

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL DIVISION

SELECT PROPERTIES, INC.

vs.

BOARD OF SUPERVISORS OF
EAST ROCKHILL TOWNSHIP

No. 2011-07612
2233 CD 2012

OPINION



Case Number: 2011-07612 37
Receipt: Z855383 Judge: 30
Code: 5214 Filing: 10157590
Patricia Bachtle - Bucks Co Prothonotary
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I. INTRODUCTION

Appellant Select Properties, Inc. ("Select") appeals to the Commonwealth Court of Pennsylvania from this Court's Order dated November 9, 2012. We file this Opinion pursuant to Pennsylvania Rule of Appellate Procedure (Pa.R.A.P.) 1925(a).

II. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the Order by the Board of Supervisors of East Rockhill Township ("the Township") on July 27, 2011 that granted a conditional use to Appellant for the development of one hundred and ninety-three (193) dwelling units on 65.48 acres ("the Property") in East Rockhill Township, Bucks County, Pennsylvania. Appellant, through its principal, Clay Heckler, is the equitable owner of the Property which is situate in the Suburban Zoning District of the Township and which is further identified as Bucks County Tax Parcel Numbers 10-008-022, 10-008-022-001, 12-008-022-002, and 12-008-03. The Property is located on Three Mile Run Road and is bounded on one side by Old Bethlehem Pike and on the other side by Hill Road.

Appellant filed a Conditional Use Application with the Township on December 1, 2010.

Between January 31, 2011 and June 14, 2011 a series of seven (7) hearings were held by the Township to evaluate Appellant's application. During these hearings, the Township and the

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twenty five (25) people who had requested and received party status raised concerns regarding changes in traffic conditions, emergency vehicle access, storm water and sewer management, and open space accessibility.

The Township was specifically concerned about deficiencies in Appellant's plan which would adversely affect the long-term stability of proposed housing developments within surrounding areas.

Because the property is divided in part by a creek, storm water management and sewage access were also primary areas of concern. The Township was particularly concerned with the development's impact on Three Mile Run, a "major stream," which bisects part of the property. The Township also reviewed the East Rockhill Township Comprehensive Plan and prior flooding of existing developments adjacent to the stream. The Township considered the totality of these issues and determined that they could only be resolved by the modest conditions imposed on Appellant's conditional use application. As such, the Township granted Appellant's application on July 29, 2011, subject to thirty (30) conditions set forth in its adjudication.

On August 25, 2011 Appellant filed a timely appeal to the Bucks County Court of Common Pleas, claiming that the Township abused its discretion and erred as a matter of law in imposing the conditions. We held a Rule *27 Conference on January 30, 2012, with the attorneys for Appellant, the Township, and Intervenors, Donald Nase and Amy Frank¹. Although Select had appealed all thirty (30) conditions imposed by the Township, at the conference, Appellant indicated that it would comply with twenty (20) of the conditions imposed and proceed on the remaining ten (10). As no further evidence was offered or received, we granted Appellant's and Appellee's request to submit briefs covering the issues which are now before this court.

¹ Donald Nase and Amy Frank have since withdrawn from this Appeal.

Based on the legal briefs that were submitted by each party and a review of the entire record, we issued an Order dated November 9, 2012, which is attached hereto and made a part hereof as Exhibit "A." In that Order, we granted four (4) of the ten (10) appealed matters and denied relief on the remaining six (6). It is from that Order that Select has now filed its appeal to the Commonwealth Court of Pennsylvania.

III. MATTERS COMPLAINED OF ON APPEAL

Appellant filed its Statement of Matters Complained of on Appeal raising the following issues, *verbatim*:

"7. Riparian Buffer. The Township concluded a certain "drainage feature" met the definition of a stream channel, thus requiring a buffer. The conclusion was not supported by substantial evidence and the width of the buffer, then required, was never discussed by any of the witnesses. Thus, the requirement that a 75' buffer be provided is completely arbitrary.

10. 55% Single Family Homes; Townhouse Units Must Contain 5 Units or Less. The subject ordinance provides only that a maximum of 60% and a minimum of 10% of any one dwelling type be provided. At no point did the Township introduce any testimony that at least 55% of the homes should be singles. However, in any event, the requirement is contrary to the ordinance and, thus, contrary to law.

As well, the subject ordinance provides that no more than 60% of the townhouse units may exceed 5 dwelling units. As such, the Township's requirement that the townhouse units not exceed 5 dwelling units violates its own ordinance. Further, it was not the subject of any testimony at the hearings.

23. Additional Traffic Study. At no point did the Township dispute or put into the record any evidence that indicated that either an additional traffic study may be warranted or that

additional traffic improvements may be indicated. The applicant's engineer stated clearly that the traffic study he performed led him to conclude that current road improvements were sufficient to serve the subdivision and future growth in the area. The testimony is uncontroverted.

The intersection about which the Township is most interested does not touch the subject property. As such, this requirement is without support in the record and also contravenes 53 P.S. 10503-A.

24. Alignment of Tabor Road. The record is devoid of any suggestion that the subdivision entry road should align with Tabor Road. As such, it should be struck as it represents an abuse of discretion and is not supported by any substantial evidence.

25 and 26. Overlay of Hill Road and 2 Emergency Access Roads. In its adjudication, the Township required that the outlet to Hill Road be closed, a condition that the Appellant has not appealed. As well, the property does not abut Hill Road. The requirement that the applicant improve Hill Road contravenes 53 P.S. 10503-A and is also an abuse of discretion, as there is no support for this condition in the record.

The adjudication also requires that Appellant construct 2 emergency access roads to Hill Road, a condition for which no support is found in the record.

28. 36' Cartways and 60' Rights-of-Way. The subject ordinance requires that all rights-of-way shall be 54' unless modified [see 27-304B3p(4)]. As well, the Township's zoning ordinance at 27-1717 requires that all rights-of-way not listed (which would include these), shall be 50' in width. As such, the requirement that the subdivision provide right-of-way of 60' violates the Township's zoning ordinance and should be struck.

The requirement that all cartways be 36' is a thinly veiled attempt to control density as the record does not support the imposition of this condition.

Three Mile Run/Major Stream. The subject ordinance requires the Appellant to deduct from its base site area all land not contiguous which, in part, includes property separated by a "Major Stream." This term is not defined in the ordinance and, as admitted by the Township, is not a defined term by any regulatory agency. Its use in this matter thus becomes a completely arbitrary application based upon no criteria. As such, it should be struck."

IV. DISCUSSION AND ANALYSIS

Where a trial court accepts no additional evidence, the court's scope of review is limited to a determination of whether the Board of Supervisors has abused its discretion or committed an error of law. Citing Rouse/Chamberlin, Inc. v. Board of Supervisors of Charlestown Township (94 Pa. Commonwealth Ct. 413, 504 A.2d 375, 378 (1986)).

The seven issues on appeal are as follows (which by number track the Order attached hereto as Exhibit "A"):

7. Riparian Buffer. Appellant contends that a certain "drainage feature" (Three Mile Run) did not meet the definition of a stream channel and, thus, did not require a buffer. The conclusion was allegedly not supported by substantial evidence and the 75' buffer proposed by the Township was arbitrary.

The classification of this stream, which bisects the property running north and south, impacts the requirements of the riparian buffer zone afforded under the zoning ordinance. The stream could either be classified as a perennial/intermittent stream under the East Rockhill Township Zoning Ordinance (ERZO) §27-1900.4, or as an ephemeral watercourse under 27-1900.j.9. If it were classified as a perennial/intermittent stream, the zoning ordinance would require a 90' buffer zone. §27-1900.4. As an ephemeral watercourse, only a 30' riparian buffer is required and is currently what Appellant provided for in their plan to the Board of

Supervisors. §27-1900.j.9 (all references are to sections of the ERZO). The Board heard conflicting testimony offered by Steven Baluh, the Township engineer, and Dr. Bruno Mercuri, a hydro-geologist hired by Select to provide testimony on the stream. Mr. Baluh determined that the stream was an intermittent stream and, therefore, subject to a 90' riparian buffer zone. However, in making that determination, he relied upon the fact that the stream carried water on all the occasions on which he visited the property, which is not a characteristic attributable to an ephemeral watercourse. On the other hand, Dr. Mercuri, on behalf of the Appellant, opined that the stream should be classified as an ephemeral watercourse subject to a 30' riparian buffer zone as was depicted in Select's plans to the Board of Supervisors.

Accordingly, we determined that the 30' buffer was the correct one to apply, which is what is contained within our Order dated November 9, 2012, attached hereto as Exhibit "A." Therefore, we are not sure why Select has appealed this designation but, in any event, we have provided the explanation above for our decision.

10. 55% Single Family Homes; Townhouse Units Must Contain 5 Units or Less.

The subject ordinance provides that a maximum of 60% and a minimum of 10% of any one dwelling type be provided. Appellant contends that since there was no testimony that at least 55% of the homes should be singles, this condition should be struck. The Township's claim is that ERZO provides that a use B3, Performance Standard Development, which proposes 151 or more dwellings, must have at least three (3) different classes of dwelling unit types. §27-304.B3.n. Of those classes, there cannot be a particular dwelling unit type that is less than 10% of the units, nor can there be a particular dwelling unit type that is more than 60% of the units. Id. The required dwelling unit mix can be modified by conditional use, provided the applicant provides sufficient evidence that the alternative is better suited for the Township. Id.

Select requested the conditional use to permit only two dwelling unit types in the development. The Board, in granting the conditional use, required that 55% of the units be single family homes. Select simply argues that the condition is "an attempt to control density" and that the zoning ordinance allows the applicant to determine the best mix of dwelling unit types. We believe Select's interpretation to be incorrect as they could have chosen to comply with the zoning ordinance by simply providing three dwelling unit types for a development of 193 homes, which would have been permitted. We agreed with the Township that the flexibility in determining the appropriate mix of units under §27-304.B3.n is afforded to those who are developing under that Section. However, the applicant is not entitled to that flexibility when it proposes an alternative to the requirements of the zoning ordinance. In this matter, the Board determined that the alternative proposed by Select would better serve the Township with the specific condition that 55% of the units be constructed as single family homes. In imposing the condition, the Board claims that it took into consideration its comprehensive plan, as well as the nature of the surrounding properties. It also points out that if Select does not wish to abide by this condition, they are entitled to develop the property strictly in accordance with the zoning ordinance.

In the Statement of Matters Complained of on Appeal, Select also attempts to raise an issue under number 10 as to the density of townhouse units. Select claims that ERZO provides that no more than 60% of the townhouse units may exceed five dwelling units. However, the Township's conditional use required that the townhouse units not exceed five units and, therefore, that it violates its own ordinance. This issue was never raised before the Board of Supervisors and, accordingly, was never raised before this Court. It has never been briefed or argued and it was not addressed by the Township. We, therefore, believe that if there is any

issue with regard to the density of the townhouse units, Select has waived any argument with regard thereto by raising it for the first time within the Statement of Matters Complained of on Appeal.

23. Additional Traffic Study. Appellant claims that there is nothing in the record before the Township that would support the requirement of an additional traffic study to be performed at a time when the development is 75% occupied. Both the Township's traffic engineer and Select's traffic engineer agreed that the major intersection of Three Mile Run Road, Park Avenue and Old Bethlehem Pike did not presently warrant the installation of a traffic signal pursuant to standards promulgated by PennDot. However, the Township countered that Select's engineer did not consider the impact on that intersection when the project is built out and reasonably determined that a supplemental traffic study when 75% occupancy is achieved would address any future concerns regarding traffic control at the aforementioned intersection. We agreed and denied the appeal of this condition.

24. Alignment of Tabor Road. Appellant has appealed the Board's requirement that the subdivision entry road aligned with Tabor Road. Appellant claims that there is no evidence in the record to support such a condition and, therefore, it is an abuse of discretion and is not supported by substantial evidence.

The Township answers, however, that moving the entrance onto Old Bethlehem Pike so that it is directly opposite and aligned with Tabor Road, will alleviate an otherwise potentially hazardous situation. If the proposed entrance was not aligned with Tabor Road, traffic crossing over Old Bethlehem Pike would be required to make a sharp immediate turn and then another turn within a matter of feet in order to continue on to Tabor Road. The Board determined that this created a traffic safety issue that was potentially dangerous and was easily correctable. We

agreed with the Township after reviewing the testimony presented during the seven hearings and the maps presented as Exhibits during said hearings. Accordingly, the appeal of condition number 24 was denied.

25 and 26. Overlay of Hill Road and 2 Emergency Access Roads. In the Township adjudication, the Township required that the outlet to Hill Road be closed, which is a condition that Appellant has not appealed. Not only has Select not appealed that condition, but Select generally agreed with it. However, Select then takes the closing of Hill Road to the next step and claims that because of that closing, there is no need to construct two emergency access roads to the development. One hundred and ninety-three new homes in East Rockhill Township is a large new development. The Township responded to Select by indicating that if only one emergency access road is built, there are numerous occasions when that access road could be inaccessible. If that were the case, emergency personnel servicing the development would have no way of entering the development other than through normal access roads, which may well be blocked as they could have been during the recent super storm, "Sandy." The requirement of a second emergency access road simply insures that emergency personnel are able to sufficiently access the development in case of an emergency, which is a point that would seem to be favored by most of the individuals who will be buying Select's new homes. In that these conditions are clearly related to the health, safety and welfare of township residents now and in the future and that the objection by Select is based solely on the cost of this safety requirement, the condition should be upheld and, accordingly, we denied the appeal.

28. 36' Cartways and 60' Rights-of-Way. Select contends that the rights-of-way shall be 54' pursuant to the zoning ordinance, unless modified. Select has proposed a 56' right-of-way in order to be in compliance with the least restrictive requirements of the zoning ordinance.

However, the Township required that Select provide 60' rights-of-way and that all cartways be 36'. Select argues that the requirement of 60 feet for rights-of-way and 36 feet for cartways violate the ERZO and should be struck.

Select's claim is that the ERZO and the SALDO are in conflict and that they are entitled to the least restrictive interpretation.² The Township counters that there is no conflict because pursuant to §27-103(e) of ERZO, the provisions of the zoning ordinance are not be considered in conflict with the SALDO. Furthermore, under §103(c), when other regulations impose higher standards than that required in the zoning ordinance, the higher standards shall govern. In this case, SALDO sets forth greater width requirements which were chosen by the Township for the health, safety and welfare of the residents of Appellant's new subdivision. The Township reasoned that a 60' right-of-way, providing for parking on both sides of a public street within the development, is more appropriate and safer, given the relative high density proposed on the site. Furthermore, sufficient right-of-way width and cartway width is needed in a higher density, residential development such as the one being proposed, not only for the safe transportation of its residents, but also to ensure that fire and police services may have quick access to the residents therein. Accordingly, we concluded that the requirement of a 36' cartway and a 60' right-of-way were supported by the ordinance and provided for the health, safety and welfare of the residents and were not so onerous as to obstruct Appellant's right to build on the property.

Three Mile Run/Major Stream. Although not specifically set forth as a condition attached to the Board's grant of conditional use approval, Appellant, nevertheless, has appealed the Township's determination that Three Mile Run is a "major stream" as it flows through the proposed development. Appellant complains that the subject ordinance requires Appellant to deduct from its base site area all land not contiguous which, in part, includes property separated

² The zoning ordinance has a 50' width requirement whereas SALDO has a 60' width requirement.

by a major stream. The term is not defined in the ordinance and, as admitted by the Township, is not a defined term by any regulatory agency. Therefore, its use is alleged to be arbitrary and based on no criteria. The Township's response acknowledges the determination within its adjudication that Three Mile Run is a major stream within East Rockhill Township and will reduce the base site area and may result in the elimination of four units from the 193 units proposed.

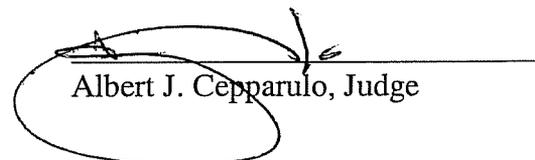
The Township indicates that in making its determination, the Board reviewed the East Rockhill Township Comprehensive Plan, specifically figure 4-hydrological resources, and that based on the delineation on the Comprehensive Plan, East Rockhill Township has three major streams running within the Township and one of those is Three Mile Run. It was determined further that its classification as a major stream was, in fact, supported by substantial evidence in the form of exhibits admitted and the testimony of the township engineer, Steven Baluh, and, therefore, should be upheld. Appellant has not proposed any workable definition, nor any setback area, to satisfy the Township and its own planners. Therefore, the Township believes that the definition of Three Mile Run as a major stream was supported by substantial evidence and, therefore, the Appeal of this condition should be denied.

V. CONCLUSION

The foregoing represents this Court's reasons for the partial denial of Appellant Select's Land Use Appeal.

BY THE COURT:

Date: February 27, 2013


Albert J. Cepparulo, Judge

**SELECT PROPERTIES, INC. VS. BOARD OF SUPERVISORS
EAST ROCKHILL TOWNSHIP
No. 2011-07612-30**

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IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL DIVISION

SELECT PROPERTIES, INC. : No. 2011-07612-30
 :
 vs. :
 :
 BOARD OF SUPERVISORS EAST :
 ROCKHILL TOWNSHIP :

ORDER

AND NOW, this 9th day of November 2012, upon application by Appellant, Select Properties, Inc., on a land use appeal taken from the conditional grant of a Conditional Use Application on a property located at 1731 Old Bethlehem Pike, East Rockhill Township, Pennsylvania; and a decision issued by the East Rockhill Zoning Hearing Board (ZHB) and approved by Appellee East Rockhill Township Board of Supervisors (Township), and after a *Rule 27 Conference held thereon; and following submission of briefs and a review of the entire record, including the evidence introduced at seven hearings held before ZBH, and no additional evidence having been submitted, it is hereby ORDERED as follows:

A. Although Appellant filed an appeal of all zoning conditions imposed on the grant of a conditional use, Appellant is now pursuing only ten (10) of the thirty (30) conditions and the remaining twenty (20) are being withdrawn. Utilizing the numbers used by ZBH in the written decision issued on July 29, 2011, it is hereby ORDERED as follows:

Condition #5: Sanitary Sewer Connections for All Abutting Property Owners

Appeal Granted, condition removed.

EXHIBIT "A"

Condition #7: Riparian Buffer Zone of Seventy-Five (75) Feet on Either Side of the North/South Stream Bisecting the Property

Appeal Granted. A buffer zone of thirty (30) feet shall be applied.

Condition #10: Applicant Shall Establish Two Dwelling Types Provided That 55% of the Units Are Single Family Housing

Appeal Denied, condition remains.

Condition #20: Applicant Shall Tie All Roof Drains and Sump Pumps to the Stormwater Management System

Appeal Denied, condition remains.

Condition #22: Footbridge Across Three-Mile Run

Appeal Granted, condition removed.

Condition #23: Future Traffic Impact Study When 75% Occupancy of the Total Dwelling Units Has Occurred

Appeal Denied, condition remains.

Condition #24: Alignment of Tabor Road

Appeal Denied, condition remains.

Conditions #25 & #26: Hill Road, Two Emergency Access Roads

Appeal Denied, condition remains.

Condition #28: Width of Cartway (36') and Right-of-Way (60'):

Appeal Denied, condition remains.

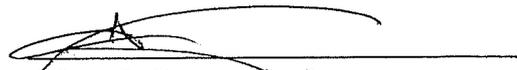
Miscellaneous: Definition of "Three Mile Run as a Major Stream"

Appeal Denied, condition remains.

Miscellaneous: Construction of Road to an Existing Well Within the Riparian Buffer

Appeal Granted, construction of road permitted.

BY THE COURT:


Albert J. Cepparulo, J.