

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Narberth Borough :
 :
 v. : No. 1867 C.D. 2003
 :
 Lower Merion Township, Merloc :
 Partners, L.P., Wynnewood Civic :
 Association, Rosalind Nathanson and :
 Maureen D. Witte :
 :
 Appeal of: Merloc Partners, L.P. :

Narberth Borough, :
 Appellant :
 v. : No. 1938 C.D. 2003
 : Argued: March 11, 2008
 Lower Merion Township, Merloc :
 Partners, L.P., Wynnewood Civic :
 Association, Rosalind Nathanson and :
 Maureen D. Witte :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE ROBERT SIMPSON, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
 SENIOR JUDGE FLAHERTY

FILED: May 14, 2008

This matter is before us on remand from the Supreme Court's decision in Narberth Borough v. Lower Merion Township, 590 Pa. 630, 915 A.2d 626 (2007), which reversed our decision in Merloc Partners, Inc. v. Narberth Borough, 849 A.2d 318 (Pa. Cmwlth. 2004), and determined that the appeal filed by Narberth Borough (Narberth) to the Court of Common Pleas of Montgomery

County (trial court) from the Lower Merion Township Board of Commissioners' (Board) approval of the tentative sketch plan of Merloc Partners, L.P., (Merloc) was timely. On remand, the Supreme Court has directed this court to review the merits of the trial court's decision reversing the Board's approval of Merloc's tentative sketch plan. Based on our review, we conclude that the trial court erred in reversing the Board's decision granting approval to Merloc's tentative sketch plan.

Merloc is the owner of two parcels of land consisting of approximately 44 acres. The property is split zoned R-3 Residence and R-7 Residence, and is located within the Open Space Preservation District and Historic Resource Overlay District in Lower Merion Township (Township). The property includes a mansion, four other structures and open space. Narberth is an abutting municipality.

Pursuant to Chapter 135, entitled Subdivision and Land Development of the Lower Merion Township Code (Code), Merloc proposed to subdivide the property into six lots and construct a 250 unit apartment building and an attached four story parking garage. It also proposed various alterations to the existing mansion and other structures. As is required by § 135-7 of the Code, Merloc submitted a tentative sketch plan to the Township, along with four conditional use applications. The Township approved the tentative plan and the conditional use applications.

Narberth appealed to the trial court. The trial court affirmed the grant of the conditional use applications but reversed the Board's decision granting tentative sketch plan approval to Merloc, concluding that it failed to provide

required information, including a conservation inventory plan and information regarding soil type, limitation and classification.

Both Merloc and Narberth thereafter appealed to this court. We reversed the Board's decision granting tentative sketch approval to Merloc, concluding that the appeal to the trial court was untimely. This court further affirmed the trial court's decision to affirm the Board's grant of four conditional use applications.

Narberth thereafter appealed to the Supreme Court challenging all aspects of our disposition with respect to the tentative sketch plan and the conditional use applications. The Supreme Court, however, only granted allocatur with respect to our ruling regarding the timeliness of Narberth's appeal of the Board's approval of the tentative sketch plan.¹ Specifically, the Court stated in Narberth Borough, 590 Pa. at 637, 915 A.2d at 630:

Finding no cause to review the lower court's disposition of the conditional use applications, but finding cause to consider Narberth's challenge to the Commonwealth Court's ruling regarding the timeliness of Narberth's appeal of the Board's tentative sketch plan approval, we granted review only as to the two questions Narberth presented concerning the later aspect of this case.

As to the tentative sketch plan, the Supreme Court determined that the appeal period begins to run from the date of the mailing of the written decision and reversed our decision which held that the appeal period ran from the date of the Board's meeting, when the Board's decision was orally announced. The case was

¹ The Court granted allocatur in Narberth Borough v. Lower Merion Township, 584 Pa. 542, 886 A.2d 223 (2005)(*per curiam*).

then remanded to this court for review of the trial court's decision reversing the Board's approval of Merloc's tentative sketch plan. Thus, we now decide whether Merloc's tentative sketch plan complied with the Code requirements.

Before doing so, however, we observe, as did the Supreme Court, that according to the Code, there is a three-step approval process which requires a tentative sketch plan followed by a preliminary plan and ultimately a final plan. Here, during the pendency of the litigation pertaining to the tentative sketch plan, Merloc submitted its preliminary plan to the Board, in which it purported to demonstrate compliance with the forty-four conditions imposed in the Board's conditional approval of its tentative sketch plan. The Board approved Merloc's preliminary plan and, on appeal, this court affirmed.² Thereafter, the Supreme Court denied allowance of appeal of Narberth's appeal of the preliminary plan approval.³

Although Merloc argued to the Supreme Court that since Merloc has now obtained preliminary plan approval, any question pertaining to the tentative sketch plan became moot, the Supreme Court disagreed. The Court observed that the land use approval process requires compliance with the three steps identified in the Code (tentative sketch, preliminary plan and final plan) and that each step contains unique requirements designed to protect the community. Moreover, the Court recognized that if approval of the second or third step mooted the preceding steps without regard to those steps unique requirements, a municipality could

² Borough of Narberth v. Board of Commissioners of Lower Merion Township, 876 A.2d 1108 (Pa. Cmwlth. 2005)(memorandum opinion).

³ Borough of Narberth v. Board of Commissioners of Lower Merion Township, 586 Pa. 741, 891 A.2d 734 (2005)(*per curiam*).

hasten approval of the later step and avoid an objector's right to judicial review of the prior steps.

In a footnote, the Court, again recognizing that Merloc's preliminary plan had in fact been approved, stated:

This in itself does not necessarily vitiate any deficiencies in Merloc's tentative sketch plan. We think it prudent, however, to emphasize that this Court does not intend to suggest that the land use process must begin anew if the tentative sketch plan was, indeed, deficient in any of the regards alleged. We trust the Commonwealth and trial courts to fashion appropriate relief as they deem necessary.

Narberth Borough, 590 Pa. at 647 n.20, 915 A.2d at 637 n.20. With this in mind, we now address the tentative sketch plan.⁴

Initially, Merloc states that the tentative sketch application is the first of three approvals Merloc is required to obtain before it can develop the Property, the other two being preliminary and final plan approval. A tentative sketch application "does not ensure that the developer or owner can develop the property as shown in the plan." (Board approval of Merloc's tentative sketch plan, R.R. at 32a.) Merloc points out that the tentative sketch plan, which is not even required in all municipalities or for all developments, is meant to be exactly what it is called, "tentative" and a "sketch."

Here, there is no dispute that Merloc was required to submit a tentative sketch plan in accordance with § 135-7 of the Code, which mandates a

⁴ Where, as here, the trial court did not take additional evidence, our review is limited to determining whether the Board committed an error of law or abused its discretion. Morris v. South Coventry Township Board of Supervisors, 836 A.2d 1015 (Pa. Cmwlth. 2003).

sketch plan when the development includes eight or more units or involves five acres of land. With respect to a tentative sketch plan, § 135-16B of the Code sets forth seventeen requirements that are to be included therein. The trial court concluded that Merloc failed to comply with § 135-16B(13), which requires information as to soil type, limitation and classification and with § 135-16B(16), which requires a conservation plan inventory.

Initially, we will address whether Merloc complied with § 135-16B(16) of the Code as to the conservation plan inventory. In accordance with § 135-16B(16) tentative sketch plans shall include a “conservation plan inventory containing the information set forth in § 101-14A, Inventory.” Section 101-14A of the Code provides that such inventory shall include a property base map, boundary and adjoining conditions, existing natural features and existing wildlife habitat. Here, Merloc maintains that, contrary to the trial court’s determination, it provided all of the information required by § 135-16B(16) and § 101-14A of the Code. We agree.

Specifically, as to the property base map, Merloc states that it submitted an Existing Conditions Plan and a Development Sketch Plan as part of its tentative sketch application and that these plans include all of the information required to be included on a property base map. Although neither was labeled as a “property base map,” Merloc maintains that such mislabeling of a plan is not the kind of objective defect that justifies an outright denial of the plan. Shelbourne Square Associates, L.P. v. Board of Supervisors of Township of Exeter, 794 A.2d 946 (Pa. Cmwlth. 2002). We agree with Merloc that the documents submitted meet the requirements of a property base map, “with respect to sheet size, scale, property acreage calculations, delineation of courses and distances of property

boundaries, dedicated street rights-of-way and easements” as required by § 101-14A(1).

As to the boundary and adjoining property conditions of § 101-14A(2) Merloc has provided this information, including names of adjoining property owners, residential and institutional structures within 200 feet of the property, and existing zoning and minimum setback requirements applicable to the property, in its Existing Conditions Plan, Yield Plan and Development Sketch Plan.

As to existing natural features, Narberth claims that Merloc failed to provide information required by § 101-14A(3)(f) which requires:

Soil series, types and phases, as mapped by the Soil Conservation Service for the Montgomery County Soil Survey, and accompanying data tabulated for each soil, including its name, depth to seasonal high water table, depth to bedrock, agricultural capability class, credibility **(if data are available)**, limitations of soil type (including load-bearing capacity, drainage and plant growth), and hydrologic group.

(Emphasis added.) In accordance with the above, an applicant is to provide soil series types and phases as contained in the Soil Conservation Service for the Montgomery Soil Survey and such other accompanying data, if such data is available.

The soil information is contained within Merloc’s Existing Conditions Plan. The plan states that the “[s]oil types, boundaries and soil information are taken from soil maps prepared by Montgomery County Soil Conservation Service.” (R.R. at 683a.) The soil type, name and its limitation for residential development are listed. Additionally, the Existing Conditions Plan identifies the drainage flow and hydric soils. We also observe that the Wetlands Delineation

Report, which Merloc submitted with its tentative sketch application, also provides information with respect to soils, drainage and plant growth. (R.R. at 36a.)

The trial court determined and Narberth argues, however, that the inventory information was not provided for in a plan and that a plan is required by the Code. Specifically, Narberth argues that in accordance with § 135-16B(16), Merloc was required to provide a “conservation plan inventory containing the information set forth in § 101-14A, Inventory.” Narberth further maintains that § 101-14A provides:

A conservation plan shall include the following information. When any of the information already has been prepared as part of an application under the Township Subdivision and Land Development Ordinance, then it shall be duplicated and inserted into the pertinent section(s) of the conservation plan. (Emphasis added.)

Narberth states that even if in the various forms and reports submitted by Merloc contain the inventory information required, Merloc was nonetheless required to duplicate it because § 101-14 of the Code states that if the information has already been prepared elsewhere, it still must be “duplicated and inserted” where necessary.

Narberth is mistaken, however, in stating that the above language is found in § 101-14A. Rather, that language is contained in § 101-14. The whole of § 101-14 pertains to the information that is required to be included in a conservation plan. Inventory is just one of three components required in a conservation plan. Specifically, information required in a conservation plan under § 101-14 includes, “Inventory” under § 101-14A, “Impact assessment” under § 101-14B and “Mitigation maintenance” under § 101-14C. Thus, it is when an

applicant is required to produce a conservation plan, that it must duplicate information which may have already been provided elsewhere.

During the tentative sketch plan proceedings, as is the case here, an applicant, in accordance with § 135-16B(16), is required to provide a conservation plan inventory containing the information set forth in § 101-14A. It is not until the preliminary plan stage that a conservation plan is required.⁵

In this case, although not contained in a single document, Merloc has provided all of the information required by § 101-14A. The documents, as submitted, address all of the Code requirements. We also note that Merloc has received preliminary plan approval and that it is at the preliminary plan stage that an applicant must submit a conservation plan.

We next address the trial court's determination that Merloc failed to comply with § 135-16B(13) of the Code, regarding soil information. Specifically, § 135-16B(13) of the Code requires information as to "[s]oil type, limitation and

⁵ In accordance with § 101-13B a conservation plan shall be submitted for any of the following activities:

A. Any activity listed in § 101-7 of this chapter, except activities listed in § 101-7A(2).

B. Any application for approval for which such plan is required under Chapter 135, Subdivision and Land Development § 135-17B(11).

C. Any activities which would interfere with the use of a pedestrian or equestrian trail.

In accordance with § 135-17B(11), development of five acres or more, as is the case here, requires a conservation plan at the preliminary plan stage. We further observe that, as stated in the facts previously, Merloc has obtained approval for its preliminary plan. Thus, it is acknowledged that all of the requirements of § 101-14 for a conservation plan, including inventory information required by § 101-14A, have been met.

classification as required by § 135-17B(8)(a),(f) and (g).” Section 135-17B(8)(a)(f) and (g) provides:

B. Existing features. The plan shall set forth:

* * *

8. Soil classification by the United States Department of Agriculture Soil Conservation Service, as shown in the document entitled “Soil Survey Montgomery County, Pennsylvania,” dated April 1967. In addition to the soil symbol shown on the plan and the area in acres for each, the following shall also be provided from the above documents as characteristic of each soil type:

(a) Soil name.

* * *

(f) Limitation of soil type, including load-bearing capacity, drainage and plant growth.

(g) Hydrological classification, as set forth in the Soil Conservation Service Engineering Field Manual.

A review of the Existing Conditions Plan reveals that Merloc has provided soil data which includes the soil type, soil name and the limitation for residential development. The soil type, boundaries and soil information was taken from soil survey maps prepared by the Montgomery County Soil Conservation Service. Although Narberth argues that Merloc failed to provide load bearing capacity, the column marked “Limitation for Residential Development” on the Existing Conditions Plan, is a summary of the soil characteristics as those characteristics pertain to residential development. Thus, in general terms, Merloc has provided the load-bearing capacity.

Narberth also maintains that Merloc has failed to provide drainage information and hydrological classification. We observe, however, that in addition

to showing the drainage flow on its Existing Conditions Plan, Merloc has also provided drainage information in its Wetlands Delineation Report. Therein, the site soils are listed and described and such data includes drainage information.⁶ Moreover, as to hydrological classification, the Wetlands Delineation Report states that “[n]one of these soils are classified as a hydric soil....” (R.R. at 40a.)

The information provided by Merloc satisfies the requirements of § 135-16B(13) of the Code. Specifically, Merloc has provided the soil names, the limitation of soil type and hydric information.

We further note that the trial court in this case, in reversing the Board’s grant of tentative sketch plan approval relied on Schultheis v. Board of Supervisors of Upper Bern Township, 727 A.2d 145 (Pa. Cmwlth.), petition for allowance of appeal denied, 559 Pa. 709, 740 A.2d 236 (1999). In Schultheis, the township’s planning commission and engineer reviewed the applicant’s tentative sketch plan and concluded that it was deficient because it failed to address code requirements including soil percolation, probe testing and wetlands. The planning commission and engineer informed the applicant that the deficiencies should be satisfied prior to submission of the preliminary plan. Thereafter, the applicant submitted a preliminary plan containing many of the deficiencies that appeared in his sketch plan.

This court determined that the board of supervisors properly rejected the applicant’s preliminary plan rather than conditioning approval upon correction of the deficiencies. This court observed that applicant was informed of the

⁶ The Wetlands Delineation Report describes the codorus silt loam soil as “deep with a variable natural drainage” The glenelg silt loam and manor cannery silt loam soils are both described as “well drained.” (R.R. at 40a.)

deficiencies, told to correct them prior to submission of the preliminary plan, yet he failed to do so.

In this case, Merloc's tentative sketch plan was approved by the Board, so Merloc was never informed of any deficiencies in his tentative sketch plan. Moreover, unlike Schultheis, the record in this case reveals that Merloc has complied with the Code requirements.

In accordance with the above, the decision of the trial court is reversed insofar as it reversed the Board's approval of Merloc's tentative sketch plan.

JIM FLAHERTY, Senior Judge

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ORDER

Now, May 14, 2008, the Order of the Court of Common Pleas of Montgomery County, in the above-captioned matter, is reversed insofar as it reversed approval of the tentative sketch plan.

JIM FLAHERTY, Senior Judge