

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Hamburg Logistics Park, LP	:
	:
v.	:
	: No. 719 C.D. 2014
	: Argued: December 8, 2014
Board of Supervisors of Perry Township, Berks County	:
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	:
Appeal of: Perry Township, Board of Supervisors of Perry Township	:
	:

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: May 29, 2015

On June 11, 2013, the Perry Township Board of Supervisors (Board) voted to grant approval of the Preliminary Subdivision and Land Development Plan (Plan) submitted by Hamburg Logistics Park, LP (HLP) subject to conditions. HLP did not accept conditions Nos. 1-4 and appealed to the Court of Common Pleas of Berks County (Trial Court). The Trial Court issued an April 21, 2014 order striking conditions Nos. 2-4 and condition No. 1 to the extent that it required HLP to grant an easement to an adjacent landowner. The Board appealed to this Court for review.¹ For the reasons that follow, we vacate the Trial Court's order and remand for further proceedings.

¹ In a land use appeal where the trial court does not take additional evidence, our scope of review is limited to determining whether the local government body committed an error of law or an

The Municipalities Planning Code² (MPC) governs a municipality's authority to enact a subdivision and land development ordinance (SALDO) and to make decisions regarding subdivision and land development plans submitted pursuant to the municipality's SALDO. The MPC distinguishes between a municipality's decision to approve a plan subject to conditions, or a conditional approval, and a municipality's decision to deny a plan for failure to conform to its SALDO or other applicable statutes.

Section 503(9) of the MPC, 53 P.S. § 10503(9), provides a municipality with authority to approve a subdivision and land development plan subject to conditions.³ The applicant may then accept or reject the conditions imposed as a part of the municipality's approval of the plan. *Id.* Sections 508(2) and (3) of the MPC govern the manner in which a municipality may deny a subdivision and land use plan, and mandate that a denial include the specific defects found, describe the requirements that have not been met, and cite to the provisions of the statute or ordinance relied upon in support of each conclusion.⁴

abuse of discretion. *Watts Residential Associates v. Board of Supervisors of Watts Township*, 59 A.3d 25, 28 n.2 (Pa. Cmwlth. 2013). Where the board does not make findings of fact and it is incumbent on the trial court to act as fact finder, we review the trial court's decision to determine if it committed an error of law or abused its discretion. *Eastern Consolidation and Distribution Services, Inc. v. Board of Commissioners of Hampden Township*, 701 A.2d 621, 623 (Pa. Cmwlth. 1997). As discussed further in this opinion, the disposition below has precluded this Court from properly exercising its full scope of review to resolve the issues raised on appeal.

² Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101-11202.

³ Section 503(9) states: "Provisions for the approval of a plat, whether preliminary or final, subject to conditions acceptable to the applicant and a procedure for the applicant's acceptance or rejection of any conditions which may be imposed, including a provision that approval of a plat shall be rescinded automatically upon the applicant's failure to accept or reject such conditions within such time limit as may be established by the governing ordinance." 53 P.S. § 10503(9).

⁴ Section 508(2) states: "When the application is not approved in terms as filed the decision shall specify the defects found in the publication and describe the requirements which have not been

Under the MPC, when a municipality approves a plan subject to conditions, the municipality is not required to specify in its decision the provisions of its SALDO or other statutes that the municipality relied upon in attaching the conditions. In contrast, when a municipality denies a plan, failure to include citations accompanying the denial results in a deemed approval of the plan. Section 508(3) of the MPC, 53 P.S. § 10508(3).

The different treatment within the MPC of a conditional approval of a plan and a denial of a plan, even though both avenues can lead to a rejection of the plan, is due to the agency the MPC provides for the applicant in the subdivision and land development process. The MPC provides the applicant with the authority to make the final decision on whether to accept or reject the conditions attached when the applicant receives a conditional approval. Section 503(9) of the MPC, 53 P.S. § 10503(9); *see, e.g., Morris v. South Coventry Township Board of Supervisors*, 836 A.2d 1015, 1020 (Pa. Cmwlth. 2003) (*Morris I*). If the applicant decides to reject one or more of the conditions, the applicant has the right to bring a land use appeal to the court of common pleas. *See, e.g., Watts Residential Association v. Board of Supervisors of Watts Township*, 59 A.3d 25, 27-28 (Pa. Cmwlth. 2013). By contrast, when a municipality denies a subdivision and land development plan, the denial is a final decision that must conform to the requirements of the MPC and is immediately appealable to the court of common pleas. *See* Sections 107 (defining “decision”), 508(2) of the MPC, 53 P.S. §§ 10107, 10508(2).

met and shall, in each case, cite to the provisions of the statute or ordinance relied upon.” 53 P.S. § 10508(2). Section 508(3) states: “Failure of the governing body or agency to render a decision and communicate it to the applicant within the time and in the manner required herein shall be deemed an approval of the application in terms as presented.” 53 P.S. § 10508(3).

This Court, in *Bonner v. Upper Makefield Township*, 597 A.2d 196 (Pa. Cmwlth. 1991), addressed and gave effect to the different treatment under the MPC of a conditional approval and a denial of a subdivision and land development plan. *Id.* at 199-200. We revisited the issue in *Koller v. Weisenberg Township*, 871 A.2d 286 (Pa. Cmwlth. 2005), clarifying that the line of cases that failed to distinguish between the requirements necessary for a municipality to deny a plan and to conditionally approve a plan were no longer controlling authority. *Id.* at 291-292. We identified *Brown v. Borough Council of Emmaus*, 496 A.2d 873 (Pa. Cmwlth. 1985), which had in turn relied upon *Montgomery Township v. Franchise Realty Interstate Corporation*, 422 A.2d 897 (Pa. Cmwlth. 1980), as an example of authority that was overturned by *Bonner* and we reiterated that *Bonner* was controlling—a municipality is not required to cite the ordinance or statute relied upon in support of conditions attached to its approval of a subdivision and land development plan. *Koller*, 871 A.2d at 291-292. The issue was again raised in *Stauffer v. Weisenberg Township Board of Supervisors*, 934 A.2d 783 (Pa. Cmwlth. 2007), where an applicant argued that the municipality’s failure to cite to the relevant ordinance or statute when issuing a conditional approval entitled the applicant to a deemed approval. We stated in *Stauffer* that “this argument is directly contrary to this Court’s precedent,” and that “*Koller* is controlling; its logic continues to be compelling; and [applicant] has offered no reason for this Court to revisit the merits of *Koller*.” *Stauffer*, 934 A.2d at 786.

The confusion surrounding the different treatment by the MPC of a denial and a conditional approval is essentially due to the blurring of form and substance. The requirement that a denial include citations to the relevant ordinance or statute, while a conditional approval does not, speaks to the form of the

municipality's action. However, regardless of the form required, a municipality must act in accordance with the authority provided to it by the SALDO or other governing statutes. If the municipality denies a plan or approves a plan subject to conditions that an applicant rejects, an applicant may bring a substantive challenge arguing that the municipality was without authority to take the action it did. In *Franchise Realty*, this Court first held that the municipality failed to conform to the form required for its conditional approval, and as stated above this holding has been overturned. This Court's second holding in *Franchise Realty*, however, was that the municipality acted outside of its authority by imposing a condition not required by its SALDO or other governing statutes, thereby selectively applying requirements on some applicants and not others. 422 A.2d at 899. This holding remains controlling: a municipality may not deny a plan or impose conditions that an applicant rejects upon approval of a plan based on requirements not provided in the SALDO or other governing statutes.

In the instant matter, a record was created before the Board. In its decision, the Board attached eight (8) conditions to its approval of HLP's Plan. The Board did not make findings of fact. HLP accepted conditions Nos. 5-8. In a land use appeal to the court of common pleas, HLP challenged condition No. 1 to the extent that it required HLP to grant an easement to an adjacent landowner and challenged conditions Nos. 2-4 in full. Before the Trial Court, HLP argued that the Board failed to include the specific defects found, describe the requirements that have not been met, and cite to the provisions of the statute or ordinance relied upon in support of each condition. The Trial Court did not examine the record and make findings of fact. The Trial Court concluded that the decision issued by the Board was insufficient because the Board had failed to cite within its decision to objective

provisions of the SALDO that supported the conditions that HLP rejected. The Trial Court erred by holding that the Board must adhere to the form required for a denial of the Plan in contravention of *Bonner*. The Trial Court also erred by not examining the record and making findings of fact where the Board had failed to do so.

Upon remand “the [Trial Court] shall make its own findings based on the record below,” with the discretion to receive additional evidence or to remand to the Board to supplement the record if the Trial Court concludes additional evidence is necessary for proper consideration of HLP’s appeal. Section 1005-A of the MPC⁵, 53 P.S. § 11005-A; *McGrath Construction, Inc. v. Upper Saucon Township Board of Supervisors*, 952 A.2d 718, 729 (Pa. Cmwlth. 2008); *Morris v. South Coventry Township Board of Supervisors*, 898 A.2d 1213, 1217-1218 (Pa. Cmwlth. 2006) (*Morris II*); *Eastern Consolidation and Distribution Services, Inc. v. Board of Commissioners of Hampden Township*, 701 A.2d 621, 623-624 (Pa. Cmwlth. 1997). The Trial Court’s factual findings must be supported by substantial evidence or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Eastern Consolidation and Distribution Services*, 701 A.2d at 623; *Faulkner v. Board of Adjustment of Moosic Borough*, 624 A.2d 677, 679 n.4 (Pa. Cmwlth. 1993).

Based on the record before it, the Trial Court must then determine whether the conditions attached to the Board’s approval of the plan that were rejected by HLP require HLP to adhere to requirements not mandated by the SALDO or other governing statutes. *See, e.g. Ice v. Cross Roads Borough*, 694 A.2d 401, 405 (Pa. Cmwlth. 1997); *Franchise Realty*, 422 A.2d at 899; *County*

⁵ Added by Act of December 21, 1988, P.L. 1329.

Builders, Inc. v. Lower Providence Township, 287 A.2d 849, 852 (Pa. Cmwlth. 1972) (“If, therefore, the land subdivision ordinance of Lower Providence Township contained no requirement of cul-de-sacs, the failure of appellant’s plans to provide such was not a valid ground for disapproval. This is not to say that supervisors have no discretion to require variations in their requirements in particular circumstances where demanded by health, safety and the general welfare. They may not, however, lawfully hold in reserve unpublished requirements capable of general application for occasional use as they deem desirable.”) If the Trial Court determines that substantial evidence in the record demonstrates that the rejected conditions comply with the SALDO or other applicable statutes, then the Trial Court must affirm the Board’s conditional approval of the Plan. If the Trial Court determines that substantial evidence demonstrates that the rejected conditions have no basis in the requirements mandated by the SALDO or other applicable statutes, then the Trial Court must strike the contested conditions from the Board’s approval of the Plan.

Accordingly, we vacate the Trial Court’s order and remand the instant matter for further proceedings to enable the specific factual findings and legal conclusions necessary for a proper resolution of HLP’s land use appeal.

JAMES GARDNER COLINS, Senior Judge

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ORDER

AND NOW, this 29th day of May, 2015, the Order of the Court of Common Pleas of Berks County in the above-captioned matter is VACATED and this matter is REMANDED for further proceedings consistent with the attached opinion.

Jurisdiction relinquished.

JAMES GARDNER COLINS, Senior Judge