

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

CORE5 AT VALLEY COMMERCE)	No. 2023-C-2100
CENTER LLC)	
)	
Appellant)	
)	CIVIL
v.)	
)	
LOWHILL TOWNSHIP)	ASSIGNED TO:
)	THE HONORABLE
Appellee)	ZACHARY J. COHEN

MEMORANDUM

Core5 at Valley Commerce Center LLC (“**Core5**”) appeals from the July 25, 2023 decision of the Lowhill Township Board of Supervisors (the “**Township**” or the “**Supervisors**”) to deny Core5’s land development application seeking approval of a final plan to construct a warehouse in the Township (the “**Final Plan**”). Core5 brings this statutory land use appeal pursuant to the Pennsylvania Municipalities Planning Code (“**MPC**”). 53 P.S. §11001-A, *et seq.* The central issue raised by Core5 is whether the Final Plan is deemed approved under the MPC. As more fully explained below, Core5’s appeal is sustained, the Township’s denial of the Final Plan is reversed, and the Final Plan is approved.

Background and Procedural History

Core5 is the equitable owner of approximately 43 acres of land located at 2766 Pa Route 100 in the Township (the “**Property**”).¹ On March 14, 2022, Core5’s predecessor filed a land development application for approval of a preliminary plan to develop a warehouse on the Property

¹ R. at 99.

(the “**Preliminary Plan**”). At a June 16, 2022 Township meeting, the Supervisors voted 2-1 to approve the Preliminary Plan and a related sewage facility planning module.² Notably, the Township never issued a written decision memorializing the approval of the Preliminary Plan. Furthermore, the minutes of the Township’s June 16, 2022 meeting reflect that the Supervisors approved the Preliminary Plan without conditions.³

On May 9, 2023, the Township received Core5’s application for approval of the Final Plan for the Project and placed it on the Supervisors’ June 8, 2023 meeting agenda. At the June 8 meeting, Supervisor Dietrich stated that “[Core5] plan[s] to take their deemed approval and it would be more responsible on our part to table this plan this evening and put it on July’s agenda.”⁴ By unanimous vote, the Supervisors tabled review of the Final Plan until the July 13, 2023 meeting.⁵

At the July 13, 2023 meeting, the Supervisors voted to deny the Final Plan.⁶ On July 25, 2023, the Township, through its counsel, issued a written letter-decision identifying fourteen deficiencies supporting the Township’s denial of the Final Plan.⁷ In sum, the deficiencies relate to perceived zoning and development issues affecting the Project, third-party approvals, and comments provided by engineers, consultants, and the public during prior stages of the development process.⁸

Core5 timely appealed the Township’s July 25, 2023 letter-decision denying the Final Plan by filing a Notice of Land Use Appeal with this Court on July 28, 2023. On appeal, Core5 contends

² R. at 234-7.

³ *Id.*

⁴ R. at 146.

⁵ R. at 146.

⁶ R. at 264.

⁷ R. at 305-47.

⁸ *Id.*

the Township lacked authority to deny the Final Plan because the Final Plan is “deemed approved” under the MPC.

Discussion

Core5 argues it is entitled to approval of the Final Plan because: (a) when the Township approved the Preliminary Plan in June of 2022, it failed to communicate any written conditions or defects to the applicant as required by Section 508 of the MPC; and (b) the Final Plan is the same as the Preliminary Plan.

In opposition, the Township contends it properly denied approval of the Final Plan because: (a) the Township conditioned approval of the Preliminary Plan by way of comments contained in a May 2022 letter from the Township’s engineers (and the Final Plan does not meet those conditions (as well as others)); and (b) the Final Plan is substantially different than the Preliminary Plan.

We begin the analysis of these issues by examining Section 508 of the MPC, which provides in relevant part:

* * *

(1) ***The decision of the governing body*** or the planning agency ***shall be in writing and shall be communicated to the applicant*** personally or mailed to him at his last known address ***not later than 15 days following the decision.***

(2) When the application is not approved in terms as filed ***the decision shall specify the defects found in the application*** and describe the requirements which have not been met and shall, in each case, cite to the provisions of the statute or ordinance relied upon.

(3) ***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*** unless the applicant has agreed in writing to an extension of time or change in the prescribed manner

of presentation of communication of the decision, in which case, failure to meet the extended time or change in manner of presentation of communication shall have like effect.

(4)(i)...In addition, ***when a preliminary application has been duly approved, the applicant shall be entitled to final approval in accordance with the terms of the approved preliminary application*** as hereinafter provided...

* * *

53 P.S. § 10508(1)-(4)(i) (emphasis added).

“Section 508 of the MPC was enacted to remedy indecision and protracted deliberations on the part of local governing bodies, to eliminate deliberate or negligent inaction on the part of government officials, and to assure that an unsuccessful applicant is provided with bases for appeal.” *Timothy F. Pasch, Inc. v. Springettsbury Twp. Bd. of Sup'rs*, 825 A.2d 719 (Pa.Cmwlt. 2003) (citations omitted). Where a governing body fails to communicate in writing to a developer its decision to deny a plan within 15 days of decision, the plan is deemed approved. *Appeal of Buchsbaum*, 540 A.2d 1389 (Pa.Cmwlt. 1988). Once a preliminary plan is approved, approval of a substantially identical final plan is required. *Weiser v. Latimore Twp.*, 960 A.2d 924, 930 (Pa.Cmwlt. 2008); *Rickert v. Latimore Twp.*, 960 A.2d 912 (Pa. Cmwlt. 2008). On review, where the trial court receives no additional evidence, the trial court’s role is limited to determining whether the local agency abused its discretion or committed an error of law. *Kassouf v. Twp. of Scott*, 883 A.2d 463 (Pa. 2005).

It is undisputed that the Township failed to issue a written decision specifying defects (or unmet requirements) as required by 53 P.S. § 10508(1) and (2). Therefore, the Preliminary Plan is deemed approved “in the terms as presented” pursuant to 53 P.S. § 10508(3). Although the Township argues that the Preliminary Plan was approved subject to conditions set forth in a May

23, 2022 letter from the Township's engineer, this argument is not supported by the minutes from the June 16, 2022 meeting, or by any other evidence in the record. Additionally, the Township does not cite any authority for its novel theory that review letters from its consultants (that are not even dated within 15 days of the Supervisors' June 16, 2022 vote to approve the Preliminary Plan) somehow served as a surrogate for the statutorily mandated Section 508 written Township decision. And even though the record indicates Core5 addressed comments raised in a May 23, 2022 correspondence from the Township Engineer (as well as additional comments and concerns raised by the Township), this Court cannot agree that Core5's willingness to address Township concerns converts the unconditional approval received on June 16, 2022 into a conditional one.

Having determined that there are no conditions placed on the approved Preliminary Plan, we must now turn to whether the Final Plan is the same or substantially the same as the Preliminary Plan so as to require Township approval.

In *Annand v. Board of Supervisors of Franklin Township*, 634 A.2d 1159 (Pa. Cmwlth. 1993), the Commonwealth Court held that the township erred when it rejected the developer's final plan after the preliminary plan was deemed approved, even though the final plan did not conform to the township's zoning ordinances. The *Annand* Court, relying on 53 P.S. § 10508(4)(i), ruled that approval was required because the final plan was essentially the same as the deemed-approved preliminary plan, even with the developer's addition of engineering details to the final plan. *Id.* at 1161.

Similarly, in *Rickert v. Latimore Twp.*, *supra*, the Commonwealth Court held that a township must approve a final land development plan that is substantially similar to a deemed approved preliminary plan, notwithstanding outstanding zoning concerns. Relying on *Annand*, *supra*, the *Rickert* Court observed that "a preliminary plan, whether approved by vote or by

statutory deemer, relates only to subdivision and land development matters and not to zoning matters”; therefore, approvals needed to effect the development, such as the grant of a variance, do not impede a deemed approval under MPC Section 508(4)(i). *Id.* at 918-9. Accordingly, it was error for the township to further condition final approval of the plan on outstanding zoning approvals. *Id.* In reaching its conclusion, the *Rickert* Court found that the applicant’s final plan, which revised the preliminary plan by adding labels and depictions of features, was “essentially identical” for purposes of Section 508. *Id.* at 915.

Upon review of this record, we find that Core5’s Final Plan is essentially the same as the Preliminary Plan and therefore must be approved, notwithstanding the concerns of the Supervisors raised at the July 13, 2023 meeting. The *only* differences the Township highlights are that the Preliminary Plan was submitted to the Township by Core5’s predecessor-in-equitable-ownership (whereas Core5 filed the Final Plan), and vague references to unspecified revisions; yet the Township fails to explain how any of these supposed changes significantly alter the essence of the Preliminary Plan. At the July 13, 2023 Supervisor meeting, the Supervisors questioned Core5’s engineer extensively, and his answers clearly indicate that the May 9, 2023 Final Plan is exactly the same as the March 14, 2022 Preliminary Plan the Township previously approved, without conditions, on June 16, 2022.⁹ Supervisors Dietrich and Christman’s comments at the July 13, 2023 Supervisors meeting buttress Core5’s position as to the lack of any significant differences between the Preliminary Plan and the Final Plan.¹⁰ Thus, the record establishes that the Final Plan is essentially the same as the previously approved Preliminary Plan. Accordingly, Core5 is entitled to approval of the Final Plan.

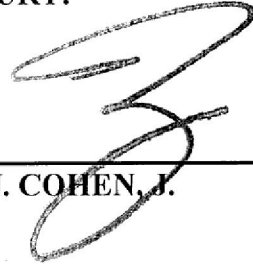
⁹ R. at 255.

¹⁰ R. at 260.

Conclusion

Based on a thorough review of the record, the relevant portions of the MPC, and applicable appellate authority, this Court finds that Core5 is entitled to approval of the Final Plan. An order consistent with this Memorandum follows.

BY THE COURT:



ZACHARY J. COHEN, J.

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LOWHILL TOWNSHIP)	ASSIGNED TO:
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Appellee)	ZACHARY J. COHEN


ORDER

AND NOW, this 8th day of April, 2024, upon consideration of the Appeal of Core5 at Valley Commerce Center LLC ("Core5") filed on July 28, 2023, the briefs of the parties, and after argument held on January 9, 2024, and for the reasons stated in the accompanying Memorandum,

IT IS ORDERED THAT:

1. Core5's appeal is **SUSTAINED**;
2. The July 25, 2023 decision of Lowhill Township denying Core5's application for approval of the Final Plan is **REVERSED**; and
3. The final plan submitted with Core5's May 9, 2023 application to Lowhill Township is **APPROVED**.

BY THE COURT:



ZACHARY J. COHEN, J.