

BRANDYWINE VILLAGE
ASSOCIATES AND L&R
PARTNERSHIP
Appellants

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

VS.

NO. 2016-04843

EAST BRANDYWINE TOWNSHIP
BOARD OF SUPERVISORS
Appellees

LAND USE APPEAL

VS.

CARLINO EAST BRANDYWINE,
L.P.

Intervenor

Paul Allen Prince, Esquire, Attorney for Brandywine Village Associates
Eugene Orlando, Jr., Esquire, Attorney for L&R Partnership
Stacey L. Fuller, Esquire, Attorney for East Brandywine Township Board of
Supervisors
Marc Kaplan, Esquire, Attorney for Carlino East Brandywine L.P.

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OPINION OF THE COURT

Nagle, S.J.

July 18, 2017

Brandywine Village Associates and L&R Partnership (Appellants) appeal from the decision of the East Brandywine Township Board of Supervisors ("Board"), rendered on April 20, 2016, granting conditional preliminary approval of a Preliminary and Final Land Development Plan of Carlino East Brandywine LP ("Carlino") for the "East Brandywine Center", dated October 16, 2015, last revised December 9, 2015 (the "Plan"). The decision was communicated to Carlino, equitable owner of

the development tract, in a four-page letter on Township letterhead, dated April 22, 2016 and signed for the Board by Scott T. Piersol, Township Manager (the "Approval Letter"). The conditions of approval are specified in eleven numbered paragraphs, which detail various compliance requirements and conditions which must be demonstrated to the Board's satisfaction by revisions to the Plan, its plan notes, and submission of required documentation and agreements, as relevant. The Approval Letter, which is appended to this Opinion and Order for convenience, also granted 15 waivers, identified therein, from the Township's Subdivision and Land Development Ordinance ("SALDO"). Appellants 14 page Notice of Appeal, plus attachments, was timely filed on May 20, 2016. The Board's voluminous record was filed on August 5, 2016 pursuant to the writ of certiorari issued by this court on June 23, 2016. Carlino filed an untimely notice of intervention in the appeal on August 10, 2016. On August 29, 2016 Carlino filed a Petition to Intervene pursuant to Pa.R.C.P. 2327. Appellants filed an Answer in opposition on September 13, 2016. We scheduled a hearing as required by Rule 2329 for May 26, 2017. By correspondence addressed to the undersigned, dated and received on May 25, 2017, Appellants withdrew their opposition to Carlino's said Petition. We granted Carlino's Petition to

Intervene by Order dated May 25, 2017. On August 12, 2016 Appellants petitioned the court for a stay of proceedings, which, following answer filed, was granted by Judge Mark Tunnell on August 23, 2016. On August 26, 2016 Carlino filed a motion to vacate the stay. On September 23, 2016, the Appeal was reassigned to the undersigned. Following hearing and oral argument, by order entered on December 2, 2016 the stay was lifted. Appellants' brief in support of its appeal was filed on December 20, 2016. Carlino's brief in opposition to the appeal was filed on January 17, 2017. The Board by praecipe filed on January 18, 2017 joined in Carlino's brief in opposition. Following our review of this voluminous record, we affirm the Board and dismiss the Appeal.

History of the Case

The tortured history of this case began in 2010 with Carlino's submission to the Board and the Board's approval of a final land development plan for the East Brandywine Center, a mixed-use commercial development on an approximate 11.535 acre parcel located in the Township's MU – Mixed Use District. Proposed is a Giant supermarket, attached retail building and pad site for a bank (the East Brandywine Center"). The development tract is owned by the Estates of Frank Watters and Beatrice Watters, and is referred to herein as the

“Watters’ Parcel”. Carlino is equitable owner. The Watters’ Parcel, formerly owned by Mr. and Mrs. Watters, is contiguous to the Brandywine Village Shopping Center, a 10.645 acre parcel owned by Brandywine Village Associates (“BVA”). BVA was formed by L&R Associates, a general partnership owned by Leonard Blair and Richard Blair and John Cropper and his father, Robert Cropper. Both parcels were originally part of a 21 acre tract owned by the Watters, who ultimately agreed to convey the 10.645 acre parcel to BVA. Appellants aver that the Watters and the Croppers jointly submitted a subdivision and land development application to the Township showing division of the entirety into two parcels, and the development of BVA’s resulting 10.645 acre parcel into what ultimately became the Brandywine Village Shopping Center. The Township approved the BVA Plan for the Brandywine Village Property in a series of resolutions culminating in a plan approval on April 4, 1994, following which Mr. and Mrs. Watters conveyed the Brandywine Village Property to BVA on June 24, 1994. (the “BVA Plan”). The Cropper family subsequently operated a food market on BVA’s parcel that grew to 45,000 square feet, and was eventually leased to Associated Wholesalers Inc., who operated a Stauffers’ Market on the property until 2015, when it closed its doors.

Both properties front on SR322, known as the Horseshoe Pike, the highway that provides access to both properties. Part of the present dispute between Appellants and Carlino has its genesis in Brandywine's efforts to protect its rights in three easements created in a 1994 Cross Easement Agreement executed by the Watters, who then owned both parcels, and BVA. The latter document was signed and recorded contemporaneously with the Watters' conveyance of the 10.645 acre parcel to Brandywine. These private easements and the rights and obligations flowing from them are central to the dispute between the parties, and are being litigated in companion cross-declaratory judgment actions filed by Carlino and Brandywine against each other, presently pending in this court. Carlino East Brandywine L.P. v. Brandywine Village Associates and Associated Wholesalers, Inc., ChesCo Docket 2011-05037; and Brandywine Village Associates v. Carlino East Brandywine L.P. et al, ChesCo Docket 2011-05189. Under the terms of the 1994 Cross Easement Agreement, the Watters' Parcel, which Carlino is now attempting to develop, was burdened by the following easements: (1) a "perpetual easement" on the Watters' Parcel, "in common with" the Watters' Parcel, providing access, egress and ingress to the Brandywine Center; (2) a sanitary sewer easement pursuant to which sewage from

the Brandywine Village Shopping Center was formerly treated and disposed of in an on-site package treatment plant located on the Watters' Parcel; and (3) an irrevocable stormwater basin and drainage easement pursuant to which stormwater management facilities were constructed on the Watters' Parcel to accept surface water drainage from the Brandywine Village Shopping Center and its access driveway that crosses the Watters' Parcel. L&R/BVA Exhibit 2. BVA's Center has subsequently been connected to the Township Municipal Authority's public sewer system and the on-site package sewage treatment plant located on the Watters' Parcel within the confines of the sewer easement has been abandoned pursuant to PADEP regulations. Appellant, BVA argues that Carlino's proposed development and the Township's Plan approval thereof unlawfully interferes with and impairs the contractual and vested property rights to which it is entitled by virtue of the 1994 Cross Easement Agreement and its predecessor, a June 13, 1990 easement agreement, and the 1994 BVA Plan.

History of Township Approval Process From Inception

First Plan. Carlino's initial preliminary land development plan for its proposed Center was filed with the Township on May 27, 2010, review and discussion about which culminated in Carlino's submission to the

Township of a formal preliminary plan on January 12, 2011, revised again after Township review in March 2011. We have previously noted in our January 6, 2017 Opinion, pp. 4-5, addressing the 2014 Plan appeal, the Board's initial insistence that the proposed access to the Carlino and Brandywine developments depicted on that Plan connect Route 322 to North Guthriesville Road by means of a new road through the Watters' Parcel. Carlino East Brandywine v. Brandywine Village Associates, ChesCo Docket 2015 – 01448-ZB; Andreas Heinrich, P.E., Township Engineer's testimony, 3/29/16, pp. 609-614. This was the genesis of the so-called Connector Road that is discussed later in this Opinion, which continues to appear on **the Revised 2015 Plan** now under appeal. Access to both Carlino's proposed development and the Brandywine Village Shopping Center is proposed to be provided via a new "Connector Road", identified on the plans as Brandywine Village Drive, at the signalized intersection with Horseshoe Pike (Route 322) by means of the proposed extension of Brandywine Village Drive as a public road to a new intersection with Guthriesville Road. The Township intends to accept dedication of the Connector Road after it is constructed by Carlino. The Board conditionally approved Carlino's first preliminary plan on April 8, 2011. (**the "2010 Plan"**). Carlino accepted the conditions, and

on July 20, 2011 entered into an agreement with the Board memorializing various undertakings to which Carlino and the Township agreed as conditions of that approval (**the “Development Agreement”**). Among the conditions of approval, the Township required Carlino to construct a road for public use on and through both the Watters' Parcel and the contiguous property now owned by L&R. On August 4, 2011, the Board approved Carlino's final land development plan. (**the “2011 Approval”**). It is undisputed that construction of this road by Carlino, imposed by the Board as a condition of approval of Carlino's land development plans, is not required by any Township ordinance or regulation.

In the Development Agreement accompanying the latter plan approval, Carlino agreed to amicably acquire a portion of L&R's land from the latter's predecessor in title to facilitate construction of the Connector Road; if unsuccessful, the Township agreed to acquire the land by exercising its power of eminent domain at Carlino's sole cost and expense. Development Agreement, pp. 2-4, paragraphs C. thru K & pp. 13-14, paragraphs A. & B.

On October 12, 2012, this court reversed the Board's **2011 Approval** because L&R's predecessor was not an applicant or otherwise

party to Carlino's land development application, and Carlino had no ownership interest, actual or equitable, in that property. **(the "2010 Plan Reversal")**). The Township has subsequently taken the position that in light of the Court's reversal of the Board's approval of the 2010 Plan, the Development Agreement is null and void. Carlino has disagreed with the Township's position, and has nonetheless decided to include the Connector Road in its subsequent plans. Irrespective of its stated position respecting Carlino's obligation to build the Connector Road, the Township proceeded with condemnation of Brandywine's easements and a portion of L&R's property over which the Road is proposed to be constructed. See BVA/L&R Exhibits 13, 15 & 21.

On November 17, 2014, the Township filed a Declaration of Taking that condemned a portion of L&R's property for construction of the Connector Road and associated stormwater management facilities. The Declaration also condemned and extinguished portions of the three easements located on the Watters' Parcel that were created by the 1994 Cross Easement Agreement, to the extent they precluded construction of the Connector Road and its associated facilities. The declaration did not condemn the underlying fee title to the land. **(the "Condemnation")**.

The Development Agreement also required Carlino to negotiate with Brandywine to amend the 1994 Cross Easement Agreement in three respects: (1) replace Brandywine's access easement and the driveway located within the easement, which now provides the sole access to the BrandywineCenter, by substituting such access over and through the Connector Road. Negotiations, if any, failed. Brandywine contends that such disruption of its existing access would require a modification of the access easement itself, which is prohibited by the terms of the Cross Easement Agreement and by applicable law. As now configured, the proposed Connector Road extends over a portion of the existing detention basin on the Watters' Parcel, which serves Brandywine's existing driveway access to its shopping center; (2) secure decommissioning of the on-site package treatment plant on the Watters' Parcel serving the Brandywine Center by requiring Carlino to purchase sewage capacity from the Township's Municipal Authority and at the wastewater treatment plant, and by requiring Brandywine to connect its shopping center to those facilities by tapping into Carlino's sewer line. A provision in the Cross Easement Agreement obligates Brandywine to connect to "a publically operated sewer system" when such facilities become available; *Pursuant to orders issued by this court, as required by*

the 1994 Cross Easement Agreement Brandywine has subsequently connected the Brandywine Shopping Center to the Township Municipal Authority's public sewer system, has disconnected its Center from the on-site sewerage system located on the Watters' Parcel, and is in the process of decommissioning the on-site sewage treatment plant and its facilities; and (3) securing a court declaration, if necessary, that Brandywine abandoned the stormwater basin and drainage easements by grading the Brandywine shopping center to divert surface water drainage away from the Watters' Parcel to underground stormwater management facilities on Brandywine's Center. Carlino's contends that when the Connector Road is constructed, the need for the basin that currently accepts surface water drainage from Brandywine's driveway will be eliminated.

Second Plan. On December 8, 2014, Carlino submitted a new Preliminary/Final Land Development Plan to the Township for its proposed shopping center (**the "2014 Plans"**). The 2014 Plans are substantially the same in material part as the 2011 Plans; however, based upon the Townships condemnation of a portion of L&R's land, these plans identified the Township, rather than L&R, as the owner of the land over which the Connector Road and its improvements would be

constructed by Carlino. Brandywine's easements in the Watters' Parcel were not shown on the 2014 Plans, since by then they had been condemned by the Township. Brandywine and L&R have appealed the condemnation, which is pending before another judge of this court.

Brandywine Village Associates and L&R v. East Brandywine Township, ChesCo Docket 2014 – 11237.

On January 21, 2015, 44 days after plan submission, in what Appellants characterize as “surreptitiously rushing through the plan approval without providing required notice” to Appellants, the Board granted preliminary plan approval of Carlino's **2014 Plans**, communicated to Carlino in a written decision dated February 3, 2015 (**the “2015 Approval”**). Appellants' brief, p. 6.¹ Brandywine and L&R (“Appellants”) appealed that decision on February 20, 2015. (**the “2015 Appeal”**). Pursuant to Appellants' March 9, 2015 “Motion for Evidentiary Hearing”, the case was remanded to the Board to allow the Appellants to present additional evidence. The Board conducted additional hearings on July 28, August 4, September 9, and September 17, 2015 during which the Appellants presented additional evidence in opposition to Carlino's

¹ Section 399-48 of the Township's zoning ordinance requires development in the MU District to be supported by a plan demonstrating compliance with area and bulk regulations and design standards. §§399-46 & 399-47; however, where the proposed use constitutes a land development, the plan submission requirements of the SALDO supersede this requirement. Section 399-48 requires that notice be given to property owners within 500 feet of the development tract of the application and the process through which the application will be reviewed and decided upon. Carlino's proposed use is by right and not by conditional use. Irrespective of Carlino's disagreement that it was required to provide Appellants' notice, the Court's remand of the case to the Board for further hearings cured any perceived violation of this Section.

2014 Plan, and Carlino extensively cross-examined Appellants' witnesses, during which Carlino introduced documentary evidence previously authenticated during prior proceedings before the Board respecting Carlino's Plans.

On October 1, 2015 the Board reversed its prior decision, **the 2015 Approval**, and denied Carlino's **2014 Plan**, finding non-compliance with various sections of the SALDO, its Zoning Ordinance, and SWMO. The Board premised its decision in part on Appellants' evidence. (**the "Revised 2015 Decision"**).

Third Plan. While the remand hearings were in progress, on June 1, 2015 Carlino filed a Final Land Development Plan, which it believed addressed the Township's objections to its **2014 Plan**, and which was accompanied by Carlino's written narrative. This narrative acknowledged various design flaws and deficiencies in its 2014 Plan and explained the corrections made.

On October 22, 2015, Carlino appealed the Board's Revised 2015 Decision. ChesCo Docket 2015-09905-ZB; however, pursuant to stipulation of the parties approved by the court on November 12, 2015, Carlino withdrew that appeal based upon agreement of the parties that all issues related thereto could properly be addressed and determined by this court in the 2015 Appeal.

Fourth Plan. On October 22, 2015 Carlino also filed a fourth application for a new Preliminary/Final Land Development Plan approval, entitled Preliminary/Final Plan for East Brandywine Center, dated October 16, 2015, last revised December 9, 2015) (**the "Revised 2015 Plan"**). This plan does not vary in material part from **Third Plan**. Evidentiary hearings were again conducted by the Board at

Brandywine's request on February 17, 2016, March 3, 2016, and March 29, 2016, during which Brandywine and L&R presented testimony substantially similar to, and respecting the same issues as had been presented during the Board's 2015 evidentiary hearings concerning the **2014 Plan**. The Board conditionally approved **the Revised 2015 Plan** on April 20, 2016. **(the 2015 Revised Plan Approval)**. It is this plan approval that is the subject of the instant appeal.

On January 6, 2017, this court issued an Opinion and Order essentially sustaining the Board's October 1, 2015 denial of Carlino's 2014 Plan. In doing so, we discussed at length all of the issues, save two, that have again been raised by the Appellants in the instant appeal, finding no merit in them on the record then before us. As a consequence, Carlino now argues that our disposition of those issues bars reconsideration of them in this Appeal under the doctrine of collateral estoppel. Appellants argue that they sought to delay the Board's consideration of the Revised 2015 Plan pending this court's decision on the 2014 Plan, but their request was rejected, which prompted them to insist upon additional hearings, since the zoning violations they claim existed in the 2014 Plan continued to be perpetuated in the 2015 Plan. Accordingly, we have thoroughly reviewed the instant Record to determine whether and in what respects Carlino's collateral estoppel argument has merit. We find that it does have merit.

Standard of Review

Where, as here, we have not taken additional evidence, our review is limited to determining whether the governing body committed an error of law or abused its discretion. *CACO Three, Inc. v. Board of Sup'rs of*

Huntington Township, 845 A.2d 991 (Pa.Cmwlt.,2004), citing *Ruf v. Buckingham Township*, 765 A.2d 1166 (Pa.Cmwlt.2001). The governing body abuses its discretion when its findings and decision are not supported by substantial evidence, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Ass'n v. Zoning Board of Adjustment*, 462 A.2d 637 (Pa.,1983); *Bailey v. Upper Southampton Township*, 690 A.2d 1324 (Cmwlt.Ct. 1997). Evaluating whether substantial evidence is present to support the Board's decision, we may not impose our own view on the credibility of witnesses because the Board, as fact finder, is the sole judge of credibility with power to resolve conflicts in the testimony and to reject even uncontradicted testimony that it finds to be lacking in credibility." *In re Petition of Dolington Land Group*, 839 A.2d 1021, 1026 (Pa. 2003) (citing *Nettleton v. Zoning Board of Adjustment*, 828 A.2d 1033, 1041 (Pa. 2003).

Applicable Law

Preliminary Plan Review & Approval Standard:

A preliminary plan must be approved if it meets all specific, objective requirements under a subdivision and land development ordinance. *Herr v. Lancaster County Planning Commission*, 625 A.2d

164 (Pa.Cmwlt.,1993), appeal denied, 649 A.2d 677 (Pa.,1994). The preliminary plan is essentially conditional in nature in that after its approval, the developer must still fulfill all the requirements to obtain final approval. *Joseph v. North Whitehall Tp. Bd. of Sup'rs*, 16 A.3d 1209 (Pa.Cmwlt.,2011); *Tuscarora Forests, Inc. v. Fermanagh Board of Supervisors*, 471 A.2d 137 (Pa.Cmwlt. ,1984). Consequently, even where the preliminary plan fails to comply with the objective, substantive ordinance requirements, the governing body may in its discretion either reject the plan outright or grant conditional approval. *Schultheis v. Board of Supervisors of Upper Bern Township*, 727 A.2d 145 (Pa.Cmwlt.1999). A governing body may impose on the approval of a land development reasonable and economically feasible conditions with the applicant's acceptance. *Koresko v. Farley*, 844 A.2d 607(Pa.Cmwlt.,2004) citing *Doran Inv. v. Muhlenberg Township*, 309 A.2d 450 (Pa. Cmwlt.,1973); *Weiser v. Latimore Township*, 960 A.2d 924 (Pa.Cmwlt.,2008); 53 P.S. §10508(4). However, a governing body may not condition its approval of a plan upon a developer meeting a standard not contained in a statute or ordinance. *Appeal of Fiore*, 459 A.2d 911, 912 (Pa.Cmwlt., 1983). The interpretation and application of ordinance terms are within the sole discretion of the governing body, and

will not be disturbed absent a demonstration that an abuse of discretion or an error of law was committed. *Morris v. South Coventry Tp. Bd. of Sup'rs*, 836 A.2d 1015 (Pa.Cmwth.,2003) citing *Baker v. Chartiers Township Zoning Hearing Board*, 677 A.2d 1274 (Pa.Cmwth.1996), petition for allowance of appeal denied, 547 Pa. 738, 690 A.2d 238 (1997). A preliminary plan containing minor defects correctable by amendment must be approved subject to a condition that necessary corrections be made. *Shelbourne Square Assoc. v. Board of Supervisors of Township of Exeter*, 794 A.2d 946 (Pa.Cmwth., 2002), appeal denied, 572 Pa. 727, 814 A.2d 679 (2002). Once a preliminary application has been approved, the applicant is entitled to final approval in accordance with the approved preliminary plan. However, Section 508(4) of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended and reenacted, 53 P.S. §101 et seq. ("PAMPC") permits the governing body to impose conditions upon the approval of the final plan with the applicant's acceptance. *Morris v. South Coventry Tp. Bd. of Supervisors*, 898 A.2d 1213 (Pa.Cmwth.,2006). 53 P.S. §10508(4).

Waivers

Since Appellants contest two plan waivers granted by the Board, we address the applicable law. A grant of waivers from subdivision and land development ordinance provisions requires less rigorous proof than the proof required for granting a variance from the zoning ordinance provisions. *Telvil Constr. Corp. v. Zoning Hearing Bd. of E. Pikeland Twp.*, 896 A.2d 651 (Pa.Cmwlt.2006). Waivers may be properly granted where literal enforcement of a requirement in question will frustrate the implementation of other requirements, or where an additional requirement would offer little or no additional benefit. *Tioga Pres. Group v. Tioga County Planning Comm'n*, 970 A.2d 1200 (Pa.Cmwlt.2009), appeal denied, 603 Pa. 687, 982 A.2d 1229 (2009); *Ruf v. Buckingham Twp.*, 765 A.2d 1166 (Pa.Cmwlt.2001). Further, a municipality “may grant waivers which it deems appropriate in the interest of the township.” *Valenti v. Washington Twp.*, 737 A.2d 346, 349 (Pa.Cmwlt.1999). The decision to grant waivers is within the discretion of the governing body. *Miravich v. Twp. of Exeter*, 54 A.3d 106, 114 (Pa. Cmwlt. 2012) (*Miravich II*). The Township has the discretion, pursuant to Section 512.1(a) of the MPC, to grant or deny any and all SALDO waivers requested in a subdivision plan. *Miravich v. Township of Exeter, Berks County*, 54 A.3d 106, 114 (Pa.Cmwlt.2012), appeal denied, — Pa. —

—, 75 A.3d 1283 (2013). However, such discretion is not unfettered. In deciding whether to grant a modification pursuant to Section 512.1(a) of the MPC, “ [the governing body's] duty is to actively oppose schemes of development unreasonably proposed and conceived, but likewise, [its] duty is to sanction well planned development.” *Ruf*, 765 A.2d @ 1169 (Pa.Cmwlth.2001) (quoting *Raum v. Board of Supervisors of Tredyffrin Township*, 370 A.2d 777, 781 (Pa.Cmwlth.1976)). “Further, where literal enforcement of a requirement under the [SALDO] will frustrate the effect of the improvements designed to implement other requirements, grant of a waiver is proper under Section 512.1(a) of the MPC.” *Id.*; see also *Monroe Meadows Housing Partnership, LP v. Municipal Council*, 926 A.2d 548, 553 (Pa.Cmwlth.2007) (“[A] [SALDO] waiver [is] proper where a development offers a substantial equivalent to a subdivision requirement, where an additional requirement would offer little or no additional benefit, and where literal enforcement of a requirement would frustrate the effect of improvements.”).

Collateral Estoppel

To invoke **collateral estoppel**, five elements must be present: 1) the issue decided in the prior case must be identical to the issue in the present case; 2) there was a final judgment on the merits; 3) the issue

must be essential to the judgment; 4) the party against whom the estoppel is asserted must have had a full and fair chance to litigate on the merits; and 5) the party against whom the estoppel is asserted must be a party or in privity with a party in the prior case. *Mellon Bank v. Rafsky*, 369 Pa.Super. 585, 593, 535 A.2d 1090, 1093; *Shaffer v. Pullman Trailmobile, Division of M.W. Kellogg Co.*, 368 Pa.Superior Ct. 199, 533 A.2d 1023 (1987). Collateral estoppel will bar a subsequent cause of action if: (1) the issue decided in the prior adjudication was identical with the one presented in the later action; (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 the party to the prior adjudication; and (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue and question in a prior action. *Pat's Auto Sales v. Department of Transportation*, 744 A.2d 355 (Pa. Cmwlth. 2000).

We find that the following issues, decided in our January 6, 2017 Opinion and accompanying Order respecting the 2014 Plan, Appendix "A" hereto, and again raised by the Appellants in this instant appeal, are subject to collateral estoppel, and are barred from reconsideration, there being no material changes from the 2014 Plan. References below are to the latter Opinion. They are as follows: (1) Bank building setback from

Connector Road, Zoning Ordinance §399-46.C, pp. 8-11; (2) Reserve Sewage Effluent Area, SALDO §350-47.B(2) and Zoning Ordinance §399-47.K, pp. 11 – 14. Note the second waiver approved by Board, discussed below is from the reserve area regulation; (3) Minimum Tract Area, Zoning Ordinance §399-46, p. 14; (4) Development Tract Ownership, Zoning Ordinance §399-47.N, p. 23; (5) Impervious Surface Coverage, Zoning Ordinance §399-46.F, pp. 25-26; (6) Parking, Slope and Street regulations, Zoning Ordinance §399-46.J, and §399-112.D, pp. 24-25; (7) Riparian Corridor Conservation District. Zoning Ordinance §399-13.1.B(2)(a)(5), pp 27-29 & SALDO§350-52.H(6), H(7) & C.(8), §350-53.A(1), & §350-53.1, pp. 31-32; (8) Preliminary Plan Reviews, SALDO §§350-14.A.(2) & 14.B.(2), p. 29 (moot after remand hearings); (9) Street width, SALDO §350-32. A & C, pp. 29-30; (1) Erosion Control, SALDO§350-52.A.(2), pp.30-31; and (11) Sediment Control, SALDO §350-52.C.(1), pp. 31.

Discussion - Waivers

Appellants argue that two waivers granted by the Board constitute an abuse of discretion and are contrary to law. The other waivers granted by the Board are neither in dispute nor contested. The waivers at issue are as follows.

First waiver. The Board granted a waiver from Section 350-40.N.2, which provides in pertinent part:

“N. In order to provide for safe and convenient ingress and egress, private driveway entrances shall be rounded as follows:

(2) For non-residential driveways, a minimum radius of 30 feet shall be provided. Greater radii may be required where truck traffic is to occur.”

On October 16, 2015 ARNA Engineering submitted to the Board on Carlino’s behalf various waiver requests. Included among them was a request allowing a decrease in the radius of the driveway (Connector Road) to 25 feet at its signalized intersection with Route 322. SALDO Section 350-40.N.2. The waiver was predicated on the geometry of the driveway, which does not allow for a 30 feet radius without encroaching on Brandywine’s property. Under Carlino’s plan, the proposed Connector Road is located to the East of Brandywine’s existing driveway access, closer to the BrandywineCenter. Brandywine argues that the waiver would not be required if Brandywine’s existing driveway access were not proposed to be replaced by construction of the Connector Road. This SALDO requirement applies to the construction of private driveways. Some history is in order. Pursuant to an August 20, 2014 Memorandum of Understanding (the “MOA”) between Carlino and the Board, as noted above, on November 17, 2014 the Township filed a Declaration of Taking

condemning the access and stormwater easements or parts thereof located on the Watters' Parcel created by the Easement Agreement. The Township also condemned a portion of L&R's adjoining property to enable the location of the Connector Road, linking Horseshoe Pike and North Guthriesville Road. The Connector Road will serve as the principal access to both developments. The MOA pertinently specifies (1) the Township's intent that the Connector Road be a "public road", constructed and dedicated in the public interest; (2) Carlino's obligation to construct the Connector Road "in accordance with the development plans"; (3) following its construction, Carlino's obligation to convey the Connector Road, its related improvements and the right-of-way of the road in fee to the Township, and the Township's obligation to accept such dedication. As we understand the testimony and Carlino's plan, that portion of the proposed Connector Road located on L&R's property has a SALDO compliant depicted right-of-way of 50 feet; the portion of the Connector Road located on Watters' Parcel is depicted as a "driveway" without a designated right-of-way, although the driveway cartway width equals or exceeds both the cartway and right-of-way widths required for a "minor collector" street. SALDO Section 350-32.A.

Brandywine rightly argues that it has no obligation to reconfigure or eliminate an access isle in its shopping center to provide additional land to accommodate the 30 foot radius. Given Brandywine's opposition to Carlino's development, it refuses such accommodation. Although the Township's traffic engineer, Andreas Heinrich, P.E., opined that the radius could be enlarged with Brandywine's cooperation, the Board made no such request to Brandywine. Mr. Heinrich testified in his March 29, 2016 testimony that he had previously recommended to the Board that it was necessary to relocate the Connector Road to the location now shown on Carlino's Plan – to the East of the present driveway access to the Brandywine Center from Horseshoe Pike - to provide for adequate separation on Route 322 between a signalized intersection at Bollinger Road and Route 322, located to the West of the signalized intersection serving the Brandywine/Carlino developments. Notes of Testimony, 3/29/16, Heinrich testimony, p. 614.

As was the case in the prior hearings during which Carlino's 2014 Preliminary Plan was considered by the Board, traffic engineer John Caruolo, P.E. again appeared as an expert witness on Appellants' behalf and testified respecting several traffic concerns. Notes of Testimony, 3/16/16, pp. 347 – 516. They are fully expressed in his review

memorandums dated February 16 and March 16, 2016. L&R & Brandywine Exhibits 4 & 5. Summarizing, and respecting the instant waiver, he opined that the driveway (Connector Road) needed to be widened, and the turning radii of the internal intersections connecting both developments to the Connector Road needed to be enlarged, to accommodate the turning movements of delivery trucks, including tractor-trailers. His objections centered upon the turn-in and turn-out lanes to and from both Carlino's development and the Brandywine Center located along the Connector Road, including the radius reduction for which the Board granted the contested waiver. The point of his opinion testimony was that as configured, the Connector Road does not provide safe and efficient access because delivery trucks would need to go outside their lane of travel to complete their turns. See Carlino Exhibit A-36, Drawing No. 20. Mr. Caruolo also offered testimony on other objections, all of which are described in his testimony and summarized by him. L&R/BVA Exhibits 4 & 5. Having read the entirety of the testimony of Mr. Caruolo and Mr. Heinrich, we conclude that the Board had adequate basis in the evidence to locate the Connector Road as depicted on Carlino's instant Plan, thereby necessitating a reduction in the radius at the Connector Road intersection with Route 322. Literal

enforcement of the radius requirement in this one instance to which the waiver applies, would require shifting the Connector Road to the West, thereby reducing the separation of traffic signals on Route 322 described by Mr. Heinrich. As noted, it would not improve Brandywine Center's access, which is fixed by the existing travel isles within that development. Considering the standard of review by which we are bound, we conclude the credibility of the testimony of both traffic experts was for the Board to determine, and in accepting Mr. Heinrich's evaluations on this issue, Board was justified in granting the requested waiver from Section 350-40.N.2., and did not abuse its discretion in doing so.

Second Waiver: The Board granted a waiver from SALDO Section 350-47.B(2), which addresses the requirement that a storage area be provided for "treated sewage effluent on the land development site.

"All subdivisions and land developments shall be self-sustaining relative to the storage and disposal of treated sewage effluent. The applicant shall provide sufficient storage and land area on or off the subdivision or land development site to store and dispose of all treated sewage effluent which is generated by the uses on the site by means of conventional underground seepage beds or drip irrigation. The land area shall be sized at 1 ½ times the land area determined necessary...". 350-47.B(2).

Carlino proposes to provide public sanitary sewage service to its proposed development, and has obtained approval from both the

Township and its Sewer Authority to do so, thereby leading the Board to conclude that an effluent storage area is not required in this instance. Sewage effluent is the end by-product of the treatment of raw sewage. We addressed the need for a waiver from this Section in our January 6, 2017 Opinion. Appellants had also previously argued that Carlino needed a variance from Section 399-47.K of the Zoning Ordinance because the latter Section incorporates the Section 350-47.B(2) SALDO provisions, thereby rendering them subject to traditional zoning variance hardship standards. It pressed the argument that in its future plans Carlino would be precluded from seeking a waiver of 350-47.B(2). We found Appellants' argument to be meritless. Section 399-47.K merely references the necessity of the developer's compliance with the cited sections of the SALDO, but does not by incorporation make them zoning regulations. We have previously found that PADEP approved the Township's expansion of its public sewerage system to include both the Watters' Parcel and Brandywine's property, including the facilities needed to convey and treat raw sewage from those development parcels and dispose of the treated effluent on other land. Accordingly, we now conclude that the Board is empowered to grant a waiver from this SALDO regulation pursuant to PAMPC Section 503(8), 53 P.S.

§10503(8) upon its determination that Carlino complies with the standard for waiver created by PAMPC Section 512.1, 53 P.S. §10512.1.

Appellants have also previously argued that pursuant to SALDO Section 350-47.B(2), Carlino must maintain Brandywine's existing reserve sewer area on the Carlino property for the Brandywine Center's on-site septic system. We have found this contention meritless. Brandywine has connected its Shopping Center to the Township's public sewer system, and in another proceeding we have ordered Brandywine to remove its on-site sewerage facilities which were originally located on the Carlino tract pursuant to the terms of the 1994 Cross Easement Agreement between Brandywine and Carlino's grantors. Brandywine is also required to decommission the sewage system, including any reserve disposal area, which it is now in the process of doing. There is no evidence in this record that Brandywine's on-site sewage system located on Carlino's land was designed and installed with the intention of complying with SALDO Section 350-47.B(2), which Section was not adopted until January 3, 2011 well after the Brandywine Center's development plan was approved in 1994. Indeed, the Cross Easement Agreement attached to Appellants' appeal as Exhibit "A" specifically states in paragraph "A" that the sewer easement has been granted for

“an on-site septic sewer system”. No provision is made in that Agreement for the continued reservation of an area for disposal sewage effluent once Brandywine’s property is connected to the public sewer system.

Safe and Convenient Efficient Ingress and Egress, Zoning

Ordinance § 399-81.E.

As to the Connector Road width and turning radii at other interior locations, Mr. Heinrich opined that the width of the road was adequate, and not problematic, and complied with Township regulations. In his testimony, he specifically addressed his disagreement with Mr. Caruolo’s objections. He opined that truck access over the Connector Road from Route 322 was adequate to accommodate truck turns. N.T. 3/29/16, pp. 618-619. While he agreed that turning radii on the Connector Road were not in every instance optimum in terms of the occasional anticipated delivery truck traffic, such did not render the road and intersections unsafe, and was a condition common to most shopping centers. Heinrich 2/24/16 Review Letter, Board Exhibit B-21, p.2 & 3. Contrary to Appellants’ brief, in reading Mr. Heinrich’s testimony about this issue, we found no instance in which he concluded the road intersections were deficient or unsafe. In fact, he specifically testified that the Connector

Road intersections were not unsafe, and that there were no safety issues. Notes of Testimony, March 29, 2016, pp. 616-617 & 647. He related that access from Route 322 to the Connector Road had been reviewed by PennDot, and that in his opinion the location of the intersection was fixed and approved by PennDot. N.T. 630-639. In this regard, Mr. Heinrich also observed that access from the Connector Road to Brandywine Center was fixed by the location of the existing access isles in that Center. He also recommended a second access to Brandywine Center from the Connector Road at the rear of the Center, the location of which is depicted on Carlino Exhibit A-36, Drawing No. 20.00. A second such access would provide improved circulation within Brandywine Center and better access for truck deliveries, but Brandywine has declined to permit such additional access. N.T. 3/29/16, pp. 620-629. Mr. Heinrich also noted that Brandywine has an existing second access to its Center, a right in/right out only driveway on Route 322, now used for truck deliveries that would not be affected by the Connector Road.

Mr. Caruolo criticized Carlino's March 2011 Traffic Impact Study as out-of-date and, opined that the proposed 125 feet long deceleration lane accommodating West bound Route 322 traffic proposing to access the

Connector Road was inadequate in length by half the required 250 feet. Mr. Heinrich disagreed with each of Mr. Caruolo's opinions and testified to the contrary. Notes of Testimony 3/29/16, pp. 599 – 770. Mr. Heinrich completed a Traffic Engineering Review of Carlino's first plan and subsequent iterations for the Board, which included several review letters, June 22, 2010, April 1, 2011, February 22, 2011, August 2, 2011, March 30, 2012, February 15, 2016 and February 24, 2016. Board Exhibits B-17 & B-21; Carlino Exhibit A-50. Respecting the issue of safe and efficient access, Mr. Heinrich concluded that the issue of traffic counts on Route 322 was of concern principally to PennDOT, who has final regulatory authority over that State highway. Based on his familiarity with subsequent development in the Township that would potentially add traffic to Route 322, he concluded that an updated traffic study with new traffic counts would not materially change the impacts on that highway. He noted that traffic counts would focus on optimization of the traffic signal timing, but not access to the Connector Road or other considerations. He agreed that PennDot might require an updated traffic study, but that that agency had reviewed the plans and made comments, and had not yet specified a need for a revised traffic study. See Heinrich 2/24/16 Review Letter, Board Exhibit B-2, p.1; Notes of Testimony,

March 29, 2016, p. 632 et seq. In its decision, the Board took the path of caution, ordering Carlino “to provide an updated Traffic Impact Study for the proposed development”, thus mooted this issue.

SALDO Section 350-36. Access to the Connector Road from Route 322 for north bound traffic is facilitated by a separate traffic lane 165 feet in length, including a 55 feet taper, variously referred to in the Record as a deceleration lane and a turning lane. The speed limit on Route 322 at this location is 35 mph. Section 350-36.B(3) specifies that a deceleration lane must be 165 feet in length when the speed on the highway is less than 40 mph. Mr. Caruolo's third principal concern was the failure of the Plan to provide a deceleration lane to the Connector Road as part of the Horseshoe Pike (SR322) road improvements. Route 322 is a state highway. Were a deceleration lane required, PennDot standards would apply and require it to be 250 feet in length. Joseph Dobson, P.E. the Township Engineer testified that as designed on Carlino's plans, the lane is shorter than required by the foregoing Section. Mr. Heinrich testified the proposed right-hand turn lane was not designed as a deceleration lane, but, rather was required by PennDOT as a right turn-in lane. Mr. Heinrich explained the difference between a deceleration lane and a turn-in lane, and opined that his review of the operation of the

intersection – Route 322 and the Connector Road – demonstrated that adequate levels of service are provided without a deceleration lane on Route 322. While he did not think a turn-in lane was necessary, he noted that PennDOT had the authority to require a right-in traffic lane and did so in its “conditions statement” specifying its initial requirements in approving connection of the Connector Road to Route 322; however, PennDot did not require a deceleration lane. Notes of Testimony, 3/29/16, pp. 641-646. PennDot has ultimate authority over this issue on its state highway.

Recorded Easements. Appellants present the following question for determination by the Court in their Appeal.

“Do recorded easements and related plan approvals in furtherance thereof create vested rights in a landowner that must be acknowledged by proposed developments that come later in time?”

Brandywine argues that it enjoys vested rights in the Cross Easement Agreement and in the Brandywine Center approved 1994 land development plan. Citing *Starling v. Lake Meade Owners Association*, 121 A.3d 1021 (Pa. Super. 2015) and PAMPC Section 508(4)(iv), 53 P.S. §10508(iv), Brandywine contends that the Township is precluded “from approving plans changing zoning, density and street locations of already approved plans”. Applt’s Brief, p. 27. The Township has done none of those things. In this case, the existing driveway located on the

Watters' Parcel that now provides access to the Brandywine Shopping Center is a private driveway predicated on the access easement provided for in the Cross Easement Agreement. That same access easement is the subject of the Declaration of Taking filed by the Township that condemned the easement, as described above, and of the appeal therefrom presently pending in this Court. Brandywine Village Associates v. Carlino East Brandywine L.P. et al, Docket 2011 - 05189.

Brandywine claims its access easement is irrevocable, and that only the access drive constructed within the easement is subject to modification, subject to Brandywine's consent. We note that the Cross Easement Agreement describes the access easement as "perpetual", not irrevocable. Carlino's Plan replaces Brandywine's existing access driveway over the Watters' Parcel with the proposed Connector Road, thereby rendering the access easement unnecessary. Brandywine links its rights in the Cross Easement Agreement with Carlino's right to develop the Watters' parcel, contending Brandywine's access easement is sacrosanct and precludes the Board from approving a land development plan that provides for an equal or better access over the Watters' Parcel to the Brandywine Center over the proposed Connector Road. Brandywine argues that the Cross Easement Agreement requires

its consent to the development scheme approved on the Watters' Parcel; however, the property rights Brandywine is asserting arise from a private easement agreement that must be resolved in the courts rather than in zoning or land development proceedings. See *Michener Appeal*, 382 Pa. 401, 115 A.2d 367 (1955) (any consideration of building restrictions placed on a property by private parties has no place in proceedings under the zoning laws for a building permit or variance); *Anderson v. Bd. of Supervisors of Price Twp.*, 63 Pa.Cmwlth. 335, 437 A.2d 1308 (1981) (subdivision plan must be approved if it complies with the applicable regulations; a subdivision plan that conforms to all the technical requirements cannot be denied based on deed restrictions). Thus, disputes over easement rights are not the proper subject of a zoning or land development proceeding, but rather must be decided by the courts. If such covenants are violated, the remedy is enforcement of the restrictions in a court by the persons entitled to enforcement, not by way of zoning proceedings. *County of Fayette v. Cossell*, 60 Pa.Cmwlth. 202, 430 A.2d 1226 (1981). Land use matters involve public rather than private interests. Conflicts arising from private instruments of title may not be resolved in land use proceedings. *Gulla v. North Strabane [Township]*, 676 A.2d 709, 710–11 (Pa.Cmwlth.1996). The above cases

are cited and discussed in *BR Associates v. Board of Commissioners of Upper St. Clair Township v. Ardolino and Mendenhall*, 136 A.3d 548 (Pa. Cmwlth. Ct. 2016); and *Appeal of AMA/American Marketing Association, Inc.*, 142 A.3d 923 (Pa. Cmwlth. Ct. 2016). (quotation marks omitted).

Accordingly, Board did not err in approving Carlino's Plan for the "East Brandywine Center", dated October 16, 2015, last revised December 9, 2015. Based upon the foregoing discussion of the issues raised on appeal, we enter the accompanying Order.

BRANDYWINE VILLAGE
ASSOCIATES AND L&R
PARTNERSHIP

Appellants

VS.

EAST BRANDYWINE TOWNSHIP
BOARD OF SUPERVISORS

Appellees

VS.

CARLINO EAST BRANDYWINE,
L.P.

Intervenor

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 2016-04843

LAND USE APPEAL

SENT
JUL 21 2017

Paul Allen Prince, Esquire, Attorney for Brandywine Village Associates
Eugene Orlando, Jr., Esquire, Attorney for L&R Partnership
Stacey L. Fuller, Esquire, Attorney for East Brandywine Township Board of
Supervisors
Marc Kaplan, Esquire, Attorney for Carlino East Brandywine

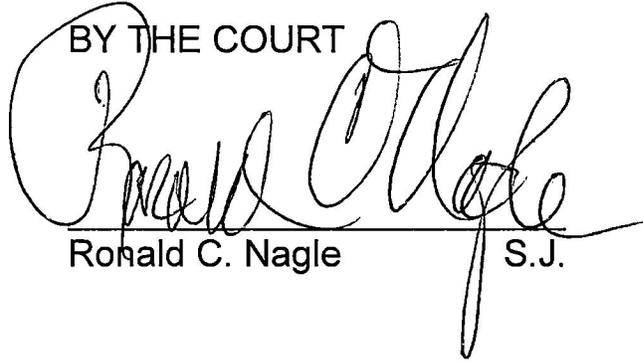
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PROthonotary
CHESTER CO. PA.

ORDER

AND NOW, July 18, 2017, upon consideration of the Land Use
Appeal filed by Brandywine Village Associates and L&R Partnership from
the Decision of the East Brandywine Township Board of Supervisors
rendered on April 20, 2016, granting conditional preliminary approval of a
Preliminary and Final Land Development Plan of Carlino East
Brandywine LP for the "East Brandywine Center", dated October 16,
2015, last revised December 9, 2015, and the briefs filed by able

counsel, it is ORDERED and DIRECTED that the said Appeal is DENIED, and the Decision of the said Board is AFFIRMED.

BY THE COURT

A handwritten signature in cursive script, appearing to read "Ronald C. Nagle". The signature is written in black ink and is positioned above a horizontal line.

Ronald C. Nagle

S.J.

APPENDIX "A"

Nagle & R Appeal, Carlino
MENE FOR Oct 20, 2015

CARLINO EAST BRANDYWINE

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

VS

:NO. 2015-01448-ZB

BRANDYWINE VILLAGE
ASSOCIATES, et al

:CIVIL ACTION

Paul A. Prince, Esquire, Attorney for Appellant, Brandywine Village Association
Eugene Orlando, Esquire, Attorney for L&R Partnership
Marc B. Kaplan, Esquire & Pamela M. Tobin, Esquire, Attorneys for Intervenor, Carlino East Brandywine, L.P.
Stacey L. Fuller, Esquire, Attorney for Appellee, East Brandywine Township Board of Supervisors

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OFFICE OF THE
PROthonARY
CHESTER CO. PA.

OPINION OF THE COURT

Nagle, S.J.

January , 2017

Procedural History. Carlino East Brandywine LP ("Carlino") filed a preliminary land development plan identified as the East Brandywine Center with East Brandywine Township on December 9, 2014 (the "2014 Plan"), which the Board of Supervisors ("Board") conditionally approved on January 21, 2015. Carlino accepted the conditions on February 12, 2015. Brandywine Village Associates (BVA) and L&R Partnership ("Appellants") appealed the Board's decision on February 23, 2015. Carlino intervened in the appeal on March 2, 2015. The Board returned the Record of the "2014 Plan" proceedings to this court on May 21, 2015. Pursuant to Appellants' March 9, 2015 "Motion for

Evidentiary Hearing", on April 7, 2015 Judge Jeffrey R. Sommer remanded the case to the Board for the presentation of additional evidence by the Appellants. The Board conducted additional hearings on July 28, August 4, September 9, and September 17, 2015 during which the Appellants presented additional evidence in opposition to Carlino's 2014 Plan, and Carlino introduced documentary evidence in support of the Plan.¹

On September 22, 2015, this court issued an Order requiring the Board to consider all evidence presented on remand and to make a decision based upon the entire record. On October 1, 2015 the Board reversed its prior decision, and denied Carlino's December 1, 2014 Plan ("Revised Decision") in correspondence directed to Carlino by Stacey L. Fuller, Esquire, the Board's Solicitor. The Board filed a supplemental return of the record on October 2, 2015. In its Revised Decision, the Board found non-compliance with various sections of the Township's Subdivision and Land Development Ordinance ("SALDO"), its Zoning Ordinance, and the Township's Storm Water Maintenance Ordinance ("SWMO"). The Board premised its decision in part on Appellants' evidence. We note that the 2014 Plan had not been found non-compliant by the Township Engineer. While the remand hearings were in progress, on June 1, 2015 Carlino filed a Final Land Development Plan, which it believed addressed the Township's objections to its 2014

¹ Carlino has previously sought preliminary land development plan approval for the subject project. It filed its initial plan with the Township on May 27, 2010 which was twice revised on January 12, 2011 and again in March 2011 following municipal review, and was conditionally approved by the Board on April 8, 2011. However, following appeal by Brandywine Associates, on October 10, 2012 we reversed the Board's Decision for reasons that are not relevant to the instant appeal.

Plan, and which was accompanied by Carlino's written narrative, which admitted to various design flaws and deficiencies in its 2014 Plan and explained the corrections made.

On October 22, 2015, Carlino appealed the Board's Revised Decision. ChesCo Docket 2015-09905-ZB; however, pursuant to stipulation of the parties approved by the court on November 12, 2015, Carlino withdrew that appeal based upon agreement of the parties that all issues related thereto could properly be addressed and determined by this court in the instant appeal.

On October 22, 2015 Carlino filed a new Preliminary/Final Land Development Plan, which again included a Connector Road proposed to be constructed through Carlino's development, addressed the issues raised in the Board's Revised Decision, and those raised in the Township Engineer's June 26, 2015 plan review letter. Carlino filed the latter plan in apparent recognition that a preliminary plan approval sets the stage for the final plan approval, and, therefore, an applicant must demonstrate its preliminary plan's ability to comply with governing ordinances or conditions imposed upon such approval before final plan submission. *"If we said that all the conditions in a preliminary plan could be made conditions for the final plan as Landowners and the Township suggest, there would be no difference between the preliminary plan, where the developer obtains certain rights to go ahead with the development if he satisfies certain conditions, and the final plan, where it is ascertained whether those conditions can be met."* Lyons Borough et al v. Twp. of Maxatawny, 123 A.3d 347 (Pa. Cmwlth. 2015).

Carlino's 2015 Preliminary/Final Plan for East Brandywine Center, dated October 16, 2015, last revised December 9, 2015 was conditionally approved by the Board of Supervisors on April 20, 2016 following additional hearings, during which many of the same issues as are now before us were again raised by the Appellants. Appellants appealed the Board's approval of this Plan. Docket No. 2016-04843-ZB. At oral argument on the instant appeal, we considered whether the issues now raised in the captioned appeal are moot, given the Board's approval of Carlino's 2015 Preliminary/Final Plan and pending appeal. All parties strenuously urged us to decide this case as a means of facilitating a resolution of recurrent issues common to these appeals, and we have recognized the usefulness of that approach. See Transcript, 10/20/16, pp. 36-45. Accordingly, we address in this decision the issues raised by Appellant in the instant appeal and in their memorandum of law filed on December 31, 2015 and the response briefs by Carlino and the Board. We heard oral argument on October 20, 2016.

From the inception of Carlino's first land development plan in 2011, a significant issue in the Board's consideration of Carlino's plans has been the Board's insistence that Carlino provide for the construction of a public road over its development tract connecting Horseshoe Pike (Route 322), on which the property fronts, and nearby North Guthriesville Road. Pursuant to an August 20, 2014 Memorandum of Understanding agreed upon by Carlino and the Township, on November 17, 2014 the Township filed a declaration of taking condemning certain of Brandywine's Easements and a portion of

L&R's adjoining property enabling the construction of a public road (the "Connector Road"), connecting Horseshoe Pike (Route 322) and North Guthriesville Road. See ChesCo Docket 2014-11237; and Notice of Appeal, paragraph 14. Appellants argue that inclusion of that road on Carlino's plan presents significant impediments to Carlino's development of its property, discussed below, and that the condemnation deprives Brandywine of easement rights over Carlino's property previously granted to it. Both Carlino and Brandywine have filed declaratory judgment actions, now pending in this court, seeking determination of their respective rights under the terms of the Easement Agreement that created the easements on Carlino's development tract for the benefit of Brandywine's property (the "Easements"). We have reserved consideration and disposition of undecided questions pertinent to the easements to the latter proceedings.

Collateral Issues

Before addressing the arguments pertaining to ordinance compliance, two collateral issues raised by the parties must be considered.

Authentication of Documents: Appellants argue that Carlino did not properly authentic documents from which it cross-examined witnesses at the remand hearings. Generally, two requirements must be satisfied for a document to be admissible: it must be authenticated and it must be relevant. In other words, a proponent must show that the **document** is what it purports to be and that it relates to an issue or

issues in the truth determining process. *Commonwealth v. Brooks*, 508 A.2d 316, 318 (Pa. Super. 1986); see also *Commonwealth v. Zook*, 615 A.2d 1 (Pa. 1992). The establishment of those two requirements is known as laying a foundation. See, McCormick on Evidence §§ 51, 218 (J. Strong 4th ed. 1992); Graham C. Lilly, *An Introduction to the Law of Evidence* 417-18 (1978).

As noted in the foregoing authorities, a document may be authenticated by direct evidence such as an admission or by circumstantial evidence relating to a myriad of considerations including its appearance, contents, and substance. See Pa. Rules of Evidence, 901 & 902. Such records are admissible into evidence without further proof of genuineness. We have reviewed the record and the exhibits at issue, and are satisfied that the document's Carlino's counsel introduced in cross-examining Appellants' witnesses were either self-authenticating or had been previously properly authenticated in prior proceedings before the Board directly pertaining to the development of the Carlino property. Appellants' claim that they were denied the opportunity of confrontation and cross-examination of the Township Engineer, Charles Dobson, is without merit, as they had the right to call him as their witness, either on direct or in rebuttal of Carlino's evidence, had they elected to do so. His report, which we reference later in this Opinion, is a public record, having been prepared for the Board in its consideration of the preliminary plan, and was available in the Township's public office as an official record. As such, it constitutes a public record, report and/or statement, it is authenticating evidence.

Pa.R.E.901(b)(7) See, Appellants' "Limited Response Brief, 2/8/2016",
pp. 2-6.

Carlino Plans' Interrelationships: Carlino argues that the Board should have approved the 2014 Preliminary Plan subject to conditions, because the issues raised by the Board are minor or highly technical and could properly be addressed in the final plan submission, citing: *Caco Three, Inc. v. Bd. Of Supervisors, Huntington Twp*, 845 A.2d 991 (Pa. Cmwlth. 2004) (preliminary plan containing minor defects correctable by amendment must be approved subject to a condition that necessary corrections be made.) *Shelbourne Square Assoc. v. Board of Supervisors of Township of Exeter*, 794 A.2d 946 (Pa.Cmwlth.2002), appeal denied, 572 Pa. 727, 814 A.2d 679 (2002). Accord: *Stein v. Easttown Township Bd. of Supervisors*, 532 A.2d 906, 912 (Pa. Cmwlth.1987) (stating that where reasonable to do so the municipality should grant conditional plan approval rather than outright denial.) Appellants argue that the defects in the Preliminary Plan are substantial, implicating non-waivable violations of the Zoning Ordinance and SALDO, and in doing so, points to the Board's Revised Decision. We agree that the Board's Revised Decision highlights several plan defects that may properly be considered substantial, a determination which the Board, in the exercise of its reasonable discretion in interpreting its ordinances, properly made, and which we will not disturb.

Appellant's Issues Premised on Township's Governing Ordinances.

Front Yard Setback. Section 399-46.C of the zoning ordinance provides: "Minimum front yard. No building shall be situated less than 85 feet from the front lot line". Pertinent terms are defined in Section 399-9 of the zoning ordinance. The term "lot" is pertinently defined as a separately described "...parcel of land, undivided by any street or dedicated future street right-of-way". The front yard is defined as "A yard extending the full width of the lot along the front lot line and extending in depth from the front lot line to the nearest point of a structure on the lot...". Appellants argue that Carlino's proposed bank building on its development tract must be set back 85 feet from both Route 322 and the proposed Connector Road. As designed on the plan, the Bank building is set-back 50 feet from the Connector Road. The building complies with the set-back from Route 322. The Zoning Ordinance pertinently defines the term, "lot line" as "A property boundary line of any lot held in single and separate ownership...", and the term, "lot line, front" as "A lot line abutting any street and coinciding with any street line..." The term "street line" is defined by the said Ordinance in pertinent part as "The dividing line between a lot and the outside boundary or right-of-way of a public street, road, or highway legally open or officially platted..." Carlino argues that the proposed Connector Road is a private driveway until such time as it is dedicated to the Township as and for a public road, precluding application of an 85 feet setback.

In support of their argument, Appellants cite an August 20, 2014 Memorandum of Understanding ("MOU") signed by Carlino and the Township. Under its pertinent terms, in lieu of paying the significant portion of Township's Transportation Impact Fee of \$1,795,000, Carlino is obligated at its expense to design, permit and construct the Connector Road and dedicate it to the Township, together with all related facilities.

Pursuant to the MOU's terms, the Township has condemned certain easements located on Carlino's property that now benefit Brandywine's adjacent property, which will allow location of the Connector Road within those easement areas. We observe that the Township has not condemned the underlying fee within which the easements exist. Carlino has agreed to construct the road on its property to specifications consistent with its dedication to the Township as and for a public road. The Township has also condemned a portion of L&R's property required to construct the Road. The MOU makes clear that the Road "is intended as a public road for the use by the general public..." It is undisputed that the Township has, from the inception of Carlino's plan submission, insisted that the Connector Road be constructed by the developer and dedicated for public use. In rejecting Carlino's preliminary plan, the Board did not cite the 50 feet setback as a violation of the foregoing ordinance provision, and the Township Engineer's January 6, 2015 plan review letter does not call out the proposed setback as a violation of §399-46.C.

We note that in the case of a typical subdivision, whether commercial or residential, individual lots are fronted on streets constructed within the development tract, and the front yard building setback is generally measured from those streets. A caveat exists in the Township's zoning ordinance with respect to a "corner lot", which by definition is described as "A lot at the junction of and abutting two or more intersecting streets...", in which event each yard abutting a street is a front yard to which the front yard setback applies. ZO §399-9. Thus it is Appellants' position that relative to the proposed bank building, the 85 feet front-yard setback from the Connector Road applies because the bank "fronts" on both Rte. 322 and the Connector Road.

Carlino contends that as presently configured on the preliminary plan, the Connector Road is not yet a road, but merely a driveway, as a consequence of which the 85 feet set-back does not apply. However, under the terms MOU with the Township, once dedicated, the driveway will public road, and will be required to comply with the required right-of-way and cart-way width mandated by Section 350-32 of the SALDO, unless a waiver is granted. Carlino argues that when that occurs, the bank will simply be rendered nonconforming as to front yard setback; however, a nonconformity must predate the regulation to which it does not conform, which is not the case in this instance.

We find the corner lot set-back regulation does not here apply. The rationale for requiring a corner lot to have 2 front yards at street intersections is to insure safe sight distance for vehicles approaching the intersection from either street. No such rationale exists in this case

for imposition of this regulation. We have previously ruled that the proposed driveway does not create a subdivision of the Carlino development tract, and thus does not render the remainder of Carlino's tract east of the driveway that lies contiguous to BVA's property a separate lot. We thus conclude that the bank building's front yard setback is properly measured from Rte. 322 and not the driveway (future Connector Road). While it is sometimes difficult to reconcile the various ordinance definitions encompassing yard, lot line and setback regulations, the subject zoning ordinance defines a front yard as one that extends "*the full width of the lot along the front lot line*". "Lot width" is defined as "the distance in feet between the side lot lines, measured along a line parallel to the street line at the building setback". As noted, the term "street line" is defined in pertinent part as "The dividing line between a lot and the outside boundary or right-of-way of a public street, road, or highway legally open or officially platted...". Instantly, Carlino's proposed development is not comprised of individual subdivided lots, nor is the bank building depicted on a lot separate that is distinct from the remainder of the development tract. Accordingly, we conclude that the entirety of the development tract is a single lot within the intendment of the zoning ordinance, and, as configured on the preliminary plan, fronts on Route 322, as does the proposed bank. It follows that the proposed bank building is not required to be set-back 85 feet from the Connector Road. See also July 27, 2015 review letter by Norman A. Ulrich III, P.E.

Reserve Area For Sewerage Effluent.

Section 399-47.K of the zoning ordinance provides in pertinent part that sewage facilities in relation to the proposed uses must be in compliance with SALDO Sections 350-47.B(2) & 350-48. The latter Section describes a plan submission requirement, and need not detain us. The crux of the issue reposes in Section 350-47.B.(2), which provides in pertinent part:

"All subdivisions and land developments shall be self-sustaining relative to the storage and disposal of treated sewage effluent. The applicant shall provide sufficient storage and land area on or off the subdivision or land development site to store and dispose of all treated sewage effluent which is generated by the uses on the site by means of conventional underground seepage beds or drip irrigation. The land area shall be sized at 1 ½ times the land area determined necessary..."

In denying Carlino's preliminary plan, the Board found that Carlino failed to provide the required effluent disposal area, either on the development tract or elsewhere. It is clear Carlino did not do so, and the Board correctly cited this deficiency as a plan defect. Appellants go a step further and argue that this failure is also a violation of Section 399-47.K of the Zoning Ordinance because the latter Section incorporates the SALDO provisions, rendering them subject to traditional zoning variance hardship standards. It thus contends that with respect to future plan revisions submitted for approval, Carlino is precluded from seeking a waiver of SALDO Section 350-47.B(2). We find Appellants' argument to be meritless. Section 399-47.K merely references the necessity of

the developer's compliance with the cited sections of the SALDO, but does not by incorporation make them zoning regulations. Carlino intends to connect its new center to the public sewer system, and has obtained the necessary municipal approvals to do so. Therefore, we find that the Board is empowered to grant a waiver from this SALDO regulation pursuant to PAMPC Section 503(8), 53 P.S. §10503(8) upon meeting the standard for waiver created by PAMPC Section 512.1, 53 P.S. §10512.1.

Appellants further contend that pursuant to SALDO Section 350-47.B(2), Carlino must maintain Brandywine's existing reserve sewer area on the Carlino property for the Brandywine Center's on-site septic system. Brandywine has now connected its Center to the Township's public sewer system, and in another proceeding we have ordered Brandywine to remove its on-site sewerage facilities which were originally located on the Carlino tract pursuant to the terms of the 1994 Cross Easement Agreement between Brandywine and Carlino's grantor. Brandywine is also required to decommission the sewage system, including any reserve disposal area, which it is now in the process of doing. There is no evidence in this record that Brandywine's on-site sewage system located on Carlino's land was designed and installed with the intention of complying with SALDO Section 350-47.B(2), which Section was not adopted until January 3, 2011 well after the Brandywine Center's development plan was approved in 1994. Indeed, the Cross Easement Agreement attached to Appellants' appeal as Exhibit "A" specifically states in paragraph "A" that the sewer easement has been granted for "an on-site septic sewer system". No

provision is made in the Agreement for continued reservation of an area for disposal sewage effluent once Brandywine's property is connected to the public sewer system. Appellants' contentions are without merit.

Minimum Tract Area.

Appellants contend that the preliminary plan violates the Mixed Use Commercial District (MU) regulation of Section 399-46 by not providing a minimum lot area of 10 acres. Their argument stems from their belief that the area of the easements previously granted to Brandywine under the terms of the Cross Easement Agreement must be netted out from the gross tract area of 10.189 acres. Appellants' engineer, Norman A. Ulrich, III, P.E. testified that he deducted 1 acre of Brandywine's easement area extinguished by the Township's Declaration of Taking from the tract's gross area, resulting in a net lot area of 9.189 acres, which does not comply with the MU District's 10 acre minimum. He did so under the mistaken belief that the Township had condemned the land itself, when in fact the Township Solicitor confirmed and the Declaration itself reveals that only the easements have been condemned, and not an underlying fee interest in the land. See N.T. 8/4/15, p. 236, Exhibit L&R/BV -3. There is no merit to Appellants' contention.

Truck Access.

We addressed Carlino's alleged noncompliance with Section 399-81.E of the Zoning Ordinance in our October 10, 2012 Opinion.

The argument then was that Carlino's plans failed to provide safe and efficient ingress and egress over the combined access driveway to BVA's shopping center. We deferred to Mr. Heinrich's opinion, expressed in the multiple review letters identified above prepared by him for the Township that the plans complied with this Section. Exhibit I-6, Opinion & Order, pp. 33-34. We did not expressly address deficiencies in cart-way widths relative to truck turning movements, although Mr. Heinrich's reviews specifically considered those issues. Carlino now takes the position, that our prior decision on the adequacy of access to the combined centers constitutes *res judicata*, or in the alternative collateral estoppel, precluding Appellants from raising the issue again. *Jacquelen v. Zoning Hearing Board of Hatboro Borough*, 620 A.2d 554 (Pa. Cmwlth. 1993) summarizes the applicable law. The doctrine of **res judicata**, or claim preclusion, will bar a claim if four conditions are met; identity of things sued for; identity of cause of action; identity of parties; and identity of capacity of parties suing or being sued. *Kurtz v. Workmen's Compensation Appeal Board (Allied Chemical Corp.)*, 504 A.2d 428 (Pa. Cmwlth. 1986). However, because the need for "flexibility in **zoning** matters outweighs the risk of repetitive litigation," Pennsylvania courts apply the doctrine of **res judicata** sparingly. *Schubach v. Silver*, 461 Pa. 366, 376, 336 A.2d 328, 333 (1975), but such application is appropriate where the four elements above are satisfied, and if there are no substantial changes in circumstances relating to the land itself. *Serban Appeal*, 480 A.2d 362 (Pa. Cmwlth. 1984); *Namcorp Inc. v. Zoning Hearing Board*, 558 A.2d 898 (Pa. Cmwlth. 1989) (quotation marks omitted). The doctrine of collateral estoppel, or issue preclusion, will preclude review of an issue

if the following four factors are present: (1) the issue decided in the earlier case is identical to the one presented in the later action; (2) there was a final judgment on the merits in the earlier action; (3) the party against whom the plea is asserted was a party, or in privity with a party to the earlier adjudication; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior action. *E-Z Parks, Inc. v. Philadelphia Parking Authority*, 521 A.2d 71 (Pa. Cmwlth.1987).

The Notice of Appeal cites 6 alleged defects in Carlino's plans as they pertain to access and loading. Notice of Appeal, 2/20/2015, pp. 9-10, paragraphs 26.K & 26.L. Initially, we note that any issue not raised or fairly subsumed in those paragraphs is waived, and we decline to consider them. As to claim and issue preclusion, L&R Partnership was not a party to the prior appeal that was the subject of our October 10, 2012 Opinion and Order, and did not become a party until the instant appeal was filed from the Board's approval of the "2014 Plan". Therefore, res judicata does not apply. We also believe we are dealing with a revised plan that recognizes a substantial change in circumstances relating to the land itself. Previously, Carlino sought to secure development rights for its project in the Spence property in which it had no legal or equitable interest. The Township has subsequently condemned a portion of that property now owned by L&R for construction of the Connector Road. As to the party identity issues, John R. Cropper is a principal of BVA and together with L&R Partnership owns the abutting property over which the Connector Road is proposed to extend. Although that relationship exists, it does not in

our view establish that L&R is in privity with BVA, who was a party to the earlier adjudication. Such privity requires "such an identification of interest of one person with another as to represent the same legal right." *Catropa v. Carlton*, 998 A.2d 643 (Pa. Super. 2010 citing *Ammon v. McCloskey*, 655 A.2d 549, 554 (Pa. Super.1995).

Accordingly, we address the traffic issues raised in the Appeal, as noted.

Citing Section 399-81.E of the Zoning Ordinance, Appellants contend that the proposed Connector Road is of inadequate width to provide for safe and efficient ingress and egress for delivery trucks proposing to enter and exit both the development and Brandywine's center over the Connector Road. It argues that tractor trailers attempting to make required turning movements from Route 322 onto the Connector Road at the entrance to Carlino's development, as well as at development intersections providing access to and from BVA's site by means of the Connector Road, will be required to encroach on opposing travel lanes and raised concrete medians. Examples given include right hand turns from left turn lanes, encroachment on medians in completing required turns, and movement off the cart-way in completing certain turns. In its revised decision denying the revised plan, the Board did not cite Section 399-81.E, but instead found that the plans "show a turning conflict for trucks in violation of Section 399-112 of the Zoning Ordinance governing "Off-street loading". This Section does not address the deficiency raised by the Appellants, as it pertains exclusively to loading regulations. But, Section 399-81.E, cited by Appellants, pertinently requires that "*Provision shall be made for safe*

and efficient ingress and egress to and from public streets, without undue congestion or interference with normal traffic flow within the Township.” Appellants argue they presented clear and convincing evidence that the plan violates the latter Section.

Norman A. Ulrich, III, a licensed professional engineer testified at the remand hearings on behalf of the Appellants to various perceived plan deficiencies, including his opinion respecting access deficiencies at intersections arising from inadequate cart-way widths that preclude tractor-trailer trucks from turning at various development intersections without encroaching on opposing travel lanes and both painted and raised concrete medians. He memorialized his opinions in a written report, to which are attached plans depicting truck turning movements as noted in the preceding paragraph. N.T. 7/28/15, pp. 98 et seq. L&R/BVA Exhibit 9, attachments 26.K (i) thru 25.K. (v). Supporting Mr. Ulrich’s testimony was that of John Caruolo, a registered engineer whose specialty is traffic engineering, who reviewed the plans on behalf of the Appellants and prepared a traffic review memorandum dated September 14, 2015. Appellants’ Exhibit 32. In his testimony, Mr. Caruolo made reference to the foregoing Exhibit 9 attachments in describing what he found to be turning radius constrictions faced by tractor-trailers arising primarily from inadequate paved cart-way widths at various development intersections. N.T. 9/17/15, pp. 775 -795. Mr. Caruolo acknowledged in his testimony that he did not review the turning templates submitted by Carlino with its Final 2015 plan. N.T. 9/17/15, pp. 787-788).

Mr. Caruolo also referred to attachment 26.L, which depicts what he described as a constricted paved area within which delivery trucks, especially tractor-trailers, accessing the loading dock located at the rear of Carlino's proposed shopping center, would be required to maneuver, shown on the plans as requiring a 180 degree turn within the dedicated loading zone area. He cited a conflict with guardrails proposed to be erected in that area, in his opinion necessitating an increase in the loading zone area. N.T. 9/17/15, pp. 796-799. This appears to be the deficiency found to exist by the Board in its October 1, 2015 Decision when it cited Section 399-112 of the Zoning Ordinance as a ground for rejection of the preliminary plan.

During the remand evidentiary hearings, Appellants introduced two traffic review letters prepared by Andreas Heinrich, P.E., Township traffic engineer, commenting upon his review of traffic and access issues pertaining to the 2011 preliminary plan, including the proposed Connector Road. Heinrich Review Letters dated April 1, 2011 and February 22, 2011, L&R/BVA Exhibits 30 and 31 respectfully. We note that the driveway access to Carlino's development has not substantially changed from that provided for in the 2011 plan. In his 2011 review, Mr. Heinrich noted three deficiencies. First, the inadequacy of cart-way width for truck turning movements to and from the Brandywine Village shopping center from the Connector Road; second, the inadequacy of the vehicle stacking distance along the Brandywine Village driveway at its intersection with the Connector Road, resulting in blockage of interior circulation aisles in the Brandywine Center from time to time; and third, the need to widen Brandywine Village Drive for dual left turn lanes into

or out of Brandywine Village Drive, resulting in a need to widen the Connector Road access in and out of two shopping centers.

Carlino introduced two additional traffic review letters prepared by Mr. Heinrich addressing access issues related to the same plan. Heinrich Review Letters dated April 4, 2011 and August 2, 2011, Exhibits I-31 and I-32 respectfully. The latter is drafted to acknowledge satisfaction with the corrective measures taken by Carlino to address his comments made in the former review letters. Two comments appear in paragraph 15 of his April 4, 2011 review that we find noteworthy. First, *"It is recommended that the right turn entry radius for the potential second access to the rear of the existing Brandywine Village shopping center be increased to at least 35 feet."* His subsequent review indicates compliance with this comment, as do the amended preliminary plans. Brandywine has not agreed to construct the rear access to its center, which would alleviate traffic queues, noted by Mr. Heinrich, on its main access to the Connector Road. Paragraph 9 of Mr. Heinrich's June 22, 2010 traffic review letter recommended a second access *"to Brandywine Village as an alternative means of access at time when the main driveway intersection" with the Connector Road is blocked by vehicular queues.* Heinrich Review Letter dated June 22, 2010, L&R/BVA Exhibit 20.

Second, Heinrich observes that *"the right turn entry truck turn from Brandywine Village Drive indicates a major encroachment over the exit lane from the existing shopping center (Brandywine Village). To increase the right turn corner radius from 45 feet as proposed to 75 feet*

to better accommodate a right turning truck will require extending the radius beyond the (Carlino) property line and require cooperation from the adjacent shopping center to construct." The preliminary plan depicts a radius of 46 feet, but BVA's counsel has stated that his client has no obligation to provide land for Heinrich's suggested improvement. With respect to Mr. Heinrich's comments in paragraph 15 above, which recommends restriction to once per day of deliveries by a WB-67 tractor trailer [size designation], Mr. Heinrich's August 2, 2011 review letter states, "Satisfied, with the condition that deliveries via a WB-67 semi-trailer and likely a WB-62 semi-trailer, if used, be limited to off-peak time periods..." which Mr. Heinrich notes has been acknowledged by Carlino. In evaluating the traffic evidence, we have also reviewed the Langan (Carlino's engineer) January 18, 2011 response to Mr. Heinrich's earlier June 22, 2010 traffic review letter, which indicates that Carlino substantially complied with the Mr. Heinrich's comments and recommendations up to that juncture of the prior plan review process. L&R Exhibit 29. We have also reviewed the July 24, 2015 review letter prepared by InLand Design, the Township's municipal engineer, commenting upon the issues raised by the parties in the instant appeal. Exhibit I-3. Of particular note is paragraph 26.K addressing the Appellant's claims with respect to traffic issues discussed hereinabove, as follows: *"We disagree with the Appellant's (sic) assertion that the preliminary Plan creates unsafe ingress and egress. Assuming that trucks for East Brandywine Center will use the drives mentioned, trucks can make the maneuvers suggested without jumping the curbs as shown on the Preliminary Plan. The "median" that the Preliminary Plan shows trucks crossing is actually striping and not curb"*.

The Zoning Ordinance requires safe and efficient ingress and egress, but not absolute perfection. "Safe and efficient ingress and egress" presents us with an issue of fact for determination. As Mr. Heinrich noted, there is a specific limitation on the number of tractor-trailer deliveries to these centers, and the provision for adequate cartway widths and radii for truck access is the principal concern expressed by Mr. Caurolo. Based upon a fair consideration of all of the evidence adduced and exhibits presented, we find that the Township traffic engineer's exhaustive evaluation of the component parts of the contested access issues, together with the plan revisions made by Carlino in addressing Mr. Heinrich's conditions for approval of the traffic plan, makes adequate provision for safe ingress and egress to both properties. BVA's counsel has expressed the view that his client is not obliged to construct a rear driveway connection from BVA's center to the Connector Road, or to widen its front driveway to provide additional travel lanes, both of which improvements would alleviate queuing of traffic leaving BVA's shopping center. While that may be the case, making the improvements would benefit BVA's center by providing more convenient access for its customers and dispelling its concerns about traffic back-ups. We find that Appellants have not proven the proposed access is either unsafe or inefficient, and that the Board did not commit error in declining to deny the plan based upon violation of Section 399-81.E. We hasten to note that the Board is tasked with providing safe and convenient traffic access to both centers, and may, to the extent authorized by its applicable governing ordinances, require such revisions to Carlino's plans as satisfies this obligation.

Conversely, based on the evidence, the Board did properly find the plan deficient as respects the constriction in turning movements for tractor-trailers accessing the loading dock located at the rear of Carlino's giant food market. Based on our examination of the preliminary plan, this is an issue that could be rectified by adjustment to the proposed location of guard rails or an increase in the loading zone area.

Development Tract Ownership. The General design and site development standards specified in the Zoning Ordinance pertinently require "The tract of land to be developed shall be in one ownership...". Section 399.47.N. In his July 27, 2015 plan review letter, Appellants' engineer, Norman Uulrich states that the plans show some 36 feet of storm sewer pipe, an Endwall and a storm sewer manhole located within a storm easement on L&R's tract outside the boundary of property condemned by the Township. In its July 24, 2015 review letter of the proposed final plan, initially identified hereinabove, Charles Dobson, P.E., the Township's engineer acknowledges that the preliminary plan did shown drainage improvements outside the area condemned by the Township on L&R's land, but states that those drainage improvements are no longer located "beyond the limits of the [development] property or the area condemned by the Township". Thus, Mr. Dobson's comment is both an acknowledgement of the correctness of Appellants' contention, and recognition that the violation has been corrected on the proposed final plan.

Stormwater facilities. Section 399-47.N of the Zoning Ordinance requires that a tract of land subject to development must be under one ownership. The Board correctly concluded the plan violated this Section because permanent stormwater facilities are shown as being outside the development tract owned by either Carlino or the Township. The plan depicted those facilities as located on L&R's land. It appears the plan has been subsequently revised to locate those facilities within the area condemned by the Township for the Connector Road. L&R/BVA Exhibit 5; Exhibit I-3, Paragraph 26.B.

Notice to Adjoiners. Section 399-48.E of the Zoning Ordinance requires notification to adjoining property owners within 500 feet of any portion of the development tract located within the MU District for which an application is submitted. The purpose is to advise such owners of the process by which the development application will be reviewed and decided; however, if the application is one for SALDO approval, the procedures of that Ordinance apply, which apparently do not specify such notice. In any event, we find this alleged defect to be moot, since the Board published notice of the remand hearings, thereby inviting public participation. Supplemental Record Return, paragraph 3.c.

Parking Setback. Section 399-46.J of the Zoning Ordinance requires minimum "parking area" setback of 50 feet from a residential property or residential zoning district. Section 399-112.D. requires screening of parking located adjacent to residential development. Appellants argue that while the 5 northern-most parking spaces along the west side of Retail building "A" meet the setback, the access drive

and turn-around areas taken together do not. The issue is whether an access drive constitutes a "parking area". Appellants allege the preliminary plan depicts parking within 35 feet of adjacent residential property. The plan has not changed in this respect since our prior decision, wherein we stated, as follows: "The term "parking area" is not defined. Accordingly, it must be construed to apply only to actual areas devoted to parking of vehicles, excluding the roadway access to the parking areas. The approved plans depict a parking setback of 50 feet as required. The development road turn-around behind the proposed building has a set-back of 35 feet, which does not violate this section, as it does not constitute parking. Respecting screening, the plans were reviewed and approved for compliance by Township consultants. In the matter of adequate screening, Section 399-112.D requires complete screening, including the use of landscaping when loading berths or truck turnarounds are within 100 feet of a residential district. In our opinion, the Board's approval of the plans determined the adequacy thereof. We give deference to the decisions of the Board when interpreting the requirements of its own ordinance. Based upon our interpretation of this Section, we find Appellants' position to be without merit." The Board committed no error in this regard.

Impervious coverage. Section 399-46.F of the Zoning Ordinance provides that impervious coverage cannot exceed 65% of the "net area of any tract". Appellants claim the preliminary plan exceeds this limitation. The preliminary plan specifies the maximum impervious coverage is 59.1%. By definition, Section 399-9 of the zoning ordinance defines "net tract area" by excluding from the gross tract area

ecologically sensitive land areas, existing street rights-of-way, and specified easement areas. The development tract is specified as 10.189 acres, from which Appellants argue must be deducted those areas encompassed by easements previously established for BVA's benefit, that were condemned by the Township, yielding a gross tract area of 9.189 acres. Appellants reach the conclusion that the net tract area is 6.907 acres by deducting the 2.282 acres of the development tract reserved for BVA's sanitary sewer easement, ultimately concluding that the allowable impervious coverage is about 87% of the net tract area, or 1.510 more acres than allowed. We have previously found that the Board condemned a portion of BVA's storm sewer and road easements, and not the underlying fee interest in the development tract. See Minimum Tract Area discussion hereinabove. We have previously ordered BVA to remove its sanitary sewer facilities from the Carlino property, as a consequence of which that easement area is not required by ordinance to be deducted from the gross tract area. Accordingly, we find that Appellants' contentions in these respects are not supported by the record.

Steep Slopes of Cuts and Fills. Section 399-14.D(1)(b) of the Zoning Ordinance states that "finished slopes of all cuts and fills....shall be no steeper than 25%." Appellants contend there is a small area along Rte. 322 that exceeds 25%, in that a portion of the proposed grading beyond the proposed sidewalk has a finished slope of 33%. The Township Engineer has reviewed the plans and expressed the opinion that the Carlino development tract is not located within the Steep Slope Conservation District. Section 399-14.D(1)(b) is one of

several regulations that apply "to all uses within the Steep Slope Conservation District", which is an overlay on the Township's zoning district map, but is not specified as applying otherwise. Appellants' have not proven that the regulation applies to the proposed cuts and fills along Rte. 322.

The Riparian Corridor Conservation District. Section 399-13.1.B(2)(a)(5) and 399-13.B(2)(b)(3) include lands in the vicinity of a pond greater than 5000 square feet in area and watercourses and surrounding sensitive lands as resources protected by the Riparian Corridor Conservation District regulations. The purpose of these regulations is to protect and preserve natural bodies of water and other ecologically sensitive lands from disturbance. In testimony Appellants initially advanced the contention that the area on L&R's land condemned by the Township is a pond of that size, requiring a 25 feet riparian buffer from land disturbance. In its Appeal, Appellants aver only that the Riparian Corridor Conservation District regulations require a 75 feet wide riparian buffer along the center line of a water course they say extends from a pond located on L&R's property condemned by the Township to a wetlands area near Guthriesville Road; however, contrary to their engineer, they do not now contend the pond qualifies as a "lake or pond", defined in the Zoning Ordinance, as "a natural body of water, containing a permanent pool of water a minimum of six feet in depth, with sides slopes no less than 10:1". See, Section 399-8; Ulrich 7/27/15 Review Letter, p. 7, para. 26.F. Not having raised the latter issue in its appeal, it is waived. Regardless, the Township Engineer has opined that the alleged pond does not meet the ordinance's definition

so as to require a riparian buffer. Exhibit I-3, Inland Design review letter, 7/24/15, p. 3, para. 26.F.

John "Butch" Yoder was called by BVA as an expert on wetlands delineation, although vigorously opposed by Carlino based on lack of qualification; however, the Board permitted his testimony concerning wetlands and the application of the Township's Riparian Corridor Conservation District regulations. N.T. 8/5/15, pp. 430-450. Mr. Yoder agreed that the so-called pond located on L&R's property condemned by the Township does not constitute a pond or wetlands as defined by the Zoning Ordinance. N.T. 8/5/15, pp. 486-491. Mr. Yoder devoted the remainder of his testimony to his contention that a stream extends from the pond, implicating application of the riparian stream buffer requirement; however, without extensively reviewing the testimony, cross examination dispelled that notion. N.T. 8/5/15, pp. 493 et seq. The Township Engineer opined that the land in question is not bisected by a stream bed and stream bank typical of a watercourse, a fact admitted by Mr. Yoder. While some grading is depicted on the preliminary plan wetland areas, the Final Plan shows no disturbance to these areas. Charles Dobson's 7/24/15 report, p. 6, para. 26.O. Neither of these issues was discussed by the Board in its Decision rejecting the preliminary plan, and we find no support in the record for Appellants' claim of error. Indeed, Appellants failed to brief the stream riparian buffer requirement, as a consequence of which we conclude the issue has been waived, as well as disproven by our examination of the record. See *Lackner v. Glosser*, 892 A.2d 21, 29-30 (Pa.Super.2006) (stating failure to offer analysis or case citation in support of relief

results in waiver); *Jarl Investments, L.P. et al v. Fleck*, 937 A.2d 1113 (Pa. Super. 2007).

Alleged Violations of the Subdivision and
Land development Ordinance

Upon consideration of the SALDO raised on appeal, we make the following findings of fact. Cited references are to paragraphs of the Notice of Appeal:

A. Section 350-14.A.2. – The issue is moot in light of the remand hearings.

B. Section 350-14.B.(2). – The issue is moot in light of the remand hearings.

C.1 & 2. Section 350-32.A & C. – As discussed hereinabove, the MOU makes clear that the Road “is intended as a public road for the use by the general public...”. MOU Recital, paras. “F” & “K”. It is undisputed that the Township has, from the inception of Carlino’s plan submission, insisted that the Connector Road be constructed by the developer and dedicated for public use. This Section of the SALDO specifies minimum right-of-way and cartway regulations for all new Township streets. While Carlino argues that as now configured on the preliminary plan the proposed public street is a private “driveway”, that argument begs the question of the intended purpose for which the driveway will be dedicated for public use in the future and the necessity

of compliance with these SALDO regulations. While the area for the Connector Road condemned on L&R's property is compliant, the proposed private driveway on Carlino's tract is not. Appellants' brief does not address this issue, except by reference to Mr. Ulrich's attached review letter. Such does not constitute proper appellate advocacy and results in Appellants' waiver of the issue. *Jarl Investments, L.P. et al v. Fleck*, supra. Nothing herein is intended to preclude the Board from granting a waiver of the regulation pursuant to PAMPC Section 503(8), 53 P.S. §10503(8) upon meeting the standard for waiver created by PAMPC Section 512.1, 53 P.S. §10512.1.

C.3. Section 350-52.A.(2). – This Section requires the developer “To control runoff, erosion, and sedimentation through measures that are on-site or suited as close as possible to where stormwater falls on the land”. Because some stormwater on the Carlino development is proposed to discharge to the Connector Street's stormwater collection system for conveyance off-site, Appellants appeal claims violation of this Section. The Township Engineer's review letter notes that this Section states the general purpose of the subject regulations, but does not contain any objective requirements that would preclude stormwater discharge on site to a storm drainage system proposed as part of a roadway. Further, we find no regulation in the SALDO that prohibits use of an off-site stormwater basin. Charles Dobson's 7/24/15 report, p. 11, para. 29.C.3. We agree. Regardless, Appellants' brief does not address this issue, except by reference to Mr. Ulrich's attached review letter. Such does not constitute proper appellate advocacy and results in

Appellants' waiver of the issue. *Jarl Investments, L.P. et al v. Fleck*, supra.

C.4. Section 350-52.C.(1). – Appellants contend that the preliminary plan violates this Section, which prohibits the increase in discharge of sediment from the development site. The plan shows that construction sediment from the Carlino tract will discharge to Stormwater Basin #2 located on the condemned portion of L&R's tract. The Township Engineer notes that the land development application was submitted jointly by Carlino and the Township (arising from the Connector Road construction), resulting in the development site encompassing both properties, and represents "a standard engineering practice". Charles Dobson's 7/24/15 report, p. 11, para. 29.C.4. The Board did not cite this proposal as a SALDO violation, and we defer to the Board and Township Engineer for its application of regulations of this sort. Interpretation by a local governing body of the ordinance for whose administration it is responsible is entitled to great deference and weight. *Arter v. Phila. Zoning Bd. of Adjustment*, 916 A.2d 1222 (Pa.Cmwth. 2007), *appeal denied*, 934 A.2d 75 (Pa. 2007). Appellants' brief does not address this issue, except by reference to Mr. Ulrich's attached review letter. Such does not constitute proper appellate advocacy and results in Appellants' waiver of the issue. *Jarl Investments, L.P. et al v. Fleck*, supra.

C.5. Section 350-52.H(6); C.6. Section 350-52.H(7); and C.8. Section 350-53.A(1). – Appellants detail sundry SALDO regulation violations which have been commented upon by the Township Engineer

as having been corrected on the Final Plans. Accordingly, he agrees with Appellants' contentions. Based upon his comments that these technical issues have been corrected, we find the issues moot, requiring no further analysis or disposition on our part. Again, we have examined Appellants' brief and find these issues have not been addressed, nor were they raised at oral argument. Accordingly, we find the issues have been waived. *Jarl Investments, L.P. et al v. Fleck*, supra.

C.7. Section 350-47.B.(2). – We have addressed this issue above under the heading "Reserve Area For Sewerage Effluent". Carlino has requested a waiver from this Section.

C.9. Section 350-53.1. – This Section provides that when an area located in the Riparian Corridor Conservation District is disturbed, the developer must prepare and submit a management plan for review and approval by the Township Engineer. In this instance, Mr. Dobson has determined that the development tract is not located within this District, and, therefore, this Section's regulations do not apply. Charles Dobson's 7/24/15 report, p. 13, para. 29.C.9. He also notes that the areas shown as disturbed on the plan have been eliminated from the Final Plan. We have addressed a related issue above under the heading "The Riparian Corridor Conservation District". We credit the Township Engineer's evaluation of the preliminary plan and the subject regulations applicable thereto.

Stormwater Management Ordinance

Appellants have raised multiple alleged violations of the Township's Stormwater Management Ordinance, Chapter 345, §§345-101 et seq. (SMO). See, Notice of Appeal, Part IV, pp. 16 – 23. The Township Engineer has provided written comments to each of the issues raised in these paragraphs. Charles Dobson's 7/24/15 report, pp. 14-20, Paras. 32.A(1)-(5) through 32.I. Many of the issues pertain to deficiencies in the Preliminary Post Construction Stormwater Management Report, intended to demonstrate compliance with Best Management Practices in controlling stormwater discharges from development. The Board's Decision noted that the Preliminary Plans did not demonstrate compliance with various technical requirements of the SMO. See, Board Solicitor, Stacey L. Fuller's Decision Letter, dated October 1, 2015, para. 9., subparagraphs "A" through "K". Carlino's written narrative submitted to the Board with its Final Plan correcting the foregoing deficiencies essentially admits them, which led the Board to deny the Preliminary Plan. See, Supp. Returned record, item 4e; & Township Brief, pp. 9-10. These issues were neither briefed nor addressed by the parties in any detail at oral argument such as to constitute elucidation of the issues. Accordingly, Appellants have waived the issues on appeal. *Jarl Investments, L.P. et al v. Fleck*, supra. The Township Engineer has opined that these issues have been adequately addressed in the Final Plan. We consider it appropriate to defer to the Board and Township Engineer in its determination of these technical provisions of the SMO. *Arter v. Phila. Zoning Bd. of Adjustment*, supra.

Accordingly, we enter the accompanying Order.

CARLINO EAST BRANDYWINE

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

VS

:NO. 2015-01448-ZB

BRANDYWINE VILLAGE
ASSOCIATES, et al

:CIVIL ACTION

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PROthonotary
CHESTER CO. PA

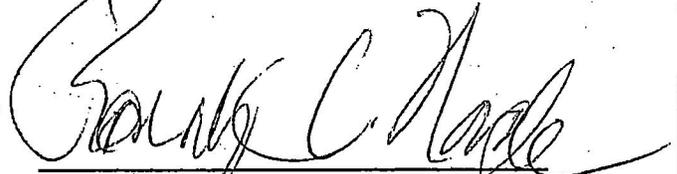
Paul A. Prince, Esquire, Attorney for Appellant, Brandywine Village Association
Eugene Orlando, Esquire, Attorney for L&R Partnership
Marc B. Kaplan, Esquire & Pamela M. Tobin, Esquire, Attorneys for Intervenor, Carlino East Brandywine, L.P.
Stacey L. Fuller, Esquire, Attorney for Appellee, East Brandywine Township Board of Supervisors

ORDER OF COURT

AND NOW, January 6, 2017, upon consideration of Brandywine Village Associates (BVA) and L&R Partnership's (L&R) Appeal of the Conditional Approval of Carlino East Brandywine L.P.'s Preliminary Subdivision and Land Development Plan, Granted on January 21, 2015 by the East Brandywine Township Board of Supervisors, the legal memorandums filed by able counsel, and following oral argument, it is ORDERED and DIRECTED that the said

Appeal is Granted only in Part, but is otherwise Denied, consistently with and as specified in the findings, discussion and determinations made and detailed in the accompanying Opinion of the Court, which we incorporate in this Order.

BY THE COURT



Ronald C. Nagle SJ