

BEFORE THE ZONING HEARING BOARD OF LOWER MERION TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA
APPEAL Nos. 4537, 4538, 4539, 4540, 4541 & 4542

IN THE MATTER OF:	:	Owner: Lower Merion School District
Kelly Biesecker (No. 4537)	:	
Thomas and Marie-Claire MacCrory &	:	
Nicholas DeSanctis (No. 4538)	:	
Deborah Robbins (4539)	:	
Beatrice Lazaroff (4540)	:	
Kelly Biesecker (4542)	:	
	:	
and	:	
	:	
Lower Merion School District (4541)	:	
(Appellants)	:	
	:	1800 W. Montgomery Avenue & 1835
	:	County Line Road, Villanova, PA 19085
	:	(the "Field Properties")

MEMORANDUM AND ORDER

Pending before the Lower Merion Township Zoning Hearing Board ("ZHB" or "Board") are six (6) consolidated appeals. Five are from an April 27, 2022 e-mail from Lower Merion Township Zoning Officer Michael Wylie; one is from the Zoning Officers' Preliminary Opinion dated July 20, 2021.

The Board has raised, *in limine*, the issue of whether it has jurisdiction to hear any or all of the appeals and requested that parties provide their written positions. On April 18, 2022, the Board heard oral argument from the Appellants and Lower Merion School District ("LMSD"), first, on the question of the Board's jurisdiction and thereafter, LMSD's Motion to Dismiss.

The Board has studied the parties' arguments. Based on its interpretations of the Lower Merion Township Zoning Code (the "Code" or "Zoning Code"), controlling decisional law, the Municipalities Planning Code and after consideration of all submissions and oral arguments, the

ZHB concludes that, excepting only Appeal No. 4542, which it dismisses without prejudice, that the Board has jurisdiction to consider and render decisions on all appeals.

The ZHB has further concluded that LMSD's Motion to Dismiss, is denied without prejudice to reraise any arguments raised in its Motion.

FINDINGS OF FACT

1. LMSD is the legal owner of 1800 W. Montgomery Avenue (“Montgomery Avenue Property”) and 1835 County Line Road (“County Line Road Property”). (The County Line Road and Montgomery Avenue Property are collectively referred to as the “Property.”)

2. On or about April 15, 2019, LMSD submitted a Tentative Sketch Plan Application (the “Tentative Sketch Plan Application”) seeking tentative sketch plan approval for a land development plan prepared by Chester Valley Engineers dated April 15, 2019, last revised on October 30, 2019, which consisted of the following: (1) the construction of 52 surface parking spaces; (2) the creation of 6 overlapping athletic fields serving a variety of male and female sports; and (3) the installation of 3 stormwater management systems (the “Tentative Sketch Plan”).

3. The Tentative Sketch Plan was reviewed at Township public meetings, *viz.*, (1) the September 9, 2019 Lower Merion Township Planning Commission meeting; (2) the September 11, 2019 Building and Planning Committee of the Lower Merion Township Board of Commissioners meeting; (3) the September 23, 2019 Lower Merion Township Historical Commission meetings; (4) the November 13, 2019 Building and Planning Committee of the Lower Merion Township Board of Commissioners meeting; and (5) the January 8, 2020 Lower Merion Township Board of Commissioners meeting.

4. At its January 8, 2020 public meeting, the Lower Merion Township Board of Commissioners granted conditional approval of the Tentative Sketch Plan Application and Tentative Sketch Plan (the “Conditional Plan Approval”) and denied LMSD’s requested waiver from Section 101-5.C.1 & 2 of the Township’s Natural Features Code (the “Steep Slopes Waiver”).

5. The Conditional Plan Approval was memorialized in a writing dated January 22, 2021 from Christopher Leswing. (A copy of the Conditional Plan Approval was submitted to and reviewed by the ZHB).

6. The Conditional Plan Approval included the following condition:

42. Approval of this Tentative Sketch Plan does not ensure the developer or the owner can ultimately develop the property as shown on the plan. The proposed development's compliance with various Township ordinances, including but not limited to the Natural Features Conservation Code[,] shall not be determined until the applicant submits a Preliminary Plan for Township approval.

7. The Conditional Plan Approval also included condition No: "45. The property owner(s) shall comply with all applicable federal, state, county, local and Lower Merion Township ordinances and laws regardless of specific mention herein."

8. The Conditional Plan Approval did not contain any indication that LMSD had been granted any relief from the provisions of the Township's Zoning Code

9. LMSD filed a land use appeal to the Montgomery County Court of Common Pleas challenging certain specific conditions imposed by the Township in connection with the Conditional Plan Approval and the denial of the Steep Slopes Waiver (the "Land Use Appeal").

10. LMSD did not appeal Conditions Nos. 42 or 45.

11. As of the date of the Conditional Plan Approval, LMSD had not sought nor received any variances, special exceptions or other forms of relief from the ZHB relative to the Township's Zoning Code related to the Property.

12. No interested parties filed an appeal of the Conditional Plan Approval, nor did they intervene or participate in the Land Use Appeal.

13. On August 5, 2020, the Honorable Wendy Rothstein of the Montgomery County Court of Common Pleas entered an Order granting the Land Use Appeal, striking the challenged conditions.

14. The Rothstein Order did not strike Conditions Nos. 42 or 45.

15. The Rothstein Order did strike or remove any condition not specifically appealed by LMSD.

16. The Rothstein Order is the final order and was not appealed to the Commonwealth Court.

17. LMSD submitted a Preliminary Land Development Plan for the Property on or about December 2, 2020 (the "Preliminary Plan").

18. On April 16, 2021, Philip Rosenzweig, counsel for Deborah Robbins, Thomas MacCroy, Marie-Claire MacCroy, Nicholas DeSanctis, Beatrice Lazaroff and Kellie Biesecker (collectively, the "Appellants") made a "Formal Request for Zoning Determinations Regarding the Application of Lower Merion School District ("LMSD") concerning Playing Fields on 1800 W. Montgomery Avenue, Villanova, PA and 1835 County Line Road, Villanova, PA as revised." ("Determinations") from Lower Merion Township Zoning Officer (the "Zoning Officer").

19. Three of the requested Determinations related to the preservation of certain structures and elements located on the Property pursuant to the Lower Merion Township Zoning Code and the provisions of the Historic Resources Overlay District (the "HROD").

20. Two requested Determinations related to compliance with the provisions of Section 155-167.4-7 of the Zoning Code (the "Wooded Lots Ordinance") in connection with the proposed development of the Property. (collectively "the Wooded Lots Issues")

21. On April 27, 2021, Zoning Officer, Michael Wylie, responded to the requested

Determinations:

Subject: RE: Formal Request for Zoning Determinations, Lower Merion File LD#3833

Dear Mr. Rosenzweig:

Your four letters dated April 16, 2021 have been received. I am declining your request to issue letters of determination. However, we have reviewed your letters with Gil High, Township Solicitor and offer the following by way of comment to some of the issues you raise:

HROD: The issues you reference were previously litigated and decided in the Common Pleas appeal that you reference.

Wooded Lots: The Field Properties are subject to the Wooded Lots provisions of the previous zoning code. Should more than 25% of the viable trees (6 inch or greater caliper) be removed, replacement trees (at least 4 inch caliper) shall be planted in excess of the 25% removed. A planting plan indicating the proposed trees to be removed and replanted is required, subject to approval of the Township Arborist. The Township Arborist noted that a planting plan submitted indicated the correct number of trees to be replaced but that there was insufficient space provided for the trees to grow and mature. The LMSD may obtain approval of a revised planting plan and obtain a Waiver from the Board of Commissioners of Natural Features Conservation Code 101-5B(1)(a) to plant required replacement trees elsewhere, or obtain a variance from the Zoning Hearing Board from the Wooded lot regulations 155-167.7.

If you have any questions, please let me know.

Michael Wylie, Zoning Officer

Lower Merion Township

Building and Planning Department

75 E. Lancaster Avenue, Ardmore, PA 19003

mwylic@lowermerion.org 610-645-6172

22. By way of Appellants' counsel's letter dated May 26, 2021, Kelly Biesecker (Appeal No. 4537), Thomas and Marie-Claire MacCroy & Nicholas DeSanctis (Appeal No. 4538), Deborah Robbins (Appeal No. 4539) and Beatrice Lazaroff (Appeal No. 4540) appealed the Zoning Officer's email dated April 27, 2021 to the ZHB.

23. LMSD (Appeal No. 4541) filed a "contingent"/"protective" appeal of the Zoning Officer's April 27, 2021 email. ("LMSD Appeal")

24. On May 17, 2021, LMSD requested that the Zoning Officer issue a “preliminary opinion” that its Preliminary Plan complied with the Zoning Code.

25. On July 20, 2021, the Zoning Officer issued a preliminary opinion (“Preliminary Opinion”) that that “the proposed use is compliant with the Zoning Code, and the proposed improvements can be constructed provided they are shown in the plan approval process to be compliant with Township Codes.”

26. On July 23, 2020, Kelly Biesecker (Appeal No. 4542) appealed the Zoning Officer’s July 20, 2021 Preliminary Opinion.

27. LMSD amended the plan which was the basis of the Preliminary Opinion and Appeal No. 4542.

28. LMSD filed a Motion to Dismiss the Appellants appeals, supporting exhibits and brief.

29. The Appellants have provided written responses to LMSD’s Motion.

30. The Board has requested the parties to address whether it has jurisdiction over any of the appeals and to specifically address the legal effect of *Friends of Lackawanna v. Dunmore Borough Zoning Hearing Board*, 227 A.3d 37 (Pa. Cmwlth. 2020).

CONCLUIONS OF LAW

1. All Appeals pending before this ZHB, were timely filed from Mr. Wylie’s email of April 27, 2021 and Mr. Wylie’s July 20, 2021 Preliminary Opinion.

2. The Board has exclusive jurisdiction under MPC §909.1(a)(3) to hear "appeals from the determination of the zoning officer, including, but not limited to, the granting or denial of any permit." 53 P.S. §10909.1(a)(3).¹

¹ The Board’s citations are to sections of the Municipalities Planning Code. (“MPC”)

3. The Board has exclusive jurisdiction under MPC §909.1(a)(8) to hear "appeals from the zoning officer's determination under MPC §916.2 [procedures for a zoning officer preliminary opinion]." 53 P.S. §10909.1(a)(8).

4. The Board has jurisdiction to hear the appeals of Kelly Biesecker (Appeal No. 4537), Thomas and Marie-Claire MacCroy & Nicholas DeSanctis (Appeal No. 4538), Deborah Robbins (Appeal No. 4539) and Beatrice Lazaroff (Appeal No. 4540).

5. The Board has jurisdiction over LMSD's "contingent"/"protective" appeal (Appeal No. 4541) filed a of the Zoning Officer's April 27, 2021 email.

6. The Board does not have jurisdiction to hear Appellant, Kelly Biesecker' Appeal No. 4542 of the Zoning Officer's Preliminary Opinion issued on July 20, 2021 in reference to LMSD's subdivision and land development Preliminary Plan application LD#3833 to install athletic fields under MPC §909.1(a)(8) because the appeal does not challenge the substantive validity of the Zoning Code. *Friends of Lackawanna v. Dunmore Borough Zoning Hearing Board*, 227 A.3d 37 (Pa. Cmwlt. 2020).

7. LMSD has not demonstrated that all necessary elements for the application of collateral estoppel have been established or that the Zoning Officer's interpretation of Judge Rothstein's decision in his determination was legally correct.

8. LMSD did not appeal Conditions Nos. 42 or 45 of January 22, 2021 Conditional Plan Approval.

9. At this stage of the proceeding LMSD has not demonstrated entitlement to have Appeals Nos. 4537, 4538, 5439 and 4540 dismissed.

DISCUSSION

Because our jurisdiction is circumscribed by the Lower Merion Zoning Code, as well as the Pennsylvania Municipalities Planning Code, it is incumbent on the Board to decide, *in limine*, whether some or all of the appeals are within the Board's jurisdiction. The controlling jurisdictional question with respect to Appeals Nos. 4537, 4538, 4539 and 4540 is whether the Zoning Officer's April 27, 2021 email is an appealable "determination?" For the following reasons, we conclude that it was.

Pursuant to Section 909.1 of the MPC, this Board has "exclusive jurisdiction to hear and render final adjudications in ... Appeals from the determination of the zoning officer, including, *but not limited to*, the granting or denial of any permit, or failure to act on the application therefore, the issuance of a cease and desist order or the registration or refusal to register any nonconforming use, structure, or lot." (emphasis added). The Township Zoning Code is consistent with Section 909.1 and provides that the ZHB "shall have exclusive jurisdiction to hear and render final adjudications ... in Appeals from the determination of the Zoning Officer, *including, but not limited to*, the granting or denial of any permit, or failure to act on the application therefor, the issuance of any cease-and-desist order or the registration or refusal to register any nonconforming use, structure, or lot." §155-11.2(A)(1)(3).

Because the Township Zoning Code does not define "determination", the Board first looked to the MPC for the definition of the term "determination", *viz.*, the "...*final action* by an officer, body or agency charged with the administration of any land use ordinance or applications..." (Emphasis furnished) Accordingly, any "*final action*" taken by Mr. Wylie, while acting in his capacity of the Zoning Officer of the Township, would constitute a *determination*

under the MPC from which an appeal is within the jurisdiction of the Zoning Hearing Board. This leads to the question of whether Mr. Wylie's April 27, 2021 email was the "final action by an officer, body or agency charged with the administration of any land use ordinance or applications."

Under the MPC and Zoning Code, Mr. Wylie was the officer "charged with the administration" of the Township's Zoning Code. *See* MPC, §614 ("...The zoning officer shall administer the zoning ordinance..."); *see also* Zoning Code, §155-11D ("The provisions of this chapter shall be administered and enforced by the Zoning Officer[.]" (emphasis added)). The decisional law states that: "[W]here a municipality has a zoning officer, he or she generally acts in a gate-keeper-type capacity, sheltering zoning hearing boards from the duty to render preliminary decisions as to zoning compliance and the Pennsylvania Municipalities Planning Code provides relief for such officers' determinations by its jurisdictional grant to zoning hearing boards." *N. Codorus Twp. v. N. Codorus Twp. Zoning Hearing Board*, 873 A.2d 845, 848 (Pa. Cmwlth. 2005).

Our analysis of the Zoning Officer's April 27, 2021 email begins with the observation that *not all* communications with the Zoning Officer result in appealable "determinations." That said, it is import to the Board that Mr. Wylie's response was to the Appellant's *specifically* requested determinations. His reply began: "Your four letters dated April 16, 2021 have been received. I am declining your request to issue letters of determination."²

² As discussed below, the Zoning Officer's purported declination to provide a determination could have been a "determination." However, what the Zoning Officer stated in his April 27, 2021 email eliminates the necessity for a detailed analysis of this issue.

But after stating that he would not issue “*letters of determination*”, he did not remain mute. Instead, Mr. Wylie offered a substantive reply to issues presented in the Appellants’ “four letters.” Mr. Wylie’s conclusions were:

[...] The issues you reference were previously litigated and decided in the Common Pleas appeal that you reference [and...] [t]he [Forested] Properties are subject to the Wooded Lots provisions of the previous zoning code. Should more than 25% of the viable trees (6 inch or greater caliper) be removed, replacement trees (at least 4 inch caliper) shall be planted in excess of the 25% removed. A planting plan indicating the proposed trees to be removed and replanted is required, subject to the approval of the Township Arborist. The Township Arborist noted that the planting plan submitted indicated the correct number of trees to be replaced but that there was insufficient space provided for the trees to grow and mature. The LMSD may obtain approval of a revised planting plan and obtain a Waiver from the Board of Commissioners of Natural Features Conservation Code 101-5B(1)(a) to plant required trees elsewhere, or obtain a variance from the Zoning Hearing Board from the Wooded lot regulations 155-167.7.

Mr. Wylie unmistakably acted in his official capacity as Zoning Officer when he offered his conclusions. The Board finds there is no legal difference between a written, substantive response to the requested “letter of determination” and the Zoning Officer’s emailed determination of the issues to the Appellants’ counsel regardless of whether the Zoning Officer’s reply specifically addressed Appellant’s requests. The Zoning Officer’s reply was substantive; the reply proffered the Zoning Officer’s determination of the import and reach of Judge Rothstein’s decision and requirements of Township ordinances. The Board would be hard pressed to call the Zoning Officer’s April 27, 2021 email as anything other than a “determination.”

In *North Codorus Township v. North Codorus Township Zoning Hearing Board*, 873 A.2d 845 (Pa. Cmwlth. 2005), a determination was requested by a developer concerning which version of a municipality’s zoning ordinance applied to a certain development application. The

municipality's zoning officer responded to the question by way of a telephone call. *Id.* The Commonwealth Court held that the verbal statement of the zoning officer determining which version of an ordinance would apply to a development constituted a determination granting jurisdiction to the municipality's zoning hearing board. The *Codorus* decision makes clear that the *form* of the communication is not dispositive, rather the *substance* of the communication controls.

The Board concludes that the Zoning Officer's April 27, 2021 email is subject to the Board's jurisdiction under Sections 909.1(a)(3) of the MPC and Section 155-11.2 .B(1)(a)(2) of the Zoning Code. This Board's jurisdiction includes: "Appeals from *the determination of the Zoning Officer, including, but not limited to*, the granting or denial of any permit, or failure to act on the application therefor, the issuance of any cease-and-desist order or the registration or refusal to register any nonconforming use, structure or lot." The legislative intent of the phrase "*including, but not limited to*" anticipates a Zoning Officer's determination of substantive issues grounded in or derived from the interpretation of the zoning ordinance which were more expansive than those specifically listed in the statute.³ The Zoning Officer's conclusions related to the Rothstein Decision are grounded in his interpretation of the legal effect of the Court's conclusion on LMSD's compliance with the Zoning Ordinance. Likewise, the Zoning Officer's opinion related the "Historic" and "Woodland" are conclusions regarding ordinance compliance.

Finally, as stated above, the Board concludes that the purported "refusal" to issue a determination is, itself, a determination. 53 P.S. § 10614 provides: "Appointment and powers of

³The Statutory Construction Act states at 1 Pa.C.S. § 1921. "Legislative intent controls."

(a) Object and scope of construction of statutes. — The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, *to give effect to all its provisions*.

(b) Unambiguous words control construction. — When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. (Emphasis furnished)

zoning officer:" "For the administration of a zoning ordinance, a zoning officer, who shall not hold any elective office in the municipality, shall be appointed. The zoning officer shall meet qualifications established by the municipality and shall be able to demonstrate to the satisfaction of the municipality a working knowledge of municipal zoning. *The zoning officer shall administer the zoning ordinance in accordance with its literal terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the zoning ordinance.* Zoning officers may be authorized to institute civil enforcement proceedings as a means of enforcement when acting within the scope of their employment."

Under the MPC and Zoning Code, Mr. Wylie was the officer "charged with the administration" of the Township's Zoning Code. *See* MPC, §614 ("...The zoning officer shall administer the zoning ordinance..."); *see also* Zoning Code, §155-11D ("The provisions of this chapter shall be administered and enforced by the Zoning Officer[.]" (emphasis added)).

The Zoning Officer is charged with the duty to offer determinations. The decisional law states that: "[W]here a municipality has a zoning officer, *he or she generally acts in a gate-keeper-type capacity, sheltering zoning hearing boards from the duty to render preliminary decisions as to zoning compliance and the Pennsylvania Municipalities Planning Code provides relief for such officers' determinations by its jurisdictional grant to zoning hearing boards.*" *N. Codorus Twp. v. N. Codorus Twp. Zoning Hearing Board*, 873 A.2d 845, 848 (Pa. Cmwlth. 2005) (emphasis added).

Mr. Wylie's actions were as "gate-keeper" and "the Pennsylvania Municipalities Planning Code provides relief for such officers' determinations by its jurisdictional grant to zoning hearing boards." For this reason, the Board has jurisdiction over the four appeals.

The second jurisdictional issue is whether, in light of the *Lackawanna* decision, does the ZHB have jurisdiction to consider and decide Appeal No. 4542? We conclude that we lack jurisdiction to consider the merits of Appeal No. 4542.

The Commonwealth Court in *Lackawanna* has held that the only issue in an objector's appeal of a preliminary opinion issued under §916.2 is the validity of the zoning ordinance. The merits of the zoning officer's opinion cannot be considered because of the limited scope of §916.2:

Section 916.2 does not confer broad authority upon a zoning officer to issue an advisory determination on the validity of a land use proposal. A favorable preliminary opinion does not give the landowner a substantive land use approval.

Friends of Lackawanna v. Dunmore Borough Zoning Hearing Board, 227 A.3d 37, 44 (Pa. Cmwlth. 2020); *see also, Susquehanna Rheems Holdings, LLC v. West Donegal Township Zoning Hearing Board*, No. 1394 C.D. 2017, 2018 WL 3520284 (Pa. Cmwlth., July 23, 2018).

LMSD "... contends that the Biesecker Appeal No. 4542 is moot as LMSD has revised and is no longer pursuing the plan which was the subject of the Preliminary Opinion. As such, the ZHB's consideration of the Biesecker Appeal No. 4542 would result in the issuance of an advisory opinion regarding the zoning compliance of a plan that is no longer under consideration for development. See e.g., *Hopkins v. North Hopewell Tp. Zoning Hearing Bd.*, 623 A.2d 938 (Pa. Commw. 1993)." The ZHB agrees that because the specific LMSD plan at issue is no longer being pursued, there is no longer any issue to be considered in the Biesecker Appeal No. 4542, but the Board does agree that the issues are "moot." Identical issues may be presented in the future.

Because Appeal No. 4542 does not challenge the validity of the Zoning Code and because LMSD's plan which is the subject of Appeal No. 4542 is no longer being pursued,⁴ consistent with

⁴ On or about November 5, 2021, LMSD submitted a revised planting plan.

the Court in *Friends of Lackawanna* the Board cannot consider Appeal No. 4542. Appeal No. 4542 is dismissed without prejudice.

LMSD'S MOTION TO DISMISS

LMSD has moved the Board to dismiss Appeals Nos. 4537, 4538, 5439 and 4540. LMSD has “grouped” the Appellant’s appellate theories as follows: “Three of the requested determinations related to the required preservation of certain structures and elements located on the Property pursuant to the Lower Merion Township Zoning Code (the ‘Zoning Code’) and the provisions of the Historic Resources Overlay District (the ‘HROD’) in connection with the proposed development of the Property (collectively, the ‘Historic Issues’),” and, “[t]he other two requested determinations related to compliance with the provisions of Section 155-167.4-7 of the Zoning Code (the ‘Wooded Lots Ordinance’) in connection with the proposed development of the Property (collectively ‘the Wooded Lots Issues’).” LMSD has posited that the decision by Judge Rothstein forecloses this Board’s consideration of these issues, relying, in part, on the legal theory of “collateral estoppel.”

In its reply, the Appellants concede: “While there was technically a final judgment on the narrow issues presented in the Land Use Appeal, *i.e.*, the Rothstein Order, *the judgment did not concern, evaluate, or determine the issues raised by Appellants in the Appeals.* The Rothstein Order provides only that no ‘structures’ were subject to preservation under the Township Code and that no ‘structures’ constituted appurtenances to Oakwell Mansion.” But the Appellants qualify their concession, arguing: “As detailed herein, the Rothstein Order clearly did not dispose of or address the issues present in the Appeals relative to cultural landscape, historic setting, and the presence of historic landscaping on the Forested Properties. The Rothstein Order also clearly did not reference the Wooded Lot Provisions of the Zoning Code.”

There appears to be no dispute between the parties of the prerequisites for the application of “collateral estoppel.” The legal authority cited by both parties is consistent, that for collateral estoppel to apply:

(1) The issue decided in the prior case is identical to the one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party of person privity to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment.

See, Callowhill Ctr. Assocs., LLC v. Zoning Bd. of Adjustment, 2 A.3d 802, 809 (Pa. Cmwlth. 2010); *Fowler v. City of Bethlehem Zoning Hearing Bd.*, 187 A.3d 287, 294 (Pa. Commw. Ct. 2018).

At this stage, the Board does not agree that LMSD has demonstrated that all necessary elements for the application of collateral estoppel have been established or that the Zoning Officer’s interpretation of Judge Rothstein’s decision in his determination was legally correct.

LMSD’s Land Use Appeal to the Montgomery County Court of Common Pleas challenged only certain specific conditions imposed by the Township Board of Commissioners. But the January 22, 2021 Conditional Plan Approval also included unappealed conditions:

42. Approval of this Tentative Sketch Plan does not ensure the developer or the owner can ultimately develop the property as shown on the plan. The proposed development’s compliance with various Township ordinances, including but not limited to the Natural Features Conservation Code[,] shall not be determined until the applicant submits a Preliminary Plan for Township approval.

45. The property owner(s) shall comply with all applicable federal, state, county, local and Lower Merion Township ordinances and laws regardless of specific mention herein.

LMSD did not appeal Conditions Nos. 42 or 45, and therefore LMSD Conditions Nos. 42 or 45 remain to be satisfied. Stated differently, LMSD did not challenge its prospective

obligations to satisfy *all* of Lower Merion Township's applicable ordinances and laws "regardless of specific mention [in the Condition]." To the Board, "all" means "all", and therefore, the Appellants' appeal based on, *inter alia*, the Zoning Ordinance have not been foreclosed by the "Rothstein Decision."

LMSD has cited *Board of Comm. Of Cheltenham Twp. V. Hansen-Lloyd, L.P.*, 166 A.3d 496 (Pa. Cmwlth. 2017) for the proposition that "certain vested rights flow from the approval of a mandatory tentative sketch plan." LMSD claims that "In reliance upon a final, unappealable Tentative Sketch Plan, LMSD proceeded with the submission of a Preliminary Land Development Plan for the Property on or about December 2, 2020 (the 'Preliminary Plan')."

LMSD's vested rights are protections from Zoning Ordinance changes. The Appellants concede these protections, including the application of the "unamended" Zoning Ordinance. The Board agrees with the parties as to the applicable "version" Zoning Ordinance.

LMSD correctly noted that "a mandatory tentative sketch plan applicant is required to include a historic resource impact study if the property is a contributing resource or is a resource listed on the Historic Resource Inventory. *SALDO §135-16.B(1 7)*. A mandatory tentative sketch plan is also subject to review by the Historical Commission. *SALDO §135-7.C(1)*." LMSD argues "Historic Issues were ripe for consideration and determination as part of the tentative sketch plan process under Township Ordinances. As such, the Conditional Plan Approval fully decided all issues that were ripe for consideration and determination as part of the tentative sketch plan process under Township Ordinance with the exceptions of those issues that were raised in the Land Use Appeal which were ultimately finally decided by the Rothstein Order."

LMSD claims that "Rothstein Order made five specific rulings with respect to the Historic Issues: (1) Oakwell Mansion is the only structure listed on the Township's Historic Resource

Inventory (2) LMSD is not required to preserve any structures on the Property under the Township Code; (3) The Township Historic Ordinances do not prohibit the demolition of any structures on the Property; (4) the structures proposed to be demolished under the Tentative Sketch Plan are not appurtenances under the Township Historic Ordinances; and (5) the landscaping on the Property are man made and do not constitute steep slopes requiring relief from the Township's Natural Features Code." LMSD concludes: "LMSD has relied upon the final, unappealable nature of the Rothstein Order in preparing the Preliminary Plan and would be severely prejudiced if it were required to relitigate the same Historic Issues before the ZHB that it has already litigated before the Montgomery County Court of Common Pleas."

The Appellants' reply that "Appellants seek to preserve the cultural landscape (including the historic setting) of the Stoneleigh Estate, Stoneleigh Mansion, and/or Oakwell Mansion, which cultural landscape (and historic setting) includes historic structures (not in issue here), landscaping, and plantings on the Forested Properties – these issues of landscaping and plantings, the historic setting and cultural landscape, were not raised by any party in the Land Use Appeal, not considered by Judge Rothstein, and not disposed of by the Rothstein Order." The Appellants further argue: "While there was technically a final judgment on the narrow issues presented in the Land Use Appeal, *i.e.*, the Rothstein Order, *the judgment did not concern, evaluate, or determine the issues raised by Appellants in the Appeals*. The Rothstein Order provides only that no "structures" were subject to preservation under the Township Code and that no "structures" constituted appurtenances to Oakwell Mansion. As detailed herein, the Rothstein Order clearly did not dispose of or address the issues present in the Appeals relative to cultural landscape, historic setting, and the presence of historic landscaping on the Forested Properties."

As it relates to the requirements of the “Wood Lots” Ordinance, we agree with the Appellants that the Rothstein Order did not specifically resolve the issues in the Wooded Lot Provisions of the Zoning Code. The Board notes that “LMSD concedes that some elements of compliance with the Wooded Lots Ordinance were not shown on the approved Tentative Sketch Plan (i.e. replacement planting calculations) and the viability of those challenges are discussed *infra*.” It further states that “LMSD has now submitted a revised By-Right Planting Plan to address comments received by virtue of Township review of the original By-Right Planting Plan.” LMSD argues “Any determination by the ZHB regarding the compliance with the Wooded Lots Ordinance has the potential to be rendered moot as a result of a subsequent revision of the Revised By-Right Plan by LMSD.”

Of course, LMSD may procedurally and substantively challenge the appeals and present evidence on all issues raised in the Appellants’ “Request for Determination” as it relates to the Wooded Lots Ordinance⁵ However, at this stage, the Board concludes that all of the Zoning Officer’s determinations are before it and therefore, all issues presented in the Appeals and in the LMSD’s “protective appeal” are before the Board.

Finally, the Board has considered LMSD’s argument that the Appeals are barred from “relitigating any of the holdings from the Rothstein Order” before the ZHB by the doctrine of the “law of the case.” The doctrine of “law of the case” has no application to the Appeals. This Board, not the Commissioners, have exclusive jurisdiction to resolve zoning issues. This Board does not interpret the Conditional Plan Approval as the Commissioners’ “poaching” this Boards authority. Indeed, in Condition No. 45, the Commissions require LMSD’s compliance with all “ordinances.”

⁵ LMSD has argued that the Appellants “have an adequate forum and remedy to contest any Wooded Lots Ordinance issues with the final version of the planting plan before the Lower Merion Township Board of Commissioners during the preliminary plan approval process.”

The Board has considered LMSD's Motion to Dismiss and supporting materials and legal argument, but do not conclude that at this stage of the proceeding that the "Rothstein Order" or any of LMSD's arguments foreclose the Board's consideration of the issues raised by the Appellants; therefore, we deny LMSD's Motion on that basis without prejudice.

CONCLUSION

Based on the foregoing, the Zoning Hearing Board of Lower Merion Township issues the following Order for the reasons set forth above.

ORDER

AND NOW, this ___th day of _____, 2022, it is hereby ORDERED:

That the Appeal of Kelly Biesecker (No. 4537), Appeal of Thomas and Marie-Claire Mac Crory and Nicholas DeSanctis (No. 4538), Appeal of Deborah Robbins (No. 4539), Appeal of Beatrice Lazaroff (No. 4540) and Appeal of Lower Merion School District (No. 4541) are all within this Board's jurisdiction.

The Appeal of Kelly Biesecker, No. 4542 is *dismissed without prejudice*.

The Lower Merion School District's Motion to Dismiss is *denied without prejudice*.

Chairman Brier and Member Ritterband voting "aye."

Attest:



Scott Houchins
Secretary

