

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

George Moore, :
Appellant :
v. : No. 292 C.D. 2008
Upper Southampton Township Board : Submitted: August 22, 2008
of Supervisors :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER

FILED: October 24, 2008

George Moore (Moore) appeals from a January 18, 2008 order of the Bucks County Common Pleas Court affirming approval by the Upper Southampton Township Board of Supervisors (Board) of a conditional use application for cluster development and subsequent approval of a preliminary subdivision plan. He also appeals from the trial court's denial of his motion to open the record to allow him to introduce additional evidence. Moore contends that the trial court was required to open the record because the Board had precluded him from presenting certain evidence in opposition to the application, that the Board and trial court incorrectly interpreted the Township's zoning and subdivision ordinances, that the approvals are not supported by the record and that the Board erred or abused its discretion in failing to apply an ordinance revision that was adopted between the filing of a prior subdivision application and the filing of the subject conditional use application.

Intervenors-appellees Michael Chiusolo, Lawrence Chiusolo and Linda Kane (Owners) own a 19.9-acre parcel bordering Stump Road in Upper Southampton Township (Property). In June 2002 Owners filed an application to subdivide the Property into ten residential lots. For reasons not germane to this appeal, Owners filed a revised plan in December 2004 to subdivide the Property as a cluster residential development with 14 lots and in July 2005 filed a conditional use application for the cluster development plan. The Property is situated in a zoning district of the Township that allows a cluster development as a conditional use. Owners of nearby properties and Moore, a tenant, opposed the application. Moore was granted party status before the Board, which after holding hearings approved the conditional use application with conditions, and Moore appealed to the trial court. After a separate hearing, the Board approved the preliminary subdivision plan with certain conditions. Moore filed a second appeal, and both were consolidated. The trial court stated the central issue as whether the Board abused its discretion in determining that the creek on the Property is not a stream, and without taking additional evidence it affirmed the Board, although recognizing that the issue of classifying the creek may be debatable.

I

Moore initially contends that after he completed his testimony in opposition to the conditional use application, he informed the Board that he had more evidence to submit but was cut off, and the Board never thereafter gave him the opportunity to present the evidence. He also claims that his testimony was repeatedly interrupted by Owners' attorney. Moore emphasizes that he was not represented by counsel at the hearing and that the Board took advantage of his lack of experience to prevent him from presenting the evidence. Citing Section 1005-A

of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, added by Section 101 of the Act of December 21, 1988, P.L. 1329, 53 P.S. §11005-A, and case law, he argues that the trial judge was required to receive additional evidence and erred in denying his motion to open the record.

Under Section 1005-A of the MPC, the trial judge may receive additional evidence "[i]f upon motion, it is shown that proper consideration of the land use appeal requires a presentation of additional evidence...." Whether the presentation of additional evidence is to be permitted is a matter within the trial court's discretion. *Eastern Consolidation and Distribution Services, Inc. v. Board of Commissioners of Hampden Township*, 701 A.2d 621 (Pa. Cmwlth. 1997). The trial court is compelled to hear additional evidence only where the party seeking to present the evidence demonstrates that the record is incomplete because the party was denied an opportunity to be heard fully or because relevant evidence was offered and excluded. *Danwell Corporation v. Zoning Hearing Board of Plymouth Township*, 540 A.2d 588 (Pa. Cmwlth. 1988). *See also Morris v. South Coventry Township Board of Supervisors*, 898 A.2d 1213 (Pa. Cmwlth. 2006) (explaining that trial court may properly refuse to consider additional evidence where it was available at time of hearing before governing body).

The record reveals that Moore never described to the Board any additional evidence that he wished to present. Moreover, although he was represented by an attorney in his land use appeal to the trial court and is represented by the same attorney on this appeal, Moore did not present to the trial court or to this Court any statement or description of the evidence that he would proffer or why "proper consideration of [his] land use appeal requires" its receipt.

Thus the trial judge properly determined that Moore did not make the showing required by Section 1005-A.

Even assuming that Moore has additional evidence that would be relevant to the conditional use application, the record does not bear out his claim that he was precluded from offering it. At the hearing, he began by stating: "I am not going to make my full presentation now because I guess some of it I have to save for the second part of the discussion." Transcript of January 17, 2006 Board Hearing at p. 29; Reproduced Record (R.R.) at p. 22a. He then called an expert witness, James Williams, to testify. After completion of his direct examination, Moore offered documents into evidence, all of which were admitted. At the conclusion of Williams' testimony, Moore stated that he had no other witnesses but then was sworn as a witness himself and testified. Owners' attorney made one objection during Moore's testimony. At the conclusion of his testimony, Moore stated: "... I have presented my case...." *Id.* at p. 54; R.R. at p. 28a. He then made remarks without interruption, at the end of which he stated: "I have a lot more evidence and about ten more exhibits, a lot of studies, but they may not be germane to the conditional use aspect of this, so - -". *Id.* at p. 57; R.R. at p. 29a.

After other party-objectors testified and Board members commented, the Chairman opened the floor and repeatedly solicited additional comments, leading to a number of parties presenting additional evidence or comments. Among them was Moore, who stated that he had intended to "save" additional documents but since Owners had introduced additional exhibits he also wished to offer additional exhibits. The Board allowed him to do so but sustained objections to the two additional documents on relevancy grounds. Moore also was allowed to question Owners' engineer. At no time did Moore advise the Board that he felt he

was being precluded from presenting testimony or exhibits or that there were interruptions that interfered with his presentation of evidence.

The record clearly supports the trial judge's finding that Moore was neither precluded from presenting evidence nor repeatedly interrupted as he tried to present evidence. Indeed, the Court cannot but conclude from its review of the record that, except for the two additional exhibits he offered that were not admitted into evidence, which rulings are not challenged in this appeal, Moore presented all testimony and exhibits that he wished to present. Accordingly, the trial court's denial of the motion to open the record will be affirmed.

II

Next, Moore contends that the Board, which is not participating in this appeal, erroneously concluded that water that intermittently flows through an area of the Property does not come within the definition of a "stream" under the Township's Zoning Ordinance (Zoning Ordinance) or Subdivision and Land Development Ordinance (SALDO). Moore contends that the ordinances provide restrictions on development which the Board did not address in approving the conditional use application and preliminary subdivision plan.¹

In its Decision approving the conditional use application, the Board made no findings of fact or conclusions as to whether the water flow constitutes a stream under the Township's ordinances and did not mention the issue in the "Discussion" section. The Board did not issue a written decision, findings of fact

¹Where the trial court does not take additional evidence in a land use appeal, this Court reviews whether the governing body abused its discretion or committed an error of law. *In re Thompson*, 896 A.2d 659 (Pa. Cmwlth. 2006). An abuse of discretion occurs only where the governing body's findings are not supported by substantial evidence. *Levin v. Board of Supervisors of Benner Township*, 669 A.2d 1063 (Pa. Cmwlth. 1995), *aff'd per curiam*, 547 Pa. 161, 689 A.2d 224 (1997).

or conclusions in connection with its approval of the preliminary subdivision plan. The record reflects, however, that there is no dispute that water flows through a particular area of the Property and continues onto neighboring properties in periods of heavy rain and significant snow melt. According to Moore's expert, the flow on Moore's property can reach a depth and width of several feet (five feet deep and 15 feet wide in one location) in a well-defined channel with banks, but upstream toward the property between Moore's property and Owners' Property the flow becomes shallower. Owners' expert testified that the water flow from the Property crosses two properties before coming to Moore's property. The expert asserted, however, that the flow is simply a shallow drainage feature, not a stream. Moore contends that the flow becomes a deep and wide stream on Owners' Property.

The Zoning Ordinance has several provisions that define a "stream." Under Section 185-5 it is defined as a body of water or a watercourse that is designated as a stream or pond on the Township's zoning map. Neither party contends that the zoning map designates a stream in the area of the water flow on the Property. Under Section 185-20, dealing with natural resource restrictions, "streams, rivers and watercourses" are defined in subsection D.(1) as "all rivers, streams and canals, whether perennial or intermittent, identified by the United States Geological Survey or by the Soil Conservation Service, U.S. Department of Agriculture, in the Soil Survey of Bucks and Philadelphia Counties, Pennsylvania, July 1975, or other watercourses not specifically so identified, but meeting the same definitions." The parties agree that the subject water flow is not identified on the United States Geological Survey but does appear on the July 1975 Bucks County Soil Survey; however, it does not appear on the current Bucks County Soil Survey. From these facts each of the parties makes a series of arguments as to

whether the Property's water flow is a natural resource that is subject to the protection of Section 185-20 of the Zoning Ordinance.

Additionally, Owners note and Moore does not dispute that the only protection that Section 185-20 expressly affords streams and watercourses is to preclude "encroachment," which is defined in subsection D.(7) as constructing impervious surface in or on the area of the water. The parties do disagree on the significance of that limitation. Owners assert that while their plan does not provide for placing impervious surface in or on the area of the water flow, the absence of any other restriction in Section 185-20 would permit them to divert the flow prior to placing impervious surface and then to fill in and pave over the area where the flow had been. Moore responds that the plan does include constructing a road and at least one house over the area of the water flow and that the Zoning Ordinance cannot be interpreted as Owners urge because it would eviscerate the protection intended by Section 185-20 and lead to an absurd result.²

The Court need not decide whether the water flow constitutes a stream under Zoning Ordinance Section 185-20.D.(1) nor the breadth of Section 185-20.D.(7) if the flow were construed to constitute a stream. In this case, provisions of the SALDO for the protection of streams and watercourses apply both to preliminary subdivision plan approval and the conditional use application and may moot those questions, as may a determination of whether the plan includes constructing impervious surface in or on the area of the water flow.

²Moore asserts that Owners are estopped from arguing such an interpretation by the fact that in connection with their original non-cluster subdivision plan they sought a variance to construct driveways over another water flow on the property that the parties agree constitutes a stream under the Township's ordinances. However, Moore did not raise this issue before the trial court, so it cannot now be raised on appeal. Pa.R.A.P. 302(a).

Zoning Ordinance Section 18-4 states that the Ordinance's provisions are minimum requirements and that the provisions of any other ordinance imposing greater restrictions shall control. The parties agree that the SALDO provides more and broader restrictions than are contained in the Zoning Ordinance to protect watercourses and streams, including provisions that would preclude diverting the water flow and filling in and paving over the area of the flow, if the water flow constitutes a stream or watercourse under the SALDO. The parties also agree that the SALDO defines watercourses and streams as "any channel of conveyance of surface water having a defined bed that banks, whether natural or artificial, with perennial or intermittent flows." Not surprisingly, the parties have opposite positions on whether the channels on the Property that convey surface water have defined beds and banks, and each cites to photographs and testimony in an effort to persuade the Court of the merit of its position.

It is the function of the fact-finder who sees and hears the witnesses to make necessary findings on factual matters. *Caln Nether Company, L.P. v. Board of Supervisors of Thornbury Township*, 840 A.2d 484 (Pa. Cmwlth. 2004); 2 Pa.C.S. §754(b). Also, the decision to grant or deny a conditional use is governed by the express standards and criteria set forth in the applicable ordinance. *Bailey v. Upper Southampton Township*, 690 A.2d 1324 (Pa. Cmwlth. 1997). The Board here failed to make findings or conclusions of law with respect to central matters, such as whether the channels that convey surface water on the relevant area of Owners' Property have defined beds and banks and, if so, the impact on approvals of the area of the water flow being subject to SALDO restrictions, and whether the plan provides for placing impervious surface in or on the area of the water flow.

Because of the Board's failure, its approval of the conditional use application and the preliminary subdivision plan must be vacated and the matter will be remanded.³

III

Moore's final argument is that on the basis of Section 508(4) of the MPC, 53 P.S. §10508(4), prohibiting ordinance amendments enacted after filing of a subdivision plan from being enforced against the plan, the Board decided not to subject the cluster development plan to a Township ordinance revision concerning "protection standards for forests," adopted between the filing of Owners' original application for single-family development and filing of the cluster development plan. Moore contends that was error or an abuse of discretion because the cluster development plan so substantially revised the original plan as to constitute a new plan, and he cites cases holding, in a different context, that filing a substantially revised plan voids or constitutes withdrawal of the original plan.

Moore's argument is fatally deficient. He fails to identify the revised ordinance and fails to cite anything in the record indicating that the Board did not consider or apply the revised ordinance, that the reason the Board did not apply the revised ordinance is that it treated the cluster development plan as a revision to the original plan and that he raised before the Board the argument he now makes to

³It is noted that the Reproduced Record contains letters, reports, photographs, etc., as to which there is no indication of whether they were admitted in evidence at a hearing and, if so, at which hearing, and without reference to the places in the hearing transcripts where the documents are discussed for the point for which they are cited in the brief. The photographs in the Reproduced Record are copies made by a copy machine, and details are not distinguishable. The certified record does not contain the original exhibits admitted in the Board hearings, including the plan. Should this matter return to this Court for a determination of whether findings and conclusions of the fact-finder are supported by the record, counsel will be responsible for assuring that all such exhibits and information are furnished to the Court.

this Court.⁴ The appellant's brief is required to set forth all of the necessary facts to be known in order for the Court to decipher points in controversy and to specify the place in the record where the appellant raised the issue below. *See* Pa.R.A.P. 2117(a)(4), (c) and 2119(e). In the absence of compliance with these requirements, the Court discerns no error of law or abuse of discretion by the Board with respect to this issue. Accordingly, for the reasons discussed in this opinion, the trial court's order is vacated and this matter is remanded for the Board to make the necessary factual findings and conclusions and to enter a new decision.

DORIS A. SMITH-RIBNER, Judge

⁴A party cannot raise on a land development appeal an issue that it did not raise before the board responsible for the approval. *Friedlander v. Zoning Hearing Board of Sayre Borough*, 546 A.2d 755 (Pa. Cmwlth. 1988).

