IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LVGC Partners, LP,	:	
Appellant	:	
	:	
v.	:	No. 239 C.D. 2008
	:	Argued: September 10, 2008
Jackson Township Board of	:	
Supervisors, Thomas Houtz,	:	
Dean Moyer and Clyde Deck	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: October 23, 2008

LVGC Partners, LP, (LVGC) petitions for review of the January 8, 2008, order of the Court of Common Pleas of Lebanon County (trial court). The trial court affirmed the decision of the Jackson Township Board of Supervisors (the Board), which denied LVGC's preliminary plan application. We now affirm.

LVGC is the owner of certain property located along Golf Road just north of Kreider Road, within Jackson Township (the Township), Lebanon County, Pennsylvania. The property has been used as a golf course for approximately fifty-five years. LVGC's property was zoned R-1 (Low Density Residential) under the Township's Zoning Ordinance. The property had been zoned R-1 since approximately 1982. In late 2006, the Township thereafter sought to amend the Zoning Ordinance, thereby changing the zoning classifications of certain properties. To that effect, the Township published two notices in the local

newspaper, on November 20, 2006, and November 27, 2006, respectively, advertising a public hearing regarding the proposed amendments. The hearing was scheduled and held on December 4, 2006.

On the day of the scheduled hearing, LVGC submitted a preliminary plan application to the Board for the proposed development of 302 housing units, including 237 townhouses, a garden apartment complex containing sixty units and fifty-eight single family homes. The proposed development was named "Exeter Creek." Under R-1 zoning, LVGC's proposed townhouses and garden apartment complex were allowed only by special exception. LVGC did not submit an application for special exception for the proposed development.

On December 18, 2006, after public hearing, the Board enacted Ordinance No. 5-2006, which re-zoned certain properties that were previously zoned as R-1 and A-1 (Low Density Agricultural) to the A-2 (High Density Agricultural) classification. LVGC's property was included in this rezoning. The new A-2 zoning designation of its property did not permit townhouses or garden apartment complexes either by special exception or as of right.

On January 15, 2007, the Board held a meeting and considered LVGC's preliminary plan application. At the end of the session, the Board announced that it was denying LVGC's preliminary plan application. Subsequently, on January 26, 2007, the Board issued a letter in which it formally denied the preliminary plan application. The Board noted that it was basing its denial on the numerous deficiencies enumerated in a letter written by Stephen A. Sherk, P.E., indicating that LVGC's preliminary plan failed to comply with the objective, substantive requirements of the Township's Subdivision and Land

Development Ordinance (SALDO).[1] The Board also noted that townhouses and garden apartment complexes had been permitted uses only by special exception in R-1 zoned areas and that LVGC had never sought or received approval for those portions of the proposed development plan.

On February 26, 2007, LVGC filed an appeal of the Board's denial of its preliminary plan application to the trial court arguing that the Board applied the wrong ordinance, the newly enacted ordinance, to its application. Subsequently, on June 25, 2007, LVGC filed a motion to supplement the record with additional evidence. The trial court denied the motion because it concluded that the Township's certified record was sufficient for determining the underlying issue of whether or not the Board was justified in denying LVGC's preliminary plan. The parties submitted briefs to the trial court and oral argument was held on November 30, 2007.

On January 8, 2008, the trial court issued its decision and order. The trial court noted that the Board had denied LVGC's preliminary plan based on Mr. Sherk's advice as Township engineer and his determination that the preliminary plan had sixty-one deficiencies. The trial court, concluding that the Board did not abuse its discretion or err as a matter of law, affirmed the Board's decision to deny LVGC's preliminary plan and dismissed LVGC's appeal. LVGC then appealed to this Court.

[1] Mr. Sherk, of Steckbeck Engineering & Surveying, Inc., is the Township's appointed engineer.

On appeal,[2] LVGC argues that the Board erred as a matter of law and abused its discretion by failing to review its preliminary plan pursuant to the zoning ordinance that was in effect at the time that the plan was submitted which allowed townhouses and garden apartment complexes by special exception in R-1 zoned areas. LVGC argues that the Board wrongfully relied upon Ordinance No. 5-2006, which was enacted after its preliminary plan was submitted, in denying its preliminary plan application. We disagree.

LVGC asserts that the following statement in the Board's denial letter provides the evidence that the Board wrongfully applied the newly enacted ordinance to its preliminary plan application:

> As a result of the enactment of Ordinance 5-2006, townhouses and garden apartments are not currently permitted uses by right or special exception on the tract subject to the Application. . . . Accordingly, because the proposed uses of townhouses and garden apartments are inconsistent with the Zoning Ordinance [5-2006], the Application has been denied by the Board of Supervisors.

LVGC's Brief at 11.

Section 508(4)(i) of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. § 10508(4)(i), provides guidance to the municipality as to the proper ordinance to be considered

[2] Where the trial court takes no additional evidence in considering a land use appeal, the Commonwealth Court's scope of review is limited to determining whether the governing body committed a manifest abuse of discretion or an error of law. North Codorus Township v. North Codorus Township Zoning Hearing Board, 873 A.2d 845 (Pa. Cmwlth. 2005). An abuse of discretion occurs if the Board's findings are not supported by substantial evidence. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id.

when a preliminary plan for a subdivision or land development has been submitted to it for approval. This Section provides as follows:

> From the time an application for approval of a plat, whether preliminary or final, is duly filed as provided in the subdivision and land development ordinance, and while such application is pending approval or disapproval, no change or amendment of the zoning, subdivision or other governing ordinance or plan shall affect the decision on such application adversely to the applicant and the applicant shall be entitled to a decision in accordance with the provisions of the **governing ordinances or plans as they stood at the time the application was duly filed**.

53 P.S. § 10508(4)(i) (Emphasis added).[3]

Our Supreme Court has interpreted this section of the MPC to require that applications for approval of subdivision plats be governed by ordinances "in effect at the time the applications were filed." Naylor v. Township of Hellam, 565 Pa. 397, 407, 773 A.2d 770, 776 (2001). Additionally, "in effect at the time" has been further defined as the ordinance's "effective date" and not as the date of the ordinance's enactment. North Codorus Township, 873 A.2d at 849.

Although LVGC correctly quotes a portion of the Board's decision, it has only extracted the portion of that decision that appears to support its argument. LVGC fails to cite the portion of the paragraph immediately preceding the portion upon which it bases its argument as well other portions of the Board's denial letter. The prior sentence, the rest of the paragraph, and other details provided in the letter

[3] A "plat" is defined as the preliminary or final map or plan of a subdivision or of a land development. See Section 107(a) of the MPC, 53 P.S. § 10107(a).

more accurately place the portion of the Board's denial letter, extracted by LVGC, in its proper context.

The first sentence of the paragraph specifically provides that "[a]s acknowledged on the cover page of the Preliminary Plan, townhouses and garden apartments are permitted uses by special exception" in the R-1 zoned areas. (R.R. at 51a). The Board indicates that "at no time prior to the effective date of Ordinance No. 5-2006 did the [Board] receive an application [from LVGC] for a special exception to allow these specific uses." Id. Further, the final sentence of the paragraph provides, as LVGC correctly asserts, that "as a result of the enactment of Ordinance 5-2006, townhouses and garden apartments are not currently permitted uses by right or special exception on the tract subject to the Application." Id.

The denial letter then provides, in the next paragraph, that any "application for special exception to allow these proposed uses [townhouses and garden apartment complexes] would be governed by the Zoning Ordinance as it has been amended on the date of the [special exception] Application to the ZHB, not the date of the submission of the instant [preliminary plan] Application for approval. . . ." (R.R. at 51a). The Board proceeds to state that "[a]ccordingly, because the proposed uses of townhouses and garden apartments are inconsistent with the Zoning Ordinance, the Application has been denied." Id. Finally, the letter indicates that support for the Board's determination is found in Department of General Services v. Board of Supervisors of Cumberland Township, Adams County, 795 A.2d 440 (Pa. Cmwlth. 2002), petition for allowance of appeal denied, 574 Pa. 776, 833 A.2d 144 (2003).

When the denial letter is read in its entirety, this letter provides evidence that the Board understood which ordinance was applicable and

considered that ordinance for its denial. The Board simply noted that LVGC had never applied for a special exception for the townhouses and garden apartment complex, which were permitted uses by special exception under the "old" ordinance, and that the same were now excluded as permitted uses by special exception under the "new" ordinance.

In addressing this issue, the trial court concluded that LVGC's argument, regarding the Board's alleged error in applying the "new" ordinance, was without merit when it considered the entire content of the Board's denial letter. The trial court noted that, after the Board mentioned the deficiencies recognized by its engineer as a reason for the denial of LVGC's preliminary plan, the Board then referenced the "new Zoning Ordinance." (Trial Court Opinion at 4). The trial court recognized that the Board referenced the "new Zoning Ordinance" because any "future submissions would be subject to the changed zoning." Id. Further, the trial court opined that the Board's mention of the new ordinance "may have caused some confusion to [LVGC]." Id. However, after reviewing the entire denial letter by the Board, the trial court concluded that the "new Zoning Ordinance was not the reason for the [Board's] denial of the Preliminary Plan." Id. Thus, the trial court concluded that the Board had not wrongfully applied or relied upon the "new" ordinance in denying LVGC's preliminary plan application.

Moreover, while the Board does not specifically refer to the "pending ordinance doctrine", a discussion of this doctrine is instructive herein. The "pending ordinance doctrine" provides that a building permit, a special exception application, or other "use" related application, may be refused, "if, at the time of application, an amendment to a zoning ordinance is pending, which would prohibit

the use of the land for which the permit is sought." Naylor, 565 Pa. at 407, 773 A.2d at 777, fn. 6.

Nevertheless, the Court in Naylor noted that the "pending ordinance doctrine" does not apply to applications for subdivision or land development as they are controlled by Section 508(4) of the MPC. This Section of the MPC provides that the application for approval of a preliminary plan is governed by the ordinance in effect at the time of the application's filing.

However, as we explained in Department of General Services, the filing of a preliminary plan does not freeze the uses permitted under that ordinance. In Department of General Services, a preliminary plan for a welcome center was submitted for approval a few days after a notice had been published in the local newspaper advertising the township's intent to amend one of its zoning ordinances. Under the amended ordinance, a welcome center was not a permitted use. The Township enacted the ordinance weeks after the preliminary plan for the welcome center was filed. Eventually, the Township denied the Department of General Services' preliminary plan.

We proceeded to stress in Department of General Services that subdivision and land development ordinances are different than zoning ordinances, as the former do not deal with "use as zoning ordinances do." Department of General Services, 795 A.2d at 444. We held that because the land development plan at issue was filed after the township's intent to change the zoning ordinance was known, the pending ordinance doctrine applied. We affirmed the order of the trial court, which had affirmed the denial of the preliminary land development plan submitted by the Department of General Services.

In the present case, LVGC filed its preliminary plan application on December 4, 2006, several days after notice of the Township's intent to amend the

ordinance was published in the local newspaper, and prior to the enactment of Ordinance 5-2006. At that time, LVGC had not previously filed an application for special exception. Consistent with our reasoning in Department of General Services and the rationale of the pending ordinance doctrine, the Board in its decision recognized that any use application, such as the special exception that LVGC would need for its townhouses and garden apartment complex, would be governed by the "new" ordinance. Under the new ordinance, townhouses and garden apartment complexes were no longer permitted uses. As LVGC had never filed an application for a special exception prior to the enactment of the "new" ordinance, and the "new" ordinance did not permit LVGC's proposed uses by special exception or by right, the Board's denial of the preliminary plan was proper.

Next, LVGC argues that the Board acted in bad faith in denying the preliminary plan when the plan allegedly met all the SALDO requirements for approval. LVGC notes that Section 22-402 of the SALDO, entitled "Preliminary Plans," sets forth seven statutory conditions which must be met in order to approve a preliminary plan. LVGC argues that although Mr. Sherk's report lists sixty-one alleged deficiencies, only five are specifically found within Section 22-402 of the SALDO, only twenty-four specifically cite to the relevant ordinance (with such lack of citation being in contradiction to the MPC) and only six of the deficiencies specifically cite to the SALDO section that governs the approval of preliminary plans. (LVGC's Brief at 15).

However, LVGC failed to raise these issues before the trial court. Before the trial court, LVGC argued that its preliminary plan should have been reviewed under the ordinance existing at the time of submission, that it was not so reviewed by the Board and that the newly enacted ordinance was invalid.

Although LVGC mentions that it believes that its preliminary plan was substantially in compliance with the zoning ordinances, and should have been conditionally approved, it does not provide supportive evidence for that statement nor does it elaborate on the reasons that the sixty-one deficiencies were erroneous in its brief submitted to the trial court.

The law is well settled that issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Pa. R.A.P. 302(a); Martorano v. Philadelphia Board of Pensions and Retirement, 940 A.2d 598 (Pa. Cmwlth. 2008); Constantino v. Carbon County Tax Claim Bureau, 895 A.2d 72 (Pa. Cmwlth.), petition for allowance of appeal denied, 588 Pa. 785, 906 A.2d 544 (2006). The purpose of such a requirement is to insure that the lower court or agency had the opportunity to consider the issue and make any necessary corrections. Eltoron, Inc. v. Zoning Hearing Board of the City of Aliquippa, 729 A.2d 149 (Pa. Cmwlth. 1999), petition for allowance of appeal denied, 563 Pa. 632, 758 A.2d 664 (2000). As the above-referenced issues were not raised by LVGC before the trial court, LVGC has waived review of these issues by this Court.[4]

Finally, LVGC argues that the Board ignored the plan's proposed single family dwellings because it specifically found that the townhouses and garden apartment complex were not permitted uses under the ordinance as a result of LVGC's failure to apply for a special exception. LVGC requests, at a

[4] We note that even if these issues had not been waived, LVGC's arguments are without merit. For example, Mr. Sherk references the preliminary plan's failure to include a statement of the total acreage of the property as well as the failure to identify water mains, sanitary sewer and storm sewers in the street profiles. (R.R. at 54a, 58a). Sections 22-402(4)(G) and 22-402(4)(O)(7) specifically require each of these elements in a preliminary plan. (R.R. at 6a, 8a).

minimum, that this Court reverse the Board with respect to the single family dwellings, and remand the matter to the Board for review of the preliminary plan as to the proposed single family dwellings under the R-1 zoning that existed at the time of the submission of the plan.

Although certain provisions of the MPC anticipate and allow for conditional approvals, LVGC does not set forth any legal authority in support of its proposition that the Board should have accepted one portion of the preliminary plan and rejected other portions.[5] LVGC has not presented legal authority that supports its argument that the Board was obligated to accept any portion of its preliminary plan with or without conditions. In the present matter, the Board chose to deny LVGC's preliminary plan application based on the sixty-one deficiencies, rather than set forth conditions to be met by LVGC in order to grant a conditional approval. LVGC has not set forth any evidence indicating that the Board failed to consider its preliminary plan with respect to the single family dwellings. Thus, we cannot say that the Board abused its discretion or committed an error of law in denying LVGC's entire preliminary plan application rather than issuing a conditional approval.

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[5] Pursuant to Section 508 of the MPC, 53 P.S. § 10508, conditions may be attached to subdivision approval; however, a municipality may approve subdivision plans subject to conditions only if the conditions are presented and accepted by the applicant. Doylestown Township v. Teeling, 635 A.2d 657 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 539 Pa. 697, 653 A.2d 1234 (1994).

Accordingly, the order of the trial court is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge

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O R D E R

AND NOW, this 23rd day of October, 2008, the order of the Court of Common Pleas of Lebanon County is hereby affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge