 30, 2008, Developer requested another extension of time. By letter dated May 8, 2008, the Township’s zoning officer and zoning/code enforcement officer informed Developer that the Board was not willing to grant such an extension without an explanation from Developer:

¹ The October 26, 2006, engineering report found that Developer was not in compliance with the following sections of the SALDO:

1. Sections 4.277 & 6.212—regarding street lighting requirements.
2. Section 4.337—concerning execution of the certification of accuracy by a professional land surveyor and professional engineer.
3. Section 4.352—completion and execution of a certification of ownership.
4. Section 4.364—regarding offers of dedication.
5. Section 4.39—pertaining to copies of approvals for erosion and sediment control plan by the Pennsylvania Department of Environmental Protection and an approval letter Berks County Conservation District.
6. Section 3.61—the Developer and Township must work out the details of subdivision improvements.
7. Section 4.42—requiring the submission of plans to be in an ARCview shapefile or AutoCAD.DWG format.

Exeter Township has been reviewing the ... plan since 6-06-06. Since that time, we have acted favorably on three (3) time extensions. The deadline for action by the board is now 5-30-08.

There has been no apparent activity on this plan for some time and although we have received a current offer of extension from you, the Board of Supervisors is hesitant to accept such an extension without an explanation as to why the plan is not being actively addressed.

With that, the Board intends to address your plan at their May 19, 2008 meeting. We previously forwarded to you the latest review letter from GVC, which indicates outstanding plan issues that remain.

At this time, on behalf of the Board of Supervisors, we are requesting a written explanation as to the status of each of these issues so that the Board can evaluate your situation prior to taking appropriate action at their May 19 meeting. Please plan to attend the meeting so that you can answer any questions the Board may have relative to your plan.

(R.R. at 3a.)

Developer did not submit a written response to the Board. However, the Board's minutes reveal that Developer's engineer, Susanne Creveling, attended the May 19, 2008, meeting and discussed the matter with the Board. The Board voted to deny Developer an extension of time and to reject the final subdivision plan. (*See* R.R. at 7a, 8a.)

By letter dated May 27, 2008, Developer received the following notice of the Board's decision:

The purpose of this letter is to make you aware that at the regularly scheduled May 19, 2008 Board of Supervisors Meeting, the Board took action on the above referenced plan. The first act by the Board was not to accept the time extension you offered. The second motion of the Board

was to reject the plan in its entirety for: 1) the reasons set forth in the latest Great Valley Consultants review letter dated 10-25-06, which is attached hereto and incorporated herein by reference; and 2) failure on your part to properly address the outstanding issues, as was requested by the May 8, 2008 certified letter.

By way of brief background, your plans were originally accepted for review on 6-06-06, which commenced the review process. Since that time three (3) extensions have been granted. On 10-25-06, the Township Engineer sent you a review letter that specified several deficiencies in the plans that were required to be corrected. To date, you have failed to submit revised plans that correct those deficiencies.

Due to the lengthy passage of time, the Township sent you the certified letter on May 8, 2008. A copy of the certified letter is attached and incorporated herein by reference. In the May 8, 2008 correspondence, the Township informed you that since there has been no apparent activity on the plan, you were required to submit a written explanation as to the status of each of the outstanding items in the most recent review letter and that you were required to attend the Board's meeting on May 19, 2008 to address any questions of the Board. You failed to submit a written explanation as to the status of each of these issues and were unable to provide an acceptable explanation for the delays in moving your application forward. Accordingly, the Township did not agree to accept any further extensions and your plans have been denied for failure to comply with the above-referenced defects.

(R.R. at 16a.) The decision stated that it was drafted in accordance with the requirements of section 508 of the Pennsylvania Municipalities Planning Code (MPC).²

² Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §10508.

Developer appealed the Board's decision to the trial court.³ Although Developer raised numerous issues in its notice of appeal, Developer's memorandum of law in support of its appeal focused entirely on Developer's argument that the Board's May 27, 2008, denial letter did not comply with section 508(2) of the MPC, 53 P.S. §10508(2), and, thus, Developer was entitled to a deemed approval. Based on its review of the record and the arguments of counsel, the trial court denied Developer's appeal on June 1, 2009.

Developer appealed to this Court on June 26, 2009. Subsequently, on July 8, 2009, Developer filed with the trial court a motion for reconsideration or, in the alternative, to supplement the record. Developer argued in the motion that the administrative record submitted by the Township did not contain evidence showing

³ The issues raised in Developer's notice of land use appeal are paraphrased as follows:

- (1) The May 27, 2008, letter does not identify with particularity which items set forth in the engineering review letter formed the basis of the denial.
- (2) The engineer's review letter does not contain substantive items that could form the basis of a denial of the plan.
- (3) The Township failed to state with specificity what aspect of the letter formed the basis for the denial.
- (4) The May 8, 2008, letter does not set forth a proper basis for denying the plan.
- (5) The Township applied incorrect legal principles.
- (6) The Township failed to comply with section 508(2) of the MPC, 53 P.S. §10508(2).
- (7) The Township failed to provide actual notice of the reasons for rejection of the plan.
- (8) The written notice of the decision is inadequate, unsupported by substantial evidence, or is arbitrary, capricious, and an abuse of discretion as contrary to law.
- (9) Developer is entitled to deemed approval of its final plan.

(Notice of Land Use Appeal, ¶ 11, subsections (a) – (h), pgs. 3-5.)

that its subdivision plan had received preliminary approval and thus the trial court may have failed to consider that the proposed subdivision had been preliminarily approved. The trial court denied Developer's motion on August 21, 2009.

On appeal to this Court,⁴ Developer first contends that, because the Board approved its preliminary plan, it was entitled to final approval in accordance with section 508(4)(i) of the MPC, 53 P.S. §10508(4)(i), which states that "when a preliminary application has been duly approved, the applicant shall be entitled to final approval...." Developer also argues that section 508(4)(ii) of the MPC, 53 P.S. §10508(4)(ii), provided it with a five year period following approval of its preliminary plan to satisfy conditions of the SALDO and obtain final plan approval.

It is true that preliminary approval of a final plan typically entitles the applicant to final approval. Rickert; Weiser v. Latimore Township, 960 A.2d 924 (Pa. Cmwlth. 2008). However, as the Board points out, in this case there is no evidence of preliminary approval in the record. In addition, the preliminary plan itself is not part of the record. Further, the Board observes that Developer did not raise any issue regarding section 508(4) or the lack of evidence of preliminary approval in the Township's administrative record until after Developer filed its post-appeal motion for reconsideration. Developer admits that the record does not contain a copy of the Board's approval of the preliminary plan and that it did not attempt to supplement the record until after its notice of appeal to this Court was filed. (Developer's brief at 5.)

⁴ In a land use appeal, where, as here, the trial court takes no additional evidence, our scope of review is limited to determining whether the local governing body committed an abuse of discretion or an error of law. Rickert v. Latimore Township, 960 A.2d 912 (Pa. Cmwlth. 2008). A governing body abuses its discretion when its findings of fact are unsupported by substantial evidence. Id.

We may not consider evidence that is not part of the record on appeal.⁵ Gibbs v. Department of Public Welfare, 947 A.2d 233 (Pa. Cmwlth. 2008); Zajdel v. Board of Supervisors, 925 A.2d 215 (Pa. Cmwlth. 2007).

Moreover, Developer did not raise the section 508(4) issues to the trial court by way of its notice of land use appeal or its supporting memorandum of law, but rather raised the question of preliminary approval of its plan for the first time during the reconsideration proceedings that followed the appeal to this Court.⁶

⁵ Developer included in its reproduced record the minutes of the Board’s February 27, 2006, meeting, which states that the preliminary plan for Asino Farms was approved by the Board subject to items listed in a February 2, 2006, engineering review letter. (R.R. at 31a and 47a.) However, including a document in a reproduced record does not cure its absence from the certified record. McGaffin v. Workers' Compensation Appeal Board (Manatron, Inc.), 903 A.2d 94 (Pa. Cmwlth. 2006).

We note that the February 27, 2006, minutes of the Board were submitted to the trial court in support of Developer’s post-appeal motion for reconsideration or to supplement the record. The trial court included these documents with the original record; however, because Developer’s motion to supplement the record was denied, they are not part of the evidentiary record and cannot be considered on appeal.

Developer also notes in its brief that the preliminary approval of its plan is posted on the Township’s website. However, our scope of review precludes us from searching the internet, building our own record, and then applying those facts to resolve an appeal.

⁶ Developer states in its brief that it referred in its notice of land use appeal to the absence of a copy of preliminary approval in the record. The notice of appeal contains the following paragraph:

5. Appellant has been advised that the project received preliminary plan approval on or about February 27, 2006, although Appellants have not been able to verify that through a review of the Township’s land development file on the property.

(Notice of Land Use Appeal, ¶ 5, pg. 2.) Developer repeated this sentence in the “history of the case” section of its memorandum of law. Although the preceding paragraph suggests that Developer was aware of a possible problem with the Township’s file at the time it filed its land use appeal, Developer did not raise an issue in the notice of appeal or in its memorandum of law regarding section 508(4) of the MPC, nor did it seek to augment the record prior to filing an appeal to this Court.

Therefore, we conclude that this issue is waived. See Carroll Sign Co., Inc. v. Adams County Zoning Hearing Board, 606 A.2d 1250 (Pa. Cmwlth. 1991) (holding that constitutional issues were waived because they were not raised in the notice of appeal and supporting brief filed with the common pleas court).

Next, Developer contends that the Board acted in bad faith because it set an arbitrary eleven day deadline for action on the final subdivision plan and did not give Developer any opportunity to cure defects in the plan.

The Board argues that Developer waived this issue by failing to raise it before the trial court via its notice of land use appeal and by failing to include the issue in its memorandum of law in support of the land use appeal. The record reflects that Developer raised this argument for the first time in paragraph 7 of its concise matters complained of on appeal, which was filed with the trial court on July 24, 2009. Therefore, this issue is also waived. Clayton v. City of Philadelphia, 910 A.2d 93 (Pa. Cmwlth. 2006).

Developer also contends that the May 27, 2008, letter rejecting Developer's final subdivision plan does not comply with section 508(2) of MPC, which provides that such decisions shall specify the defects in the application, describe requirements that were not met, and cite the pertinent provisions of the statute or ordinance. However, this issue is not specifically set forth in Developer's Statement of Questions Involved; nor is it subsumed within the issues specifically raised in the Statement of the Questions Involved. The Rules of Appellate procedure provide as follows:

The statement of the questions involved must state the question or questions in the briefest and most general terms, without names, dates, amounts, or particulars of any kind. This rule is to be considered in the highest degree

mandatory, admitting of no exception; ordinarily *no point will be considered which is not set forth in the statement of questions involved or suggested thereby.*

Pa. R.A.P. 2116 (emphasis added). Therefore, we may not consider this issue.⁷ Menno Haven, Inc. v. Franklin County Board of Assessment & Revision of Taxes, 919 A.2d 333 (Pa. Cmwlth. 2007).

Accordingly, the trial court's order is affirmed.⁸

PATRICIA A. McCULLOUGH, Judge

⁷ Even if the issue were properly before us, we would conclude that the letter complies with the requirement of section 508(2) MPC. A denial letter may incorporate an engineering report by reference, Advantage Development, Inc. v Board of Supervisors of Jackson Township, 743 A.2d 1008 (Pa. Cmwlth. 2000), and here the Board explained in the May 27, 2008, letter the reasons for denying the final plan and incorporated by reference a detailed engineering report that specified the deficiencies in the plan and cited the ordinance provisions at issue. The engineering report was attached to the May 27, 2008, letter.

⁸ Developer's Statement of the Questions Involved asks whether the trial court erred or abused its discretion by finding that the Township did not act capriciously, arbitrarily, and/or contrary to law, when it failed to include the preliminary subdivision plan approval in its return of record. However, Developer does not include any argument on this issue in its brief. When an appellant raises an issue in the Statement Questions Involved, but fails to develop it in its brief, the issue is waived. City of Philadelphia v. Berman, 863 A.2d 156 (Pa. Cmwlth. 2004).

