

CARROLL CITIZENS FOR SENSIBLE GROWTH, WAYNE PEALER, CATHERINE PEALER, and BRAD PEALER,

Appellants

v.

CARROLL TOWNSHIP BOARD OF SUPERVISORS,

Appellee

JZCM, L.P.,

Intervener

: IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

: NO. 2007-SU-1590 Y 08

: CIVIL ACTION – LAND USE APPEAL

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CITIZENS FOR SENSIBLE GROWTH

**BRIEF IN OPPOSITION TO APPELLANTS' MEMORANDUM OF LAW,
SUBMITTED BY INTERVENER JZCM, L.P.**

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I. COUNTER-STATEMENT OF FACTS

A. INTRODUCTION

The Carroll Township Board of Supervisors, having received advice, recommendations and comments from the Township Planning Commission, Township professional staff and consultants, outside agencies, and the public, conditionally approved a preliminary subdivision plan that met the requirements of the Township's ordinances, and that approval should not be disturbed on appeal.

B. PROCEDURAL HISTORY

In May, 2006, Intervener JZCM, L.P. ("JZCM"), filed an application for preliminary plan subdivision approval for the South Mountain Commons project (the "Plan") with Carroll Township, York County (the "Township"). The Plan superseded a prior plan that had been submitted for the same project. On April 2, 2007, after nearly a year of careful

review by the Township and full citizen involvement, the Carroll Township Board of Supervisors (the "Board") conditionally approved the Plan, and JZCM accepted the conditions established by the Board for the conditional approval of the Plan. The Board issued its written decision dated April 25, 2007.

On May 2, 2007, the Appellants filed a Notice of Appeal pursuant to the Municipalities Planning Code ("MPC"), 53 P.S. § 11003-A. On or about May 16, 2007, JZCM filed a Notice of Intervention. On June 8, 2007, JZCM filed an Answer to Notice of Land Use Appeal. Appellants filed a Motion to Supplement the Record and their Memorandum of Law on June 22, 2007.

C. STATEMENT OF FACTS

JZCM is the equitable owner of the property that is the subject of the instant appeal. The entire property consists of some 131.624 acres of land in the Township located at the intersection of Route 74 and Route 15. Contrary to Appellants' assertions in ¶ 1 of their Notice of Appeal, the Plan does not involve a "large retail commercial and high density residential complex." To the contrary, the Plan does not include any land development, but only proposes the subdivision of the property into building lots and the relocation of Route 74 and related stormwater planning.

JZCM submitted its Plan for the property to the Board on May 9, 2006, and public hearings, along with exhaustive and careful review by the Board, continued for nearly one year before preliminary Plan approval. In fact, the Plan superseded a prior proposal for the same project and, thus, the Board (and the Appellants) had been reviewing the proposed project for many months prior to April, 2006. The Board was

advised by the Township engineer, a traffic consultant, the Township Planning Commission, and the York County Planning Commission. The Board examined a variety of issues, including traffic safety, stormwater management, and the location of utilities. Eventually, the Board determined that the Plan met all Township ordinances, and conditionally approved the Plan. In conditionally approving the Plan, the Board determined that it met the requirements of the Township Zoning Ordinance, the Township Subdivision and Land Development Ordinance, and the Township Stormwater Management Ordinance. Members of the public, including Appellants, attended many Township meetings and had a complete and adequate opportunity to comment on the Plan. Appellants, among other members of the public, spoke at many meetings and the Board heard their concerns and considered them. Public opinion on the Plan was split, with some members of the public approving of the Plan and others opposing it. Appellants were represented by counsel throughout the process, and utilized the services of engineering consultants.

Although Appellants' Brief implies that JZCM somehow circumvented the review process by filing revisions to the Plan, this is a mischaracterization of what occurred. All submittals were made in response to comments of the County and Township Planning Commissions, the Township Engineer and the Township's traffic engineer, which is typical in land development applications.

II. COUNTER-STATEMENT OF QUESTIONS INVOLVED

- A. DO THE PEALERS HAVE STANDING TO APPEAL THE PLAN WHEN THEY ARE NOT AGGRIEVED BY THE DECISION OF THE CARROLL TOWNSHIP BOARD OF SUPERVISORS?

[Suggested Answer: No]

- B. DOES THE PROPOSED PLAN VIOLATE THE TOWNSHIP ZONING ORDINANCE?

[Suggested Answer: No]

- C. DID THE CARROLL TOWNSHIP BOARD OF SUPERVISORS COMMIT AN ERROR OF LAW OR ABUSE ITS DISCRETION IN GRANTING CONDITIONAL APPROVAL OF THE PLAN?

[Suggested Answer: No]

- D. DID THE CARROLL TOWNSHIP BOARD OF SUPERVISORS COMMIT AN ERROR OF LAW OR ABUSE ITS DISCRETION IN GRANTING CERTAIN WAIVERS?

[Suggested Answer: No]

- E. SHOULD APPELLANTS BE PERMITTED TO SUPPLEMENT THE RECORD?

[Suggested Answer: No]

III. ARGUMENT

A. SOME OF THE APPELLANTS DO NOT HAVE STANDING BECAUSE THEY ARE NOT "PERSONS AGGRIEVED" BY THE DECISION OF THE CARROLL TOWNSHIP BOARD OF SUPERVISORS

The instant appeal was filed on behalf of the Carroll Citizens for Sensible Growth (the "Organization") and the members of the Pealer family (the "Pealers"). The standing of the Pealers, particularly based upon the grounds stated for appeal, is highly suspect.

In order for an individual to have standing, he or she must be "aggrieved" by the adverse, substantial and immediate effect of the decision. See *Sunnyside Up Corp. v. City of Lancaster Zoning Hearing Bd.*, 739 A.2d 644, 648 (Pa. Cmwlth. Ct. 1999). The Pealers must be able to establish their interest in the outcome, but have failed to show themselves to be "aggrieved" persons in this matter.

The Pealers' sole basis for standing is that they "own property that is located in the vicinity of the proposed development and their property currently is susceptible to flooding, which, will significantly increase if the proposed development is permitted to proceed." See Notice of Appeal, ¶ 2(a). However, the Pealers presented no evidence or expert testimony at the numerous hearings before the Board regarding this issue, in spite of the fact that they were represented by counsel throughout this process. Further, the Appellants engaged a civil engineer, C.S. Davidson, Inc., to review the project, but that engineer did not opine about alleged flooding. Thus, the Pealers cannot use the potential flooding concern as the basis for their allegation that they are aggrieved. Accordingly, the Pealers do not have standing in this appeal.

A court cannot adjudicate an issue where evidence was not introduced at the hearing before the Board. *In re Miller*, 407 Pa. 201, 79 A.2d 194 (1962). In *Wynnewood Civic Ass'n v. Bd. of Adjustment of Lower Merion Tp.*, 406 Pa. 413, 179 A.2d 649 (1962), the Supreme Court held that where no evidence essential to the resolution of an issue was presented to the board, the matter cannot be argued before a court on appeal.

The Pealers are basing their allegation of standing upon an issue that was not presented before the Board. Pursuant to *Miller* and *Wynnewood Civic Ass'n*, the Pealers cannot argue before this Court that their property will be flooded by the development. If the issue cannot be argued before the Court, then it also cannot be the basis of their standing to pursue their appeal. Accordingly, the Pealers should be dismissed from the appeal.

B. THE PROPOSED SUBDIVISION PLAN DOES NOT VIOLATE THE ZONING ORDINANCE.

Review of this case is guided by a number of firmly established legal principles. Only where a party has been denied an opportunity to be fully heard, or where relevant testimony has been excluded, will courts take additional evidence. *Kossmann v. Zoning Hearing Board of the Borough of Green Tree*, 143 Pa. Cmwlth. Ct. 107, 597 A.2d 1274 (1991). When no additional evidence is presented after a Board's determination, the scope of review of this Court is limited to determining whether the Board committed an abuse of discretion or error of law. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 554, 462 A.2d 637, 639 (1983); *In re Appeal of Busik*, 759

A.2d 417, 420 (Pa. Cmwlth. Ct. 2000). A Court may conclude that a board abused its discretion only if its findings are not supported by substantial evidence. *Valley View*, 501 Pa. at 554, 462 A.2d at 640; 53 P.S. § 11005-A. “Substantial evidence” is defined as relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Valley View*, 501 Pa. at 554, 462 A.2d at 640. Appellants have failed to meet this stringent standard, and the decision of the Board should be affirmed.

Appellants’ argue that the Plan violates the Township Zoning Ordinance. This argument is without merit. First, Appellants’ misapply the case law. Although *In re Appeal of Fiori*, 160 Pa. Cmwlth. Ct. 659, 663, 635 A.2d 743, 745 (1993) held that “a zoning hearing board has exclusive jurisdiction to hear and render final adjudications in applications for variances, whereas a municipality’s governing body has exclusive jurisdiction to hear and render final adjudications in applications for approval of subdivisions or land developments,” that holding is not relevant in the instant matter. The conclusion gleaned from *Fiori* and the other authorities cited by Appellants is that a board of supervisors must render adjudications for approval of subdivision plans without granting zoning variances. That is exactly what occurred in this case.

The proposed Plan does not violate the Zoning Ordinance. First, Appellants argue that the stormwater inlets and outlets are “structures” and as such are improperly located within the setbacks. It is not at all clear from the text of the Zoning Ordinance that stormwater management measures are “structures.” The Zoning Ordinance in § 14.3 defines “Setback Lines” as “See “Building Lines.” A “Building Line (Building Set-back line)” is defined as “A line . . . beyond which a structure [which does not by

definition include uncovered entrance platforms, terraces and steps] may not extend” but then goes on to define the permitted location of “buildings and structures” with respect to the various setback lines. Thus, it is clear that the Zoning Ordinance is limiting the location of buildings with roofs and not stormwater management measures. Further support for this conclusion is found in the Township Subdivision and Land Development Ordinance (“SALDO”) and the Township Stormwater Management Ordinance (“SWMO”). These essential components of stormwater management systems are specifically mentioned in these ordinances as being permitted with landscape buffer areas and setbacks. In particular, these ordinances provide as follows:

- First, SALDO § 715.b.8 requires that “The landscape buffer **shall be** located between the roadway Right-of-Way and the building setback lines of the property, and along all property lines.” (emphasis added)

Accordingly, the “buffer yard” must be located within the building setback area.

- Second, SALDO § 715.g.6, which contains requirements for buffer yards, states: “The plan must show all relevant features that affect landscaping to ensure that landscaping will not conflict with site features such as lighting, **storm piping**, and overhead utilities.” (emphasis added)

This section provides that storm sewer piping can be located within a buffer yard. If the storm sewer piping can be within a buffer yard, it by definition must be within the setback area.

- “Stormwater Management Facilities” are defined within the SWMO as “Those controls and measures (e.g., storm sewers, berms, terraces, bridges, dams, basins, infiltration systems, swales, watercourses and floodplains) used to effect a stormwater management program.”

“Storm sewers” or piping is a “measure” used in order to “effect a stormwater management program”, and therefore it is included within this definition.

- SWMO Section 401.7.A (13) states, “The developer **shall incorporate** standard outlet structures into the basin design.” (emphasis added)

The term “basin” is included within the definition of “stormwater management facilities”, and an “outlet structure” is a **required** element for construction of a “basin”. Therefore, “outlet structures” are included within the definition of “stormwater management facilities”.

- Finally, SWMO § 401.6.I provides that, “Concrete headwalls and endwalls **shall be used** where stormwater runoff enters or leaves the storm sewer horizontally from natural or manmade channel. Headwalls and endwalls more than 5’ in height shall be designed by a professional engineer considering the actual soil conditions and loadings, and in accordance with American Concrete Institute Specifications.” (emphasis added)

Concrete headwalls and endwalls are a required element for storm sewer piping at the channel inflow or outflow point, therefore, they are included within the definition of “stormwater management facilities” that are specifically permitted to be located within buffer areas, and therefore within building setback lines. Given that the buffer yard

must be located within the “building setback area”, all “stormwater management facilities” are permitted within the building setback area, by ordinance.

At most, Appellants have pointed out an inconsistency between the Township Zoning Ordinance and its SALDO and SWMO. This is not unusual, and the Township has the ability to interpret its own ordinances to avoid these inconsistencies. Further, § 603.1 of the MPC, 53 P.S. § 10603.1, provides that

In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

Accordingly, Appellants argument regarding stormwater management measures located within the building setback lines is without merit.

Appellants further object to the location of buffer yards and proposed landscaping within buffer yards and easement areas. Initially, JZCM notes that the ordinance provisions discussed above answer many of these concerns. Further, the Plan complies with § 715.g.4 of the SALDO. JZCM is proposing many more trees and shrubs than the Ordinance requires. The landscaping calculations submitted as part of the Plan are shown on Plan Sheet 611. Plan Sheet 611, a reduced portion of which is attached to this brief as Exhibit A, shows that the property is required by the SALDO to have 1,046 trees and 1,043 shrubs. Instead, JZCM proposes 1,222 trees and 1,894 shrubs. These proposed plantings are over and above new trees, shrubs and other plantings that will be located within wetland replacement areas, stream stabilization areas, and riparian buffer areas. The landscaping plan was designed so that plantings

will be at or above the maximum water surface elevation within stormwater basins. The Township has exhaustively reviewed and approved JZCM's landscaping plan. The landscaping plans that JZCM submitted as part of this Plan allowed the Planning Commission and the Board to conclude that the landscaping was designed not to conflict with site features such as lighting, storm piping and overhead utilities, as required by § 715.g.6 of the SALDO. Accordingly, there is no violation of the SALDO.

Lastly, Appellants argue that access drive # 5 violates the rear yard requirement. This also is incorrect. Nowhere does the ordinance state that an access drive cannot be located within a yard. The Township Zoning Officer, who is empowered to determine if a plan is consistent with the Zoning Ordinance, did not identify this drive as violating the Zoning Ordinance. There is a twenty foot buffer on *both* sides of this access drive, as shown on Plan Sheet 250 (a reduced copy of which is attached to this Brief as Exhibit B). As discussed above regarding the intent of the definition of "building setbacks", the plan is consistent with the definition of "yard". The access drive is "unoccupied" as required by the definition of yard as there is no building proposed in this area. Appellants seem to suggest that access drives, which are required for commercial uses under § 14.3 of the Zoning Ordinance, may not cross "yards" or "setbacks" in order to access commercial uses. This is a physical impossibility. An access drive must cross a yard in order for members of the public to get from the street to the commercial use. Appellants' argument on this point must fail.

C. THE CARROLL TOWNSHIP BOARD OF SUPERVISORS DID NOT COMMIT AN ERROR OF LAW OR ABUSE ITS DISCRETION IN ITS APPROVAL OF THE PRELIMINARY PLAN.

Initially, JZCM notes that Appellants' Appeal appears to be premised upon an incorrect standard as applied to the Board's application of the SALDO. Appellants assume that the Plan must meet every criteria of the SALDO before it can be approved. This is not the law. As the Commonwealth Court has held, "where a preliminary subdivision plan fails to comply with the substantive requirements of the subdivision ordinance, its rejection or conditional approval is within the discretion of the governing body." *Morris v. South Coventry Tp. Bd. of Sup'rs*, 836 A.2d 1015, 1020 (Pa. Cmwlth. Ct. 2003). This is exactly what the Carroll Township Board of Supervisors did. It approved the Plan conditioned upon JZCM meeting several requirements of the SALDO. Thus, the inconsequential points raised by Appellants where the Board conditioned approval on correction of minor issues or granted waivers is wholly within the realm of the Board's discretion. This Court should resist Appellants' attempt to review the minutiae Appellants espouse as grounds for appeal, when the Board made a thorough review of the application and its decision was within the scope of its discretion.

The Board did not abuse its discretion in conditionally approving the Plan because the decision was in accordance with the Township's Ordinances and the MPC. The Board's decision on the Plan was based on a year of review by the Township staff and other consultants, and meetings on the Preliminary Plans by the Board and the Planning Commission. Appellants, as well as other members of the general public, were afforded a full and complete opportunity to be heard by the Board. The concerns

identified by Appellants were heard by the Board and evidence was submitted and found satisfactory by the Board. For these reasons, the Board's decision should be upheld and this appeal dismissed.

The Board followed the procedures set forth in Township ordinances. JZCM responds to the particular issues raised by the Appellants as follows:

1. *The Plan meets the SALDO's Traffic Impact Study requirements.*

If there is one place where JZCM, the Township and Appellants agree, it is that traffic has been an issue of all concerned since the inception of this project. That is why JZCM undertook a Traffic Impact Study ("TIS"), made extensive traffic evaluations, and enlisted input and approval from the Pennsylvania Department of Transportation (PennDOT) regarding the TIS and the relocation of US Route 74. The TIS, which is originally dated June 9, 2004, was reviewed and approved by PennDOT by letter dated July 22, 2004. This study and the PennDOT approval of the TIS are part of the record in this matter. The methodology of the TIS was approved by PennDOT; if the methodology had not been approved, PennDOT would not have approved the TIS itself.

Traffic increase is not a sufficient reason to refuse a property owner the legitimate use of that land. *Appeal of O'Hara*, 389 Pa. 35, 131 A.2d 587 (1957) (citing *Rolling Green Gold Club Case*, 374 Pa. 450, 97 A.2d 523 (1953)). Regardless, JZCM submitted a TIS and, at the requirement of the Township, updated the TIS before the Township acted on the Plan. The TIS used the appropriate data required by PennDOT and the Township and mitigated the traffic impact. The roadway improvements suggested by the traffic study were conditionally approved by the Board.

Appellants seem to be suggesting that JZCM should have updated the TIS on a frequent basis. This is not practical. When it appeared that most of the other planning issues had been resolved, JZCM submitted a revised TIS (and not a new TIS as claimed by Appellants). The original TIS as revised met all Township requirements.

Both the original June 2004 TIS and the 2007 update properly calculated the most probable build-out. It is then the responsibility of the developer during the land development process to assign how much of the approved traffic volume is used with each lot. This is a very common practice in the subdivision and land development process. If during the land development process the uses would exceed the approved study, then the Township and PennDOT would take appropriate actions.

By letter of March 12, 2007, Appellants attorney submitted what he styled as unsigned "Draft" comments from Douglas W. Plank, purportedly a traffic expert. For some reason, Appellants never gave the Township a completed letter. However, a review of the draft letter suggests that the Appellants "expert" is not a Professional Engineer. The letters submitted by JZCM's traffic consultants, and the PennDOT approval letter of the TIS, all identify the writer as "P.E." for Professional Engineer. Similarly, letters to the Township engineer identify him as a P.E. Mr. Plank's letterhead and signature block contain no such identification, leading one to the conclusion that he is not a professional engineer. Certainly reviews of a traffic study that have been submitted by an engineer, approved by a PennDOT engineer should be authored by an engineer. Thus, the draft letter submitted by Appellants should be disregarded.

Appellants also suggest that JZCM improperly submitted additional traffic data on March 27, 2007, and that this submission somehow came late in the process. In fact, this letter from JZCM's traffic consultant was submitted in response to comments of the Township's traffic consultant, Grove Miller Engineer, Inc., dated March 27, 2007, that very day! In other words, JZCM's consultant replied to the Township the very day that it received comments. JZCM could not have replied more promptly. There was no reason that Appellants could not have inquired of the Township whether JZCM had submitted any updated information in response to Township comments. Further, Appellants could have had their "expert" review that information either in advance of the April 2 meeting or at the meeting itself.

The Township was satisfied that the TIS contained sufficient information to comply with the SALDO. Finally, as permitted by *Morris*, the Township conditioned Plan approval on JZCM's complying with a number of conditions related to traffic. Accordingly, the Township properly considered traffic issues, and the Board's approval should be affirmed.

2. *The Developer did submit an HOP. application to the Township.*

Appellants next claim that JZCM did not submit a Highway Occupancy Permit ("HOP.") application during the review process. This is not correct.

The Board required as one of the conditions of Plan approval that JZCM obtain a HOP from PennDOT. It is not unusual for the Township to make this a condition rather than require the HOP before approval, and Appellants appear to concede this point.

Appellants state on page 11 of their Brief that the approval is deficient because JZCM “failed to submit a H.O.P. application during the preliminary plan review” and that this is a fatal defect requiring reversal of the Board’s decision. The Appellants’ contention is incorrect. In fact, JZCM submitted a HOP application to the Township by letter of transmittal dated June 9, 2006. The application was for the road realignment and three traffic signals. The application, dated June, 2006 (Application # 161404) is part of the record filed by the Township (as part of the documents containing various comment letters, minutes, etc.) and a copy of the HOP is attached to this brief as Exhibit C. Thus, this is not a reason to reverse the decision of the Board.

3. *The Plans comply with the landscaping requirements of the SALDO.*

JZCM has previously addressed landscaping issues in this brief. In a nutshell, the landscaping plan reviewed and approved by the Township meets all requirements of the SALDO. Additional landscaping plans will be submitted as a land development plan is submitted for each lot. Appellants’ objections are therefore unfounded.

4. *The Plans include all information required for preliminary plans under the SALDO.*

The Board correctly found that the Plan met the criteria of SALDO.

Appellants first complain that JZCM should have submitted Homeowner’s Association Documents. Simply stated, this Plan proposes no houses. How could the developer submit documentation for a neighborhood that is not being created?

Appellants next argue that the developer had not produced signed easement agreements from neighboring property owners. However, the Board specifically made delivering signed easement agreements to the Township a condition of Plan approval

(see conditions 17 and 18 of the conditional approval letter of April 25, 2007, attached as Exhibit A to Appellant's Notice of Appeal). Thus, this objection is baseless.

Finally, Appellants complain of other supposed deficiencies. All of these issues were conditions of the Plan approval. Appellants end this portion of their brief by stating that the Plan "should not have been conditionally approved, but should have been denied." (Appellants' Brief, p. 13). In other words, Appellants would have this court substitute its judgment for the sound discretion that is vested by law in the Carroll Township Board of Supervisors. This Court should decline this invitation.

D. THE CARROLL TOWNSHIP BOARD OF SUPERVISORS DID NOT COMMIT AN ERROR OF LAW OR ABUSE ITS DISCRETION IN ITS GRANTING OF CERTAIN WAIVERS FROM THE REQUIREMENTS OF THE SALDO.

Appellants allege that JZCM "proposes eleven (11) commercial and residential lots that would include a superstore of 203,819 square feet, two shopping centers (15,000 square feet and 6,000 square feet), three high-turnover sit-down restaurants, a drive-in bank and 175 residential condominium townhouses." See Notice of Appeal, ¶ 6. However, these alleged improvements were not at issue in the Plan approval process, as Appellants have admitted in their Brief (see Brief p. 2). These speculations were not at issue in the approval process and cannot be used as a basis to attack Board's approval of the Plan. Whether future plans for this property include a "superstore" is not relevant. See *Goodman v. Bd. of Com'rs of South Whitehall Tp.*, 49 Pa. Cmwlth. Ct. 35, 44, 411 A.2d 838, 843 (1980) (stating, "speculation as to possible future matters [are] improper for preliminary subdivision plan approval."). By Page 13 of

its brief, after speculating about future use of the property, Appellants seemingly agree that speculation can not play a part in this Plan review process.

Appellants then go on to contend that the Board erred by approving certain waivers from the SALDO and the SWMO. Of course, the Board has the inherent authority to approve waivers from the SALDO pursuant to § 1401 of the SALDO and § 512.1 of the MPC, 53 P.S. § 10512.1. Nevertheless, Appellants charge that certain waivers were improperly approved, and state (without evidence in the record) that there will be a risk of downstream flooding problems. Appellants presented no evidence to the Board that downstream flooding would be increased by the proposed development. Significantly, the Appellants retained a civil engineer, but that engineer did not comment on the alleged flooding issue. Appellant's conjecture is too little, too late. On the other hand, JZCM presented to the Board the expert testimony of environmental specialists and other evidence to show the steps taken by JZCM to protect the streams, wetlands, flood plains and riparian buffers, and downstream neighbors. The Board and its own experts reviewed all of the submissions and properly came to the determination that the proposed development adequately addressed the environmental concerns.

Nonetheless, Appellants raise several specific claims. First, Appellants complain that the Board improperly granted a waiver from the volume of stormwater runoff for a two year storm, and claims that "the only stormwater runoff that the Developer is required to infiltrate in this subdivision plan is the impervious surface area associated with the relocated Route 74." (Appellants Brief p. 15) Appellants also state that JZCM could have infiltrated stormwater on Lot 1, but it chose to "save" these infiltration areas

for future development. Neither of these statements is correct. Initially, the SWMO requires a developer to account for the difference between the pre development and post development storm and not just the increase due to the impervious surface area. Further, the plan that Appellants attached to their brief is misleading. The developer cannot infiltrate stormwater elsewhere on Lot 1 for one very simple reason – to do so would defy the law of gravity. Attached to this Brief as Exhibit D is a topographic plot of the property at issue, Plan Sheet 300. Relocated Route 74 as it crosses the stream is at an elevation of 508 feet. Lot 1 ranges from 520 to over 550 feet in elevation. It is physically impossible for JZCM to make water run uphill in order to be infiltrated on Lot 1.

Appellants further claim that there is no hardship to JZCM, and that the developer sought the waiver only in order to maximize the size of lots for future development. JZCM presented extensive expert testimony that the relocated Route 74 was located where it is proposed in order to minimize impact on wetlands, forested wetlands, riparian buffers and the existing stream. JZCM also presented extensive evidence and testimony to the Board regarding how the Plan would minimize impact on the environment. All areas available to create basins in and along the roadway have been utilized to collect, detain, and infiltrate stormwater. The only other areas left to infiltrate are located on Lots 1, 3 and 8 at a higher elevation than the roadway. JZCM is dealing with the unique qualities of the parcel of land in question. Stormwater management measures need to be at the low point of the property. Water does not run uphill.

The Appellants conclude by “shot-gunning” numerous other objections to certain waivers, claiming that the waivers were requested only because the developer is trying to “maximize the number of commercial and residential lots.” (Appellants Brief p. 16). Appellants conclude that “if the Developer would eliminate a commercial lot or reduce the size of some of the lots, it would be able to comply with the requirements of the SWMO without a waiver.” (*Id.* at 17) This statement is incorrect. The hardship is not self-inflicted. In fact, the developer could eliminate *all* of the commercial lots and still not have an area sufficient to infiltrate the 2-year, 24-hour storm event in accordance with the SWMO because the area available for infiltration is located at an elevation that is higher than the roadway. The Board understood this and properly granted the waivers. The Board acted in accordance with the law and did not abuse its discretion. Accordingly, its decision should be affirmed.

E. APPELLANTS SHOULD NOT BE PERMITTED TO SUPPLEMENT THE RECORD.

Contrary to Appellants’ assertions, JZCM did not submit new plans, reports and studies throughout the Plan process. The Subdivision Plan was largely unchanged from the original submission in May 2006 through the time of conditional approval. However, as the Township Engineer and other Township consultants made written comments regarding the Plan, JZCM filed revised plans and studies and responded in writing to those comments. JZCM’s responses to the requests of Township officials were consistent with typical procedures in subdivision applications. JZCM should not be penalized for responding to the Township Engineer’s request for information.

The Appellants had adequate opportunity to review the submissions during the entire application process, and in fact did so. JZCM has not violated the submission requirements of the SALDO. JZCM merely complied with requests for additional information made by the Township Engineer. It is important to note that the information did not change the subdivision plan, and was not significant enough to restart the entire process.

Appellants received the information at or before many meetings and had their consultants review it. Appellants attended the April 2, 2007 meeting and made many public statements individually and through their counsel. The April 2 meeting was a special meeting of the Board, which had been announced to Appellants in advance. Appellants knew that the Plan could be acted upon at that meeting. For unknown reasons, Appellants failed to have their consultants attend that meeting, even though the consultants had already been retained and had submitted prior written comments that were considered by the Board. *Importantly, Appellants never requested at the April 2, 2007 meeting that the matter be tabled until their consultants could review the Plan.*

Only now, after the matter has been fully heard and a decision rendered by the Board, have Appellants complained about the timing of the information submitted at the request of the Township Engineer and other Township consultants. Appellants were not denied an opportunity to be heard, and accordingly, are not entitled to present additional evidence. *See Morris v. South Coventry Tp. Bd. of Supervisors*, 898 A.2d 1213 (Pa. Cmwlth. Ct. 2006). JZCM did not act in bad faith as claimed by Appellants; rather, JZCM was responding to requests of the Township.

This Court should deny Appellants' request to supplement the record.

Significantly, Appellants have apparently failed to instruct their consultants to review the Plan between the April 2, 2007, meeting and the date of their Motion, June 22, 2007, a period of 81 days. Appellants could have had their consultants review the information submitted at the request of the Township Engineer during that time. For whatever reason, they chose not to do so. Appellants' Motion is nothing more than a delaying tactic.

Finally, as this Court knows, if this Court accepts additional evidence, the standard of review changes. This Court would then make a *de novo* review of the record and substitute its judgment for the sound decision of the Board. In this case, the Board met in public session for many hours over several months, and carefully considered the countless hours of work performed by the Township Engineer, other Township consultants, outside agencies, and the Township Planning Commission. The Board fully involved members of the public, who spoke both for and against the Plan. There is an extensive record.¹ This was not a decision reached in haste or without full public vetting. This Court should decline Appellants' invitation to accept additional evidence and thereby consider the Plan *de novo*. Accepting additional evidence at this late date would change the standard of review and in effect overturn the Township's careful review of a plan that was performed over the course of an entire year. The

¹ The various voluminous submissions made by JZCM, plus review comments made by the Township engineer and consultants and outside agencies, meeting minutes, and written public comment have resulted in a record that is more than four feet in height, plus eight or more thick rolls of plans submitted by JZCM with each submission. Additionally, the Township Planning Commission considered the Plan at several of its meetings, and the Board further considered the Plan at numerous meetings. Appellants were fully represented at every stage, and the public made its collective voice heard for and against this project. It is possible that this is the most scrutinized plan ever considered by Carroll Township.

citizens of Carroll Township deserve to have the decision of their elected officials upheld.

IV. CONCLUSION

A review of the mountainous evidence presented to and reviewed by the Board demonstrates that the Board's findings were supported by substantial evidence as required by *Valley View*. Accordingly, the Board has not abused its discretion, nor did it commit an error of law, *see Valley View*, 501 Pa. at 554, 462 A.2d at 640.

Accordingly, for all the reasons set forth above, this Court should affirm the well reasoned and carefully considered decision of the Board and dismiss the appeal.

Respectfully Submitted,

WIX, WENGER & WEIDNER

Date:

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By:



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