

2. Did the Board err in determining that the proposed two-lane roundabout at the intersection of Route 611 and Trinity Road would provide access to a PennDot roadway?

The Paradise Township zoning ordinance requires master development tracts to have frontage along and direct access to a road or highway controlled by PennDot. *Zoning Ordinance* §160-12(43.B)(e). JSPA's proposed access to the shopping center is right-turn in and right-turn out. However, the resort portion of the property is not situated directly on Route 611. Its access is via Trinity Hill Road. To provide access to Route 611, a PennDot-controlled roadway, JSPA proposed a two lane roundabout on Route 611 which would have five roadway entrances: Trinity Hill Road, northbound Route 611, southbound Route 611, Meadowside Road (a local roadway directly opposite Trinity Hill Road) and a resort entrance to be constructed. The roundabout would require approval from PennDot and the Township.

PennFuture contends that the Board concluded that "Applicant did not sufficiently demonstrate at the time of the hearing that the proposed roundabout is feasible or that the Resort would have the required access to a PennDOT-controlled roadway," citing the Board's findings at page 89 of the decision. *PennFuture brief*, p.23. PennFuture argues that the conditional use should be denied because JSPA did not meet this requirement of the ordinance.

JSPA responds that it owns 530 feet of frontage on Route 611 and has direct access to Route 611 for the shopping center, which brings it into compliance with §160-12.A(43.B)(e). However, the resort has no direct access to Route 611, and there is no vehicular access to the shopping center from the resort, so JSPA proposed the

roundabout, which is described in a map which is part of the record. *Applicant Exhibit – 34.*

PennFuture's suggestion that the Board concluded that JSPA would not have the required access to a PennDot-controlled roadway does not comport with what the Board actually determined. The Board found that JSPA had met its burden to establish PennDot access:

If constructed in accordance with Exhibit A-35, the roundabout will meet the requirement of §160-10.A(2)(3)(6)(7). ... Whether the roundabout actually works and will be approved will depend on the results of the expanded TIA study agreed to by the Applicant and both PennDOT and Township agreement and approval.

Decision p. 89.

The Board went on to impose a number of conditions requiring JSPA to provide a traffic impact study for the roundabout as part of its land development plan; the roundabout must be controlled by PennDot, not the township; a highway occupancy permit for the roundabout will be obtained as part of the land development plan; the roundabout must be constructed in compliance with §160-12.A (43.B)(e) of the zoning ordinance. *Decision, pp.104-105.*

Thus, the Board found that JSPA had complied with the traffic control requirements of the conditional use ordinance. Section 160-12A(43.B) requires that master development tracts have "frontage along and direct access to a road or highway controlled by the Pennsylvania Department of Transportation." The conditions imposed by the Board were not standards required for the grant of a conditional use. This question arose in *In re Thompson*, 896 A.2d 659 (Pa. Cmwlth. 2006), when the appellant argued

that a conditional use application should be dismissed rather than being upheld with conditions:

Generally, satisfying the criteria for conditional use is just one step of the subdivision approval process. In fact, subdivision approval cannot be granted until the conditional use approval is first obtained. See *Residents Against Matrix v. Lower Makefield Township*, 845 A.2d 908 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 572 Pa. 716, 813 A.2d 847 (2002) (a governing body cannot approve an application for final subdivision and land development when the applicant did not first apply for approval for the intended use.). Special exception or conditional use proceedings involve only the proposed use of the land, and do not involve the particular details of the design of the proposed development. *Schatz v. New Britain Township Zoning Hearing Board of Adjustment*, 141 Pa. Cmwlth. 525, 596 A.2d 294 (1991).

...

The conditions relating to dimensional issues and other criteria cited by the trial court as its basis for denying the application are not the express standards and criteria for the grant of a conditional use. The criteria relied upon by the trial court are the very criteria to which all applicants must adhere in developing property in the R-2 zoning district anywhere in the Township, regardless of whether or not a conditional use is required or an RCCD is involved. While issues pertaining to dimensional design standards were not relevant to the conditional use process, Council imposed certain conditions to improve the design of Appellants' preliminary Subdivision Plan at this stage as the dimensional design criteria would ultimately have to be satisfied in the subdivision and land development phase. The effect of the conditions is to enable Appellants to correct the deficiencies of the Subdivision Plan early on to ensure compliance with all the requirements of the Ordinance before subdivision and land development approval is bestowed.

Id. at 681-82.

The Board did not err in finding that JSPA's plan for access to Route 611 from the shopping center and the resort area complied with the requirements of the Master Development ordinance for a conditional use application.

3. Did the Board err in determining that JSPA's conditional use application complied with the Master Development ordinance requirements for greenway lands?

The final issue raised by PennFuture pertains to requirements of the Master Development ordinance for minimum greenway land requirements. The zoning ordinance provides in §160-12(43.B)(c) and (d) as follows:

(c) Master Developments shall be evaluated in the same manner as Option 1 conservation subdivisions to establish adjusted tract acreage and minimum greenway lands as described in Sections 160-21-C(B) and (C).

(d) Greenway land design, ownership and maintenance shall comply with 160-21-C(D)(E) and (F).

Master Development section of zoning ordinance, §160-12A(43.B)(c) and (d).

The Board made the following findings, among others, based upon evidence received during the hearings:

1. All greenway uses as they relate to the ordinance requirements (minimum areas for development) will be located in Paradise Township. Greenway areas may include passive recreation such as walking trails...

2. It is the Applicant's intent that the greenway remain in private ownership with the Resort...

3. The greenway will not be open to the public. The greenway land will be used for passive recreation purposes as shown on the plans for Resort guests. The public will not be given access to the stream...

4. The Applicant will retain primary responsibility to monitor greenway areas for trash...

5. The Applicant provided no additional information regarding establishing greenway lands or locating greenway lands.

6. All lands utilized by Applicant to meet the greenway/conservation requirements of §160-12(43)(B) shall comply with §160-21-C and be located in Paradise Township.

Decision, p.49.

PennFuture emphasizes that that the Board found that JSPA did not label greenway lands or establish easements for greenway lands in its plans before the Board. The Board had the information submitted in the JSPA site map, Exhibit 20, which contained site calculations showing greenway space required under the ordinance in both the resort area and the commercial area. The resort area calculations showed 91.40 acres of required greenway space and 97.86 acres are provided on the plan. It showed 47.35 acres of required greenway space in the commercial area and 49.54 acres are provided on the plan. The plans showed 27.94 acres of slopes, .23 acres of wetlands, and 2.245 acres of floodplain to be protected in the resort area. The commercial area had 9.74 acres of slopes and 7.62 acres of floodplain to be protected. *JSPA Exhibit 20.*

The Board found that JSPA had provided sufficient information on available greenway space to obtain conditional use approval, but it imposed conditions to require more detail for the SALDO process. It imposed conditions requiring additional greenway designations which are summarized as follows:

1. An updated conservation plan detailing the primary conservation areas and location of secondary conservation areas.
2. A dedicated easement preserving greenway land.

3. Identification of the title owner of greenway land and the holder of the conservation easement.
 4. A plan showing maintenance responsibilities for greenway land and operation of common facilities.
 5. Limitations on improvements in areas with 25% slope or greater.
 6. A plan to provide the township with an annual greenway monitoring report.
- Id.*, p. 108-09.

The Board noted that steep slopes existed on the property, particularly in the commercial area, and stated that greenways must adhere to the requirements of the Master Development ordinance, 160-12A(43.B)(c) and (d) to protect them. The Board stated that this would be a "heavy lift" for the developer.

PennFuture argues that where the Master Development ordinance states that JSPA's development "shall be evaluated as described in Sections 160-21-C(B) and (C)" and that "(g)reenway land design, ownership and maintenance shall comply with Section 160-21-C(D), (E) and (F)" it was incumbent upon JSPA to identify location, title, and maintenance of the greenway lands during the conditional use application process, not later during the SALDO approval. PennFuture acknowledges the general rule that "a conditional use applicant cannot be made to produce evidence of "technical details" at the conditional use approval stage." *PennFuture Reply Brief*, p.8. However, PennFuture contends that the Master Development ordinance requires more specific information about the greenways at the time of the conditional use application, and the conditional use should be denied because the JSPA did not provide it. PennFuture cites *Heister's Egg Farm, Inc. v. Walker Township Zoning Hearing Board*, 232 A.3d 1024, 1040 (Pa.

Cmwlth. 2020) where the zoning hearing board denied an enlargement of a poultry farm and egg-washing operation. There the Commonwealth Court found that the ZHB acted within its discretion, because the zoning ordinance required the developer to provide information about the adequacy of water services and it had not met its burden of proof:

We recognize that this Court has stated that zoning regulates the use of land, not the particulars of development and construction, and that, therefore, typically an application for a special exception need not address the issues of adequate sewage capacity, storm water management or water supply requirements. *Schatz v. New Britain Twp. Zoning Hearing Bd. of Adjustment*, 141 Pa.Cmwlth. 525, 596 A.2d 294 (1991). However, where a zoning ordinance provision requires that the adequacy of such items be addressed, a special exception can be denied if the applicant fails to establish that it can meet the requirements. See *Greth*, 918 A.2d at 186 (holding, "where the provision of sewage capacity is specifically required by the zoning ordinance, a special exception can be denied if the applicant fails to establish that it can meet the sewage treatment requirements"); *E. Manchester Twp. Zoning Hearing Bd. v. Dallmeyer*, 147 Pa. Cmwlth. 671, 609 A.2d 604, 608 (1992) (holding that zoning ordinance requirement "that all mobile homes be supplied with a 'continuing supply of safe and potable water as approved by the [Department of Environmental Protection]' is permissible insofar as the [z]oning [b]oard only considers whether the applicant can supply sufficient potable water to the proposed development").

Id. at 1040.

JSPA responds that the question before the court is *when* JSPA is required to specifically map, title and provide for maintenance of the greenways. It contends that it has shown that it will have adequate space for greenways as required by the ordinance, and that it will provide these particulars in the land development process. JSPA points out that the ordinance requires it to "apply for and obtain subdivision and land

development approval before permits may be issued to develop the property" *JSPA Brief*,

p.20. It cites §160-12(43.B)(m) which provides:

(m) Once the master development conditional use is approved, permits may be issued only pursuant to approved Land Development or Subdivision Plans consistent with Chapter 131 of the Paradise Township Code of Ordinances.

§160-12(43.B)(m).

JSPA argues that the Board acted within its discretion to approve the conditional use and to allow JSPA to transfer title and easements after the particulars of the location of the resort and commercial structures have been presented in the land development process. JSPA cites *Joseph v. North Whitehall Township Board of Supervisors*, 16 A.3d 1209 (Pa. Cmwlth. 2011) in support of its position. There the Commonwealth Court held that Walmart was not required to identify the retail and commercial uses to be included in its planned commercial development:

Section 308.B of the Zoning Ordinance provides that conditional use approval for a planned commercial development "is intended to occur over the same time period or an overlapping time period as review and approval of a preliminary subdivision or preliminary land development plan." ... Under the multi-tier procedural scheme contemplated by the Zoning Ordinance for reviewing a planned commercial development project, the only relevant consideration in this conditional use approval proceeding is whether Wal-Mart met the criteria for a planned commercial development, not the individual uses to be established in the development after conditional use approval.

Id. at 1216.

JSPA presented the Board with sufficient information to support its finding that JSPA can meet the master development requirements for its greenway space. The

Board's interpretation of its own ordinance is entitled to great deference and weight. *Pennsy Supply, Inc. v. Zoning Hearing Bd. of Dorrance Twp.*, 987 A.2d 1243 (Pa. Cmwith. 2009), *appeal denied*, 4 A.3d 1056 (Pa. 2010). The Board's approval of the conditional use application does not mean that it is approving a final plan for greenway space, as might be the case if this conditional use did not have to meet SALDO requirements. JSPA has approval of the use because it has presented evidence showing that it has greenway land comprising 50% of adjusted tract acreage, and 100% of primary conservation areas, but must show compliance with location, protection, title, easements and maintenance of these open areas under the ordinance before final approval. The Board has interpreted the ordinance to allow it to approve JSPA's greenway details when it has final plans of the resort, the commercial area and the trafficways to see that greenways are properly protected. That decision will not be disturbed.

PennFuture's Notice of Appeal raises a fourth issue, that the Board erred in approving JSPA's application because the conditions imposed by the Board on integration, the traffic circle and greenways, enabled JSPA to meet its burden of proof. PennFuture does not address that as a separate issue in its brief, or its reply brief, but it has raised this issue throughout its argument- that the Board boosted JSPA over the finish line with conditions, which it is not permitted to do. These issues have been discussed above when each of these aspects of the development were considered. The Board imposed 65 conditions on JSPA's project. JSPA has not challenged them and will have to comply with them as the law requires. I agree with Penn Future that the Board's conditions cannot serve as a substitute for JSPA's proof of compliance with the Master

Development ordinance. *In re Thompson*, 896 A.2d 659, 680 (Pa. Cmwlth. 2006). However, the Board found that JSPA met its burden of proof when the Board granted the conditional use approval, and the conditions were imposed to give JSPA advance notice of what the Board was going to ask for in the SALDO proceedings. As in *In re Thompson*, these conditions will improve the design of JSPA's project as it moves before the Board in the land development stage. See *Thompson*, 896 A.2d at 681-83.

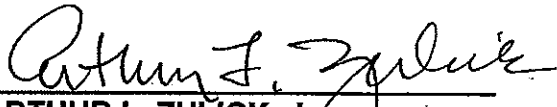
COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

IN RE: APPEAL OF CITIZENS FOR : No. 7069 CV 2023
PENNSYLVANIA'S FUTURE FROM :
THE DECISION OF THE PARADISE :
TOWNSHIP BOARD OF SUPERVISORS :
DATED SEPTEMBER 27, 2023 :
APPROVING THE CONDITIONAL USE :
APPLICATION OF JSPA REALTY, LLC, :

ORDER

AND NOW, this 12th day of March, 2024, following consideration of the appeal filed by Appellant Citizens for Pennsylvania's Future from the decision of the Board of Supervisors of Paradise Township of September 27, 2023, and the parties' briefs and arguments, that the appeal is **DENIED**.

BY THE COURT:



ARTHUR L. ZULICK, J.

cc: Brigitte M. Meyer, Esquire
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