

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cornerstone Development Group, :
Appellant :
 :
v. : No. 1463 C.D. 2007
 : No. 1464 C.D. 2007
The Board of Supervisors of Butler :
Township : Submitted: December 7, 2007
 :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: June 11, 2008

Cornerstone Development Group (Cornerstone) appeals from an order of the Court of Common Pleas of Adams County (Trial Court) which denied Cornerstone's appeal from the decision of the Butler Township Board of Supervisors (Board). The Board's decision rejected Cornerstone's preliminary subdivision and land development plan. We affirm.

Cornerstone is the owner and developer of an approximately 90-acre tract of land spanning both Butler and Cumberland Townships, within Adams County, Pennsylvania. On March 3, 2006, Cornerstone submitted to the Board a modified preliminary land development plan (the Preliminary Plan) for a single-family residential subdivision to be named Biglerville Crossing. Since Butler

Township does not own, maintain or operate public sewage facilities, the Preliminary Plan proposed that sewage services would be provided by the Cumberland Township Sewer Authority. As such, Cornerstone's Preliminary Plan included, in part relevant to the instant appeal, a "General Note" on the first sheet of the Plan stating, in full:

4. ALL PROPOSED SANITARY SEWER LINES SHOWN ON THIS PLAN ARE INTENDED FOR DEDICATION TO THE CUMBERLAND TOWNSHIP AUTHORITY. CONSTRUCTION OF ALL SANITARY SEWER FACILITIES SHALL BE IN ACCORDANCE WITH THE CUMBERLAND TOWNSHIP AUTHORITY "SANITARY SEWER CONSTRUCTION AND MATERIAL SPECIFICATIONS FOR DEVELOPERS", AS AMENDED. LOT 163 SHALL BE DEDICATED TO CUMBERLAND TOWNSHIP SEWER AUTHORITY FOR THE SOLE PURPOSE OF OPERATION AND MAINTAINING THE PROPOSED SEWAGE PUMP STATION.

Reproduced Record (R.R.) at 12a. The Preliminary Plan's first page further listed "Cumberland Township Sewer Authority" under the listing of Utilities providers contact information. Id.

Following a Board meeting on March 13, 2006, the Board notified Cornerstone, by letter dated March 14, 2006, of its vote to reject the Preliminary Plan, on the following basis:

The [Preliminary P]lan and all of its revisions were submitted without any sewage facilities planning documents. Section 85-11.C.(1) [of the Butler Township Subdivision and Land Development Ordinance] requires that a plan revision module shall accompany the preliminary plan submission.

Reproduced Record (R.R.) at 18a. Section 85-11.C.(1) of the Butler Township Subdivision and Land Development Ordinance (SALDO) references the required data to be submitted with a preliminary land/subdivision development plan, and states:

C. Supplementary data required. The preliminary plan shall be accompanied by the following supplementary data where applicable:

- (1) A plan revision module for land development as required by Pennsylvania Department of Environmental Resources.^[1]

See Original Record (O.R.), Subdivision & Land Development, Chapter 85, Township of Butler, at 8519.

Cornerstone subsequently appealed the Board's rejection to the Trial Court, which heard the matter without receiving additional evidence. Before the Trial Court, Cornerstone advanced several arguments, asserting that the Board had abused its discretion and/or committed an error of law in rejecting its Preliminary Plan, or in the alternative, failing to issue a conditional approval of the Preliminary Plan. Cornerstone primarily argued that this Court's opinion in CACO Three, Inc. v. Board of Supervisors of Huntington Township, 845 A.2d 991 (Pa. Cmwlth.), petition for allowance of appeal denied, 580 Pa. 707, 860 A.2d 491 (2004),

¹ The Pennsylvania Department of Environmental Resources (DER) is now referred to, in part relevant to the instant proceedings, as the Pennsylvania Department of Environmental Protection (DEP).

controlled the instant matter. Cornerstone argued that CACO established that a development application must be conditionally approved, even absent required SALDO documentation, where the condition requires that the developers submit the required documentation at some time prior to final approval. Cornerstone also presented an argument that Butler Township acted arbitrarily and capriciously in refusing to enter into a municipal agreement with a neighboring municipal authority. The Trial Court rejected Cornerstone's arguments, denied the appeal, and affirmed the Board's decision by order and opinion dated June 28, 2007. Cornerstone now appeals to this Court.^{2,3}

Our scope of review in a land use appeal, where the trial court did not take additional evidence, is limited to determining whether the governing body committed an error of law or abused its discretion. CACO.

Cornerstone presents three issues on appeal. Cornerstone first argues that the Board erred in concluding that the Preliminary Plan was submitted without any sewage facilities planning documents, in that this conclusion is not based upon substantial evidence of record, and is based on a capricious disregard of the evidence of record. As the Trial Court noted in its Pa.R.A.P. 1925(a) Opinion of September 11, 2007, Cornerstone has waived this issue. Cornerstone did not raise

² Pursuant to Pa.R.A.P. 1925(b), by order dated August 2, 2007, the Trial Court ordered Cornerstone to file a Concise Statement of Matters Complained of on Appeal. Cornerstone, complied, and the Trial Court thereafter issued an opinion pursuant to Pa.R.A.P. 1925(a), dated September 11, 2007.

³ By order of this Court dated August 28, 2007, we consolidated two separate appeals taken by Cornerstone from the Trial Court's June 28, 2007, order, the underlying matters having been consolidated by the Trial Court.

this issue in its land use appeal from the Board to the Trial Court, did not brief this issue in its brief in support of that land use appeal, and did not argue this issue before the Trial Court. Certified Record (C.R.) at Items 7, 16; Trial Court Opinions of June 28, and September 11, 2007. As such this issue is waived.⁴ Pa.R.A.P. 302; Township of West Manchester v. Mayo, 746 A.2d 666 (Pa. Cmwlth. 2000).

Cornerstone next argues that, under CACO and related precedents, the Board erred in denying Cornerstone's Preliminary Plan, or in failing to issue a conditional approval thereof, in light of the materials that Cornerstone submitted showing that it commenced the process required under the SALDO. Most generally stated, Cornerstone asserts that the materials it did supply in relation to its sewage plan were adequate to receive approval of the Preliminary Plan, and that the SALDO Section 85-11.C.(1) requirement of submission of a sewage planning module is the proper subject of a condition of approval, and not a proper basis for the denial at issue.⁵ Cornerstone further emphasizes that CACO, and Kohr v. Lower Windsor Township Board of Supervisors, 910 A.2d 152 (Pa. Cmwlth. 2006), establish that a lack of state agency approvals and permits, and informational details related thereto, at the time of preliminary plan submission is

⁴ Notwithstanding Cornerstone's dispositive waiver of this issue, we note that Cornerstone did not offer any evidence that could be construed as the proper documentation for a sewage planning module, as defined by the DEP and as expressly required by SALDO Section 85-11.C.(1). Our forthcoming analysis references this lack of proper evidence of record in addressing Cornerstone's remaining arguments.

⁵ We emphasize that in the case *sub judice*, Cornerstone does attack the validity, or applicability, of SALDO Section 85-11.C.(1).

an improper basis upon which to deny the plan. Cornerstone, however, fails to acknowledge that the Board's denial was not based upon any lack of state agency approvals or permits, or of materials required therefor. The Board's denial is solely and expressly based upon Cornerstone's failure to submit the planning module required by the SALDO, and makes no explicit or implicit reference to agency approvals or permits. Further, SALDO Section 85-11.C.(1) does not require DEP review or approval of the module, and does not require submission to DEP of that module; that Section merely requires submission of the DEP-defined module to the Board itself.

Cornerstone also misstates the applicability of CACO and Kohr to the instant facts, and reads those precedents in an overly broad fashion. In CACO, a developer's revised preliminary plan was submitted to the local municipal body, along with certain information regarding the plan's proposed sewage system including an engineer's feasibility report, and a preliminary sewage system plan. That proposed sewage system plan had also been submitted to the DEP, which had issued the first of at least two permits required for the proposed system. After the municipal body denied the developer's preliminary development plan on the grounds, in relevant part, that the preliminary sewage plan lacked sufficient detail, and that the DEP had not issued a second required permit for the sewage system plan that was pending before them, we reversed. In regards to this issue, we held that the still-pending DEP permit for which a preliminary sewage plan had been submitted to DEP, and various preliminary sewage plan details such as certain labels, notations, and design calculations, were not objective preliminary

development plan defects that would justify an outright disapproval of the preliminary development plan. Such failings, we held, were minor technical defects, and or pending applied-for permits, that could be corrected by later amendment, and therefore merited conditional approval of the preliminary development plan approval. CACO, 845 A.2d at 996-997.

Similarly, in Kohr, we held that a township should have conditionally approved a preliminary development plan where the landowner had submitted: (1) an agreement to organize a public utility and operate a sewage treatment plant; (2) a full sewage treatment feasibility report listing four distinct options, and: (3) two Act 537⁶ sewage planning modules to the DEP which had not yet been approved. That DEP sewage module submission requirement was required by the township's SALDO as a prerequisite to preliminary development plan approval. The township rejected the landowner's preliminary development plan, citing the lack of a final agreement with a third party to operate the sewage treatment system, the lack of all recommendations and permits from DEP despite the pending status of same via the submission to DEP of the sewage modules, and a general lack of certain final details regarding the sewage system. The Trial Court reversed, and we affirmed the Trial Court, noting again, as in CACO, that denial was improper where approval could be conditioned on later DEP approval, recommendations, permits, and the amendment of the preliminary plan to finalize the missing details.

⁶ What is commonly referred to as an Act 537 Plan is a Sewage Facilities Plan pursuant to the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, as amended, 35 P.S. §§ 750.1-750.20a.

CACO and Kohr are distinguishable on their face from the instant matter, in that the developers had the necessary agency applications, and most notably, the sewage planning modules, submitted and pending at the time that the preliminary development plans at issue therein, were before the respective municipal bodies seeking conditional approval. In the instant matter, no such modules are pending or have been submitted to the Board, despite the clear mandate of SALDO Section 85-11.C.(1).

The record clearly shows that Cornerstone unquestionably has not submitted any sewage planning modules as required by SALDO Section 85-11.C.(1). Cornerstone offers as support for the proposition that it has commenced the DEP module submission process what DEP itself describes as a “postcard” application. R.R. at 36a-37a. The postcard application cannot be read to be a planning module in any sense of that term; the reply to the postcard application, from the DEP itself, includes “the module forms required for the proposed development” and requests that Cornerstone “submit the modules to the municipality(ies) in which the project is located.” R.R. at 37. The DEP reply then goes on to list 11 specific items that must be submitted, statements and/or showings and/or address of three additional compliance subjects (relating to an intermunicipal agreement, and certain statutory and regulatory requirements), along with two additional pages of forms.⁷ R.R. at 37a-40a. The DEP’s reply to

⁷ The DEP’s regulation articulating the content of a sewage planning module states:

§ 71.52. Content requirements--new land development revisions.

(Continued....)

(a) An official plan revision for new land development shall be submitted to the Department in the form of a completed sewage facilities planning module provided by the Department and shall include, but not be limited to, the following information:

(1) The nature of the proposal, including:

(i) Type of facilities to be served, density of proposed development and whether the development is residential, commercial or industrial.

(ii) Number of lots including equivalent dwelling units.

(iii) Anticipated sewage flow from the proposed development. For individual or community sewerage systems, the flows shall be based on gauged flows or the flows contained in the Department's Sewerage Manual. A copy of the manual may be obtained from the Department's Bureau of Water Supply and Wastewater Management. For individual or community onlot sewage systems, the flows shall be consistent with §§ 73.16 and 73.17 (relating to absorption area requirements; and sewage flows).

(iv) Anticipated raw waste characteristics of the sewage.

(v) Type of sewage facilities proposed, including collection, treatment and disposal methods.

(vi) Description of required operation and maintenance activities required by Subchapter E (relating to sewage management programs).

(vii) Designation of the person responsible for operation and maintenance activities and the legal and financial arrangements necessary for assumption of this responsibility.

(2) The relationship of the proposed development to existing sewage needs, proposed sewage facilities and sewage management programs in an area delineated by the municipality, including identification of:

(i) The areas included in, and adjacent to, the project which are in need of improved sewage facilities.

(ii) Existing and proposed sewage facilities for remaining acreage or delineated lots not included in the project.

(Continued....)

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- (iii) Existing sewage facilities and sewage management programs in the area.
 - (iv) Other proposed sewage facilities and sewage management programs--public and private--in the area.
 - (v) The method for integrating the proposal into the comprehensive sewage program in the area as reflected in the approved official plan.

(3) An analysis of technically available sewage facilities alternatives identified by the municipality and additional alternatives identified by the Department, including whether each alternative:

- (i) Meets the technical requirements of this part.
- (ii) Is consistent with local and areawide comprehensive water quality management plans for the area.
- (iii) Is consistent with sewage planning policies and decisions of the municipality.
- (iv) Is consistent with the municipalities' comprehensive land use plan for the area.
- (v) Incorporates and is consistent with the requirements of §§ 71.21 and 71.31 (relating to content of official plans; and municipal responsibility to review, adopt and implement official plans).

(4) Selection of an alternative which adequately addresses both the present and future sewage needs of the proposal, through identification and evaluation of:

- (i) Interim facilities.
- (ii) Replacement facilities.
- (iii) Ultimate facilities.
- (iv) Operation and maintenance activities and requirements.

(5) Selection of an alternative which assures the continued operation and maintenance of the selected sewage facilities through evaluation and identification of the following:

- (i) Sewage management program requirements.
- (ii) Administrative capability for continued operation and maintenance.

(Continued....)

Cornerstone’s “application postcard” makes clear that all of the above-enumerated materials, in total and without exception, are required to constitute a module submission. R.R. at 37a-38a. We note that SALDO Section 85-11.C.(1) defers to DEP’s requirements for a module, and as such, DEP’s reply to Cornerstone’s postcard application is evidence that the module has not been submitted, and thus inherently contradicts Cornerstone’s argument to the Board and this Court that the postcard application is sufficient under SALDO Section 85-11.C.(1) for a conditional approval.

As such, Cornerstone’s evidence, even if combined with the scant assertions contained in the Preliminary Plan itself regarding the sewage plan, do not constitute a “plan revision module for land development as required by the Pennsylvania [DEP]”, as mandated by SALDO Section 85-11.C.(1). It follows that CACO and Kohr are inapplicable to the matter *sub judice*, since there was no issue in those precedents as to initial module submission. Those precedents cannot be

(6) Documentation of whether or not it may be implemented including:

(i) Agreements with sewer authorities, water authorities or other persons to provide services necessary for implementation of the plan.

(ii) Designation of the institutional arrangements necessary for implementation of the plan.

(b) The Department may require additional information which is necessary for adequate review of the proposal.

25 Pa. Code §71.52.

used to circumvent the plain and express requirements of SALDO Section 85-11.C.(1) by mandating conditional approval under the instant facts. As the Trial Court astutely notes, had Cornerstone submitted to the Board the module as detailed by the DEP, conditional approval could have been merited. The simple “planning module application mailer” or “postcard application” cannot be held to be an actual submitted planning module as required by the SALDO given the mere 20 lines of perfunctorily generalized information contained in the postcard, as compared to the plethora of information expressly required to constitute a module pursuant to the DEP’s reply and applicable regulation. R.R. at 36a, 37a-40a; 25 Pa. Code §71.52.

Finally, Cornerstone offers the related argument that since the Board erred in concluding that no actual sewage planning module was submitted with Cornerstone’s Preliminary Plan, the Board erred in failing to either grant, or conditionally approve, its Preliminary Plan. As the record to this matter, and Cornerstone’s own characterization of the proposed sewage system materials it offered with the Plan, clearly do not satisfy the requirements of SALDO Section 85-11.C.(1), the Board did not err in denying Cornerstone’s Preliminary Plan.

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

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	:	

ORDER

AND NOW, this 11th day of June, 2008, the order of the Court of Common Pleas of Adams County, dated June 28, 2007, at 06-S-417 and 06-S-418, is affirmed.

JAMES R. KELLEY, Senior Judge