

ANN FELDMAN  
Appellant

VS.

BOARD OF SUPERVISORS  
OF EAST CALN TOWNSHIP  
and  
PROGRESSIVE HOUSING  
VENTURES, LLC.

and  
J. LOEW & ASSOCIATES,  
INC.

and  
BOROUGH COUNCIL OF  
THE BOROUGH OF  
DOWNTOWN

Appellees

IN THE COURT OF COMMON PLEAS  
CHESTER COUNTY, PENNSYLVANIA

NO. 2010-08836

CIVIL ACTION – LAND USE APPEAL

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J. Loew & Associates  
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**OPINION and ORDER**

BY: NAGLE, J.

June 27, 2011

Ann Feldman has appealed the July 5, 2010 decision and order of the Board of Supervisors of East Caln Township (the "Board") granting conditional use approval to co-applicants Progressive Housing Ventures LLC and J. Loew & Associates Incorporated (collectively the "Applicants"/ "Appellees") to construct 70 multifamily housing units utilizing 23.2 acres comprised of 3 tax map parcels, 40-1-23, 40-1-23.1 and a part of 11-4-23, owned by the Borough of Downingtown (the "Borough"), and located on

the south side of Norwood Road in the Township. The housing units are proposed to be constructed on tax parcel 40-1-23, approximately 7 acres in area, which the Borough has agreed to sell and convey to the Applicants. The Borough, which adjoins the Township, owns the 16 contiguous acres located primarily in the Township, which were acquired by the Borough by purchase; however, un-like the 7 acre parcel, they were acquired for recreation and conservation purposes, and dedicated and accepted by the public for its use as a public park.<sup>1</sup> Ann Feldman, a Borough resident who resides on Lake Drive adjacent to the park and the Borough were granted party status by the Board. She is a riparian landowner, whose property is contiguous to the second of the four ponds located in the park. The Borough joined in the Applicants' application as a co-applicant pursuant to its Agreement of Sale with the Applicants, in

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<sup>1</sup> The Borough owns some 23 acres of land located primarily in the Township, which are the subject of this appeal. Under the terms of an August 17, 2007 Agreement of Sale with the Borough and its 2 subsequent amendments, the Applicants are the equitable owners of 7 of those acres, tax parcel 40-12-23, on which the 70 housing units are proposed to be constructed. The remaining 16 acres, tax parcels 40-1-23.1 and 11-4-23, are dedicated parkland, over which the Agreement gives the Applicants an easement to discharge stormwater from the 7 acre parcel. As a condition of the subject conditional use approval, the Applicants can count an area of the park not exceeding 10% in satisfying their open space area requirement mandated by the Township's zoning ordinance. The latter two parcels are part of a larger collection of Borough-owned tracts totaling in excess of 40 acres in area, which extend into the Borough and collectively comprise the parkland, known locally as Kardon Park. Because there are 4 separate ponds in the park, it is also known as "the Ponds". Fourth Lake, the largest of the ponds, is located within the 16 acres of dedicated parkland located in the Township, and is the northern-most of the four Park ponds. See Exhibit A-2 & "Aerial Overview Map".

which it agreed to sell Applicants the 7 acre parcel and convey easement rights to them in the two other parcels to permit the limited use of its parkland for the latter purposes.<sup>2</sup> While the dispute in this appeal focuses on the zoning aspects of the conditional use, the principal complaint is the Township's approval of the improvement and use of Fourth Lake as a stormwater retention facility to serve the 70 units to be constructed on the 7 acre parcel, and the use of the Borough's parkland to satisfy the open space requirements of the zoning ordinance associated with the development.<sup>3</sup> Among other positions, Feldman argues that such use of

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<sup>2</sup> While the Board's factual findings in its conditional use decision are Spartan, the parties have advanced various arguments in their legal memorandums in which they refer to various exhibits in the record. Our examination of the record indicates that the Borough's August 17, 2007 Agreement of Sale with the Applicants, Exhibit P-12, initially involved the proposed acquisition of various parcels of land owned by the Borough not directly involved in this appeal located wholly within the Borough, some of which were other parcels comprising parts of Kardon Park. Under the terms of the First Amendment to that Agreement, Exhibit P-13, the Applicants subsequently agreed to purchase tax parcel 40-1-23.1 from the Borough, and upon certain conditions were required to purchase the Borough's 7 acre parcel, tax parcel 40-1-23. In the Second Amendment to the Agreement, Exhibit P-14, the Borough granted Applicants the time-limited absolute right and option to purchase the 7 acre parcel subject to development approvals to be granted by the Township, and further agreed to grant Applicants easements over its park property reasonably required to construct park improvements as may be required to satisfy conditions imposed by the Township to its approval of the 7 acre parcel's development, on condition that the Borough's parkland acreage not be diminished. Exhibit P-14, paragraph 4.

<sup>3</sup> The litigants refer to the 7 acre parcel as "The Millrace". A mill race is the current or channel of a stream, especially one for conducting water to or from a water wheel or other device for utilizing its energy. The race leading to the water wheel is called the head race, and the race leading away from the wheel is called the tail race. In the early 1700s the area first became known as Milltown for its mills along the Brandywine River. The mill race in this case connects the Park's four ponds.

the parkland violates the Public Trust Doctrine and the Donated or Dedicated Property Act, Act of Dec. 15, 1959, P.L. 1772, as amended, 53 P.S. §§3381-3386 (the "Act") because Fourth Lake and the open space located within the confines of the dedicated park are adversely impacted.<sup>4</sup>

**Standard of Review.** Where the Court does not take additional evidence, the standard of review of a conditional use zoning appeal is limited to determining whether the board of supervisors committed an error of law or manifestly abused its discretion. *Borough of Perkasio v. Moulton Builders, Inc.*, 850 A.2d 778 (Pa. Cmwlth. 2004); *Tink-Wig Mountain Lake Forest Property Owners Association v. Lackawaxen Township Zoning Hearing Board*, 986 A.2d 935 (Pa. Cmwlth. 2009). The Court may not substitute its judgment for that of the board absent such abuse or legal error. *Valley View Civic Ass'n v. Zoning Bd. of Adjustment*, 462 A.2d 637, 639 (Pa. 1983) (citations omitted); *Noah's Ark Christian Child Care Center, Inc. v. Zoning Hearing Board of West Mifflin Township*, 831 A.2d 756 (Pa.

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<sup>4</sup> The Borough sought approval from the Orphan's Court Division of this Court to sell 5 separate parcels of land totaling 40.5 acres comprising part of Kardon Park to the Applicants under the terms of the August 17, 2007 Agreement of Sale. Two of those parcels, tax parcels 40-1-23.1 and part of 11-4-23, comprise the 16 acres which are in issue in the instant appeal. It is agreed by the parties that the 7 acre parcel has never been deed restricted or otherwise dedicated for public use. The Borough's Petition was denied by Judge Katherine B.L. Platt, Judge of the Orphan's Court Division of this Court on October 7, 2010 upon factual findings and legal conclusions that those parcels had been dedicated to and accepted by the public for its use, had not ceased to serve their public function, were not otherwise inalienable, and consequently were restricted from such conveyance by the Donated or Dedicated Property Act, *supra*.

Cmwlth. 2003). The governing body abuses its discretion when its findings of fact are not supported by substantial evidence. Otherwise, the court is bound by the Board's findings when supported by substantial evidence. *Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807 (Pa. Cmwlth. 2005); *Macioce v. Zoning Hearing Board of the Borough of Baldwin*, 850 A.2d 882 (Pa. Cmwlth. 2004), *appeal denied*, 863 A.2d 1150 (Pa. 2004); *In re Petition of Dolington Land Group*, 839 A.2d 1021, 1026 (Pa. 2003) (citations omitted); *In re Thompson*, 896 A.2d 659, 667 n.4 (Pa. Cmwlth. 2006) (citations omitted). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Rittenhouse Row v. Aspite*, 917 A.2d 880, 883 (Pa. Cmwlth. 2006). The court must accept the credibility determinations of the municipal body which hears testimony, evaluates the credibility of witnesses, and serves as fact-finder. *Collier Stone Co. v. Zoning Hearing Bd. for the Twp. of Collier*, 710 A.2d 123 (Pa. Cmwlth. 1998).

Board's Findings and Conclusions. In its Decision, the Board made the following pertinent findings of fact:

8. A significant amount of the Property is currently impacted by environmental contamination.
9. The Applicant is the equitable owner of Tax Parcel No. 40-1-23 containing 7+/-0 acres.

10. Tax Parcel No. 40-1-23 is currently the site of, *inter alia*, a Borough compost facility and storage and is not, and has not been, used for public park purposes.

11. The Applicant proposes to develop Tax Parcel No. 40-1-23 with 70 multi-family dwellings, roadways, parking, public water and sewer, landscaping and other improvements in accordance with Applicant's Exhibits and testimony.

12. Tax Parcel Nos. 40-1-23.1 and 11-4-23 are, and have been, used for public park purposes.

13. The Applicant proposes to retain and improve Tax Parcel Nos. 40-1-23.1 and 11-4-23 for public park purposes.

14. The Applicant also proposes, with the consent of the Borough, to utilize Fourth Lake on Tax Parcel 40-1-23.1 for stormwater management associated with the proposed multi-family development.

15. The Applicant proposes environmental remediation of most of the Property which is subject to existing contamination.

16. The proposed development of the Property complies with the Township zoning as of the date of this Decision.

The Board concluded that Applicants complied with the conditional use standards of Sections 225-35 and 225-7.F of its zoning ordinance, and that the use of tax parcels 40-1-23.1 or 11-4-23 for stormwater management of the impervious coverage proposed to occur on the 7 acre parcel and for its open space requirements do not constitute a sale or alienation of those parcels in violation of the Public Trust Doctrine or the Donated and Dedicated Property Act. The Board's conditional use approval was made subject to various conditions, *inter alia*, upon the continued use of parcels 40-1-23.1 and 11-4-23 as public parkland,

completion of pond enhancements to Fourth Lake as proposed by the Applicants, remediation of the property by capping the historic fill subject to PADEP approval, and expansion of the Park's public trails and parking, all of which it concluded will enhance the condition and use of the land.<sup>5</sup>

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<sup>5</sup> The Board imposed the following condition of approval:"14. The Applicant shall obtain any required DEP approval of any revisions to the phased remediation proposed for the overall Kardon Park site". Although the Board did not make extensive findings of fact respecting this condition, the record amply supports its imposition, disclosed in part by the following from the record made before the Board, a brief review of which also serves to explain the rationale underlying the Board's decision. In noting the following, it is not this court's intention to make any independent findings of fact.

The Borough has long considered ways to clean and remediate the Park and, by including a private developer in the project, it was able to secure a state grant toward the environmental remediation. N.T. 4/5/10, pp. 18-19. The Borough owns other open space which services the stormwater management needs of neighboring private developments. N.T. 4/5/10, pp. 31-32. The 7 acre parcel and portions of the park located in the Township were used previously as a quarry, and later used as an industrial dump by paper and steel mills. N.T. 1/7/10, pp. 60 et seq.; Exhibit A-12(a); Exhibit A-30 [photo of 7 acre parcel and Fourth Lake]. In 2000, the Borough received approval from the PADEP to use the 7 acre parcel for commercial development to serve as a cap over the contamination. Development of the parcel for residential use will require PADEP permit approval pursuant to an approved remediation and clean-up plan. The Applicants approached the Township about possibly developing the site and seeking an amendment to the zoning ordinance to permit multi-family housing there. Following months of review, and after the conditional use application was submitted, the Township Planning Commission recommended approval of the conditional use. R.R. Exhibit B-12.

At the conditional use hearings, the Applicants elicited testimony from Paul Stratman, a geologist and engineer, regarding the environmental remediation and clean-up that will be required to develop the 7 acre parcel. During a time in the early half of the 20th Century, the site was used for fill, including soils, sand and gravel. N.T. 1/7/10, pp. 60 et seq. From the 1940's through the early 1980's, the site served as a disposal and storage area for local industries. Currently, the land contains slag and construction debris and textiles mixed in the soil. N.T. 1/7/10, p.63. The Borough contracted for an environmental assessment that determined that the health risk associated with present contaminants did not preclude the 7 acre parcel's use. The Applicants have been issued a permit from the Army Corps of Engineers to disturb wetlands on the site in

order to facilitate their plan to cap the historic fill contamination. N.T. 1/7/10, pp. 69-71; Exhibit A-12(a). There is no contamination of the groundwater, nor is there concern of contamination within the ponds. N.T. 2/4/10, pp. 22 et seq. The site will be graded and 18 inches of clean soil will be applied to create the cap. N.T. 2/4/10, p.30. To facilitate PADEP approval of their Act 2 clean-up plan, the Applicants prepared a PADEP required post-remediation care plan to ensure proper maintenance of the containments following development. N.T. 4/5/10, p.85; Exhibit A-27.

Fourth Lake will not be sold or conveyed, and its use of public access is not proposed to change. It is actually a man-made pond, and currently receives stormwater runoff that is untreated and uncontrolled. That use will continue following completion of development of the 7 acre parcel. N.T. 4/5/10, pp. 17-18. Applicants' engineer, Victor Kelly, testified that the current runoff goes directly into the Fourth Lake, or the forebay located just north of Fourth Lake, or into the millrace without any controls or filtering. Applicants propose to improve both drainage and flow to the Lake. N.T. 4/5/10, pp. 44-45; Exhibit A-30. Kelly testified that Fourth Lake's surface area is approximately 125,000,000 square feet and would adequately contain the 25,000 cubic feet of stormwater discharge caused by the Millrace (7 acre parcel) development from a calculated 100 year storm. N.T. 12/15/09, p. 43; 2/4/10 p. 95; 5/6/10, pp. 68-71; Exhibit A-34. The plan will require Chester County Conservation District, Township and PADEP approval during the land development phase. In Kelly's opinion, utilizing the pond for stormwater discharge will enhance the quality of the pond's water and its appearance. N.T. 12/15/09, p.44.

The 4 ponds located on the Borough's land are interconnected by the millrace. N.T. 12/15/09, pp. 49-50. Calculations based upon a 100 year storm revealed that the water surface level of Fourth Lake will be raised approximately 2.4 inches, allowing it to detain water without flooding. N.T. 2/4/10, pp. 95-96; 3/15/10, p. 51; 5/6/10, p. 70, 79; Exhibit A-34. The run-off rate will not exceed predevelopment flow rates. N.T. 2/4/10, p. 99. The Applicants propose to connect a "feed pipe" to improve water flow from a tributary of the Brandywine River through the millrace and ponds. N.T. 3/15/10, pp. 15-16. The improved flow of freshwater will improve the water quality of the ponds. Mr. Stratman opined that the increased flow of freshwater will alleviate the presence of algae and odor within all of the ponds, directing stormwater into the ponds will have no detrimental effect on the recreational uses of Fourth Lake or the other ponds, and will not interfere with their current public use. N.T. 3/15/10, pp. 86-87. Conditional use approval by the Board is a precondition of the issue of an NPDES permit required to allow stormwater run-off into the millrace and ponds, with eventual discharge into the Brandywine River.

The Applicants' plans incorporate the suggestions of the Township's Planning Commission, including the 10 foot wide new trail and trail signage; and the conceptual designs of the townhouses containing the 70 units, consistent with Kardon Park. N.T. 4/5/10, pp. 87-90. The plans provide for fencing on the east side of the Norwood Road trail, and Applicants have agreed to install additional fencing, if required, on the west

**Discussion.** Section 603 of the Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §10603, provides that zoning ordinances may contain provisions for conditional uses to be allowed or denied by the governing body, "pursuant to express standards and criteria set forth in the ordinance. 53 P.S. §10603(c)(2). A conditional use is virtually identical to a special exception, except that it lies within the jurisdiction of the municipal governing body. *Collier Stone Company v. ZHB of Collier Township*, *supra*. Its allowance evidences the governing body's legislative decision that the use fits within the municipality's zoning scheme and is presumptively consistent with the health, safety and welfare of the community. 53 P.S. § 10603(c)(2); *LTS Development, Inc v. Middle Smithfield Twp. Bd. of Supervisors*, 862 A.2d 686, 688 (Pa. Cmwlth. 2004) (citing *Bailey v. Upper Hampton Twp.*, 690 A.2d 1324 (Pa. Cmwlth. 1997). In granting approval, the board may impose such reasonable conditions and safeguards related to the public health, safety and welfare, in addition to those expressed in the ordinance, as it deems necessary to implement the purposes of the MPC and the local zoning ordinance. 53 P.S. § 10913.2(a); *HHI Trucking & Supply, Inc.*

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side of the road adjacent to the new trail there. N.T. 4/5/10, p.100. They have also agreed to install fountains and introduce grass carp (a herbivorous, freshwater fish species), into Fourth Lake, if permitted, to further improve and maintain water quality. N.T. 4/5/10, p.103.

*v. Borough Council of the Borough of Oakmont*, 990 A.2d 152, 160-61 (Pa. Cmwlth. 2010); *Clinton County Solid Waste Authority v. Wayne Township*, 643 A.2d 1162 (Pa. Cmwlth. 1994).

An applicant has the duty in its initial proofs to show that its use satisfies the *objective standards* of the zoning ordinance that apply to the proposed use. This burden requires the applicant to produce evidence that persuades the governing body of its compliance with those objective standards. Once the applicant meets its burden, a presumption arises that the proposed use is consistent with the general welfare of the community, and the burden shifts to the objectors to rebut that presumption and to prove that the impact of the use would violate *the other general standards* of the ordinance that apply. *Bailey v. Upper Southampton Twp.*, 690 A.2d 1324, 1326 (Pa. Cmwlth. 1997) (citing Robert S. Ryan, *Pennsylvania Zoning Law & Practice* § 5.2.5 (1981); *Aldridge v. Jackson Township*, 983 A.2d 247, 253 (Pa. Cmwlth. 2009); *In Re Drumore Crossings, L.P.*, 984 A.2d 589, 595 (Pa. Cmwlth. 2009). The burden shifts because general, non-specific or non-objective ordinance requirements do not fall within the threshold persuasion burden and presentation duty of a conditional use applicant. *Bray v. Zoning Bd. of Adjustment*, 410 A.2d 909 (Pa. Cmwlth. 1980).

Because a conditional use is presumptively deemed to be consistent with the health, safety and welfare of the community, objectors bear the burden of proving the contrary by credible evidence. *Bailey v. Upper Southampton Twp.*, 690 A.2d 1324, 1326 (Pa. Cmwlth. 1997). To be successful, the objectors must show by a high degree of probability that the proposed conditional use will substantially affect the health and safety of the community. *In re Thompson*, 896 A.2d 659, 679 (Pa. Cmwlth. 2006) (citing *Johnson v. North Strabane Township*, 546 A.2d 1334 (Pa. Cmwlth. 1998)). Denial of a conditional use requires proof that its allowance poses a greater risk than normally follows approval of similar uses. *In re Cutler Group*, 880 A.2d 39, 43 (Pa. Cmwlth. 2006); *Bailey v. Upper Southampton Twp.*, 690 A.2d 1324, 1326 (Pa. Cmwlth. 1997).

Feldman raises several issues on appeal from the Board's conditional use decision, which we now address.<sup>6</sup>

Public Trust Doctrine and the Donated and Dedicated Property Act.

Appellant argues that the use of Fourth Lake to control stormwater from the 7 acre parcel, and the use of the Park's open space to satisfy the

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<sup>6</sup> The Borough and Applicants note Feldman's untimely brief in support of her appeal. Her notice of appeal was filed on July 21, 2010, the Township filed the return of the record on August 3, 2010, and Feldman filed her brief on October 6, 2010, beyond the 31 day filing period. Local Rule 5002(f). The Appellees have not moved to dismiss her appeal, as contemplated by Local Rule 5002(g), nor do we find her brief to be so untimely as would support such drastic action.

Township zoning ordinance's requirement that 40% of the "development tract" be devoted to use as open space is the equivalent of a sale of public land to private developers.<sup>7</sup> Whether requiring the execution of a lease or the granting of easements to effectuate such purposes, Appellant contends such use violates the Public Trust Doctrine and/or the Donated and Dedicated Property Act ("DDPA"). In the alternative, presumably pursuant to 53 P.S. §3384, Appellant argues that such use of the Borough's Park will, at the very least, require Orphan's Court approval, which has not been sought. Citing *In re Erie Golf Course*, 992 A.2d 75 (Pa. 2010), Appellant argues that the Orphan's Court alone has jurisdiction under the Public Trust Doctrine to decide whether a public parkland can be utilized or sold for other purposes "when the sale was [sic] pursuant to the Dedicated or Donated Property Act". Appellant's Brief, pp. 10-11. According to Appellant, Orphan's Court approval was required as a precondition to the Board's granting of the conditional use.

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<sup>7</sup> "(a) A minimum of 40% of the tract to be developed must be designed, restricted and used as open space." Ordinance 2010-01, enacted June 30, 2010, Section 225-7.F. (4)(a).

"(f) Open space may be dedicated to the Township if accepted by the Township or to the Borough of Downingtown if not accepted by the Township. Proposed open space already owned by the Borough may be retained in the Borough's ownership." Ordinance 2010-01, enacted June 30, 2010, Section 225-7. F. (4)(f).

In response, the Borough and the Applicants argue that allowance of the conditional use will not result in any change in the public use of the park parcels, and does not constitute a sale of the property. Even were it otherwise, they also argue this Court has no jurisdiction over the Township's decision to permit the proposed use of the parkland for the foregoing purposes within the context of this zoning appeal. Instead, they argue that only the Orphans' Court has jurisdiction to address Appellant's challenge in an independent proceeding brought pursuant to the DDPA. They analogize this issue to the principal that a zoning approval cannot be denied on the basis of a private restriction such as a deed restriction or restrictive covenant.

We conclude that our jurisdiction is limited to determining whether the Board abused its discretion or committed legal error in granting this conditional use. Discretion to redress an alleged violation of the Public Trust Doctrine or to approve a proposed sale or other alienation of dedicated public lands is vested solely in the Orphan's Court pursuant to the DDPA. 53 P.S. §3383; *In Re Erie Golf Course*, 992 A.2d at 87-88. Irrespective of the public trust issues advanced by the Appellant, we view the present question to be whether the Board abused its discretion or committed legal error when applying its zoning regulations on the record

made before it, a determination which necessarily included approving the use of parkland for stormwater control and open space allocation in allowing a multi-family conditional use on the 7 acre development parcel. Essentially, our primary task is to address the zoning issues raised in this appeal. Resolution of these issues is dependent upon the requirements of the zoning ordinance and the Board's administration and interpretation thereof, to which we give great deference. "A board of supervisors is entitled to considerable deference in interpreting its zoning ordinance." *Aldridge*, 983 A.2d at 254 (quoting *Caln Nether, L.P. v. Bd. of Supervisors of Thornbury Twp.*, 840 A.2d 484 (Pa. Cmwlth. 2004)). We conclude that the Board's approval of Fourth Lake for stormwater management is amply supported by the record.<sup>8</sup> See F.N. 5 above. We have previously addressed and cited to the provisions of Section 225-7. F. (4) governing open space regulations that are applicable to multifamily development.<sup>9</sup> Open space is defined by the zoning ordinance.<sup>10</sup> Although Section 225-

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<sup>8</sup> "The proposed use will be developed using effective stormwater management techniques and soil erosion and sedimentation control techniques". Section 225-35.A.(4)(p).

<sup>9</sup> The Township's Zoning Ordinance defines "dwelling, multifamily" as "A building designed for and occupied exclusively as a residence for three or more families living independently of one another." Ordinance § 225-3.

<sup>10</sup> Section 225-3 defines "Open Space Area" by reference to the term "Open Space Recreation" as "An area designed to provide outdoor recreation facilities for the

7. F. (4)(a) requires a minimum of 40% "of the tract to be developed" be designed as open space, subparagraph (f) thereof specifically permits existing open space owned by the Borough to satisfy this requirement. Rules of statutory construction are applicable to both statutes and ordinances. Specific provisions of an ordinance control over general ones. 1 Pa.C.S.A. § 1933; *Heck v. Zoning Hearing Bd. for Harvey's Lake*, 397 A.2d 15 (Pa.Cmwlth. 1979.)<sup>11</sup> Interpreting these provisions together as required by the Statutory Construction Act convinces us that the Board correctly applied its zoning ordinance in respect of the open space requirement.

During the conditional use hearings, Appellant repeatedly challenged Appellees' use of the park parcels as a violation of the Public Trust Doctrine, which realistically compelled the Board to address that argument in reaching its decision. While jurisdiction to determine such alleged violation is not within our jurisdiction in a zoning appeal, but, rather

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residents of a specific area of the Township as a whole. Any structure must be accessory to the outdoor recreation facility use".

<sup>11</sup> Section 1933 of the Statutory Construction Act, 1 Pa.C.S.1933, states: Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.

is vested in the Orphan's Court in a separate proceeding, we note our agreement with the Board's legal conclusion that the use of the park parcels in this instance is not a use, sale or alienation in violation of either the latter Doctrine or the DDPA.<sup>12</sup> A political entity is prohibited from undermining the public's use of dedicated public lands so long as they continue to be used, in good faith, for that public purpose. *In re Erie Golf Course*, supra; *City of Easton v. Koch*, 31 A.2d 747 (Pa. Super. 1943); *In re Estate of Ryerss*, 987 A.2d 1231, 1237 n.8 (Pa. Cmwlth. 2009). The Board committed no error in approving the conditional use to allow multifamily development by authorizing use of the park parcels for the purposes under discussion. The evidence shows that the use of Fourth Lake to accept additional flows of stormwater discharge arising from development of tax parcel 40-01-23 will not alter, diminish or interfere with its continued use as a public pond or adversely affect the use of Kardon Park generally, and the park parcels specifically, for public park purposes. We reach the same conclusion with respect to use of the park parcels to satisfy the open space requirements associated with development of tax parcel 40-01-23. The Park is essentially open space with some existing

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<sup>12</sup> *In Re Erie Golf Course*, supra, instructs that the DDPA incorporates the salient common-law principles of the Public Trust Doctrine, essentially reposing in the Orphan's Court jurisdiction to afford relief or determine violations of those common law and statutory laws. *Id.* at 86.

public improvements subsequently added after dedication. Adding a new walking path and parking spaces, open to all members of the general public, among who will be the future residents of the Millrace parcel, will in no way interfere with the Park's continued use for the purposes for which it was originally dedicated. The Park will remain as it has been in the past, a bucolic place within which the general public may recreate itself. In neither instance is the use of the Park being diverted to a private use different from or inconsistent with its existing public use. See *Payne v. Kassab*, 361 A.2d 263 (Pa. 1971) (citations omitted).

Appellant also argues that creation of a stormwater drainage easement and use of the Park's open space to satisfy the open space requirements of the Applicants' 7 acre parcel is the equivalent of a sale within the contemplation of Section 4 of the DDPA, 53 P.S. §3384. We do not agree. In the Second Amendment to Sales Agreement between the Borough and the Applicants, the Borough has agreed to convey easements in the Park as are reasonably necessary to permit the discharge stormwater from the development parcel and the addition of park improvements required by zoning approvals. We find nothing in the record that indicates an open space easement will be granted by the Borough over and above the existing dedication of the Park public open

space. Even were that so, it would not constitute a sale or alienation. The Board's decision conditions its approval upon the Applicants' completion of certain improvements in the Park, which requires their reasonable access to the parkland to make those improvements. See Conditions of Approval 7, 8, and 10 – 13. However, these improvements are public improvements that inure to the benefit of all members of the public, not simply residents of the prospective development. They do not interfere with or detract from the use or availability of the Borough's land as a public park, and certainly do not constitute a sale of the land. As discussed in *Clements v. Sannuti*, 356 Pa. 63, 51 A.2d 697 (1947), an easement is a liberty, privilege, or advantage which one may have in the lands of another without profit. However, there can be no easement or incorporeal right that binds the servient tenement, the effect of which would be to deprive its owner of the right of use or possession of its property. An easement is not an estate or interest in the land itself, or a right to any part of it'. *Slegel v. Lauer*, 148 Pa. 236, 240, 23 A. 996, 997(1892). 'An easement is a right in the owner of one parcel of land by reason of such ownership to use the land of another for a special purpose not inconsistent with a general property in the owner'. *Reifler & Sons v. The Wayne S. W. P. Co.*, 232 Pa. 282, 289, 81 A. 300, 302. Instantly, the

general purpose contemplated by the Board's decision is continued use of the park parcels by the general public, and not a sale or alienation.

We also acknowledge the Borough's obligation is to ensure that the use of these parcels remains consistent with those uses attendant to a public park, irrespective of the Board's decision, and we see no evidence in this record that the Borough intends to do otherwise. Should events prove otherwise, the public has recourse to the courts to redress any violation of the public trust. *White v. Township of Upper St. Clair*, 799 A.2d 188 (Pa. Cmwlth. 2002); *Pilchesky v. Redevelopment Authority of City of Scranton*, 941 A.2d 762 (Pa. Cmwlth. 2008).

Zoning Ordinance Amendment.

Appellant argues that the Board's approval of the multifamily conditional use is unsupported by a valid legal foundation because the zoning ordinance amendment allowing the use was not adopted by the Township supervisors in advance of the conditional use hearings. The Applicants included in their application for conditional use approval a proposed ordinance seeking to amend the existing zoning ordinance regulations governing low density cluster residential in the R-4 zoning district's in which the subject parcels are located. The amendment was adopted by the Township's Supervisors on June 30, 2010 as Ordinance

2010-01, and prior to the Board's July 5, 2010 decision approving Applicants' multifamily conditional use. East Caln Township is a Second Class Township, whose ordinances are effective 5 days after enactment unless a later date is stated in the ordinance. 53 P.S. §66601. No such later date is stated in Ordinance 2010-01, and Appellant has not challenged its effective date.

Appellant supports its argument by recourse to Section 917 of the MPC, which essentially precludes municipal adoption of a zoning amendment that adversely affects a pending conditional use application.<sup>13</sup> Although the subject zoning amendment is consistent with and not adverse to Applicants' conditional use application, citing to *Lehigh Asphalt Paving and Construction Co. v. Bd. of Supervisors of East Penn Twp.*, 830 A.2d 1063 (Pa. Cmwlth. 2003), Appellant nonetheless argues this statutory proscription should apply equally in this case. In short, it doesn't. Neither Section 917 nor any other MPC directive prohibits a municipality from enacting a zoning amendment that benefits a landowner whose

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<sup>13</sup> "When an application for... a conditional use has been filed with either the zoning hearing board or governing body, as relevant, and the subject matter of such application would ultimately constitute either a land development as defined in section 107 or a subdivision as defined in section 107, no change or amendment of the zoning, subdivision or other governing ordinance or plans shall affect the decision on such application adversely to the applicant, and the applicant shall be entitled to a decision in accordance with the provisions of the governing ordinances or plans as they stood at the time the application was duly filed...." 53 P.S. §10918.

application for conditional use approval is pending at the time of adoption. *Lehigh Asphalt Paving and Construction Company* has no application to Applicants' proposed amendment or its conditional use application.<sup>14</sup>

Several additional observations are pertinent. It is accepted practice in many municipalities to coordinate conditional use applications with zoning amendment hearings submitted by landowners as tandem applications.<sup>15</sup>

This process is perfectly legal and makes eminent sense from both the applicant's and the municipality's perspectives. Zoning amendments are legislative enactments that Supervisors can either accept or reject, assuming they are not brought by the applicant as a constitutional challenge to the validity of the ordinance. If the Supervisors conclude the proposed amendment is in the public interest and within the municipalities

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<sup>14</sup> "Section 917 in prohibiting an adverse decision on a special exception application based on a pending zoning amendment, provides a statutory shield against the application of zoning amendments pending pursuant to the procedure established in Section 609 of the MPC, as amended, 53 P.S. § 10609. [citation omitted]... Section 609 establishes what might be called the ordinary amendment process based on discretionary legislative policy decisions. In contrast, the procedures under Section 609.2 apply only after a determination by the municipality that an amendment is necessary to cure an invalidity in the ordinance rather than undertaken purely as a matter of legislative discretion. There is no principled reason that the shield under Section 917 should not equally apply to a zoning amendment under the procedures established in Section 609.2 for a municipal curative amendment and to an amendment pending pursuant to the procedures in Section 609...." *Lehigh Asphalt Paving and Construction Co.*, supra, 830 A.2d at 1072-73.

<sup>15</sup> Ordinance 2010-01 was under consideration by the Township when the conditional use application was submitted. Applicants stated at the inception of the conditional use hearings that implementation of the proposed use would require the zoning amendment that it proposed and included in its application. N.T. 11/11/09, pp. 25-26.

comprehensive plan, they are free to adopt it, while contemporaneously approving the conditional use that needs the previously adopted amendment for implementation. A zoning ordinance amendment “is a purely legislative act within the complete discretion of the local governing body.” *Springwood Development Partners, L.P. v. Board of Supervisors of North Cornwall Twp.*, 985 A.2d 298, 304 (Pa. Cmwlth. 2009) (citing *East Lampeter Twp. v. County of Lancaster*, 744 A.2d 359, 364 (Pa. Cmwlth. 2000); *Assoc. of Concerned Citizens of Butler Valley v. Butler Twp. Bd. of Supervisors*, 580 A.2d 470 (Pa. Cmwlth. 1990)). There is no procedural defect and certainly nothing sinister or illegal about that process. Instantly, the ordinance amendment permitting this multifamily conditional use was legally enacted when the Board rendered its decision approving the multifamily conditional use. In addition, when presented with a conditional use application, the MPC and the Township’s zoning ordinance oblige the Supervisors to schedule and conduct a public hearing to consider it, or risk a deemed approval. 53 P.S. §10913.2; Section 225-35.D; N.T. 4/5/10, p. 10.

#### The Borough’s Intervention.

Appellant contends we should reverse the Board’s decision because Borough Council did not timely decide by formal vote to approve the

Borough's participation as a co-applicant and party to the conditional use hearings. It appears the Council adopted a formal resolution to do so on May 19, 2010, after the first eight conditional use hearings had been concluded, but before the last hearing; however, the Board granted the Borough both party and co-applicant status. Appellant cites no authority for its argument, and indeed, there is no such hard and fast rule. The Borough is a landowner as defined in Section 107 of the PMC. 53 P.S. §10107. The Board has discretion in admitting parties to the proceeding before it, but assuredly as a landowner and entity affected by the application, the Borough was a party in interest. It was within the Board's discretion to grant the Borough co-applicant and party status. 53 P.S. §§10908; 10913.2. We find no abuse of discretion on the Board's part in doing so, and consider Appellant's argument that we strike all references in the record to the use of Fourth Lake and the park's open space that occurred during the first eight hearings to be fallacious.

Applicants' Burden of Proof.

Appellant next argues that the Applicants' lack of formal and specific plans precluded the Board from properly applying the objective standards of its zoning ordinance and determining the Applicants' ability to comply with those standards. Appellant further contends that because the

proposed conditional use is inconsistent with the R-4 zoning in effect when the application was submitted, there can be no presumption that the use is consistent with the public health, safety and welfare. Finally, Appellant argues her evidence demonstrated that the proposed conditional use will adversely affect the public interest by using public parkland for private use. These arguments are without merit. We have addressed the latter two contentions earlier in this opinion. As to the former, the Township's zoning ordinance requires the applicant to submit a report "which describes how the standards and criteria have actually been met or will be met . . . ." Ordinance § 225-35.A(4). This Section delineates the various requirements, some of which are general, and some of which are specific, including, *inter alia*, that the proposed use will provide for adequate and effective sanitation and water supply; will provide for adequate off-street parking; will contain adequate signage, and will use effective stormwater management techniques and soil erosion and sedimentation control techniques. In addition to the standards and criteria contained in Section 225-35.A(4), the applicant must provide specific information regarding (1) the proposed scale plan showing the size and location of the proposed use, the location of the buildings, access drives and roads within 200 feet; (2) documentation that the existing road

network is adequate to support the traffic generated by the proposed use; (3) documentation that the access points are properly located to facilitate the safe and efficient movement of traffic; (4) landscape plans; and (5) site analysis maps and plans, and plans drawn to scale, particularly relative to water resources. Ordinance § 225-35.B. The Board concluded that the Applicants' testimony and exhibits demonstrated compliance with these requirements, and that the objectors (Appellant) failed to successfully prove any public deprivation. Board's Decision, pp. 5-6. Our review of the record does not disclose any abuse of discretion on the Board's part in so concluding.<sup>16</sup> The conditional use applicant is not required to show the particular details of the design of the proposed development. Rather, his obligation is to demonstrate that he can comply with basic zoning criteria. *In Re Appeal of Drumore Crossings, L.P.*, 984 A.2d 589 (Pa. Cmwlth. 2009); *In re Thompson*, supra, 896 A.2d at 670. The Supervisors who

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<sup>16</sup> The Applicants submitted plans for the multifamily units that included the floor plans. Exhibit A-14 & 14a; site plans, A-17a and 17b; fiscal impact report and revised report, Exhibit A-5 & 5a; the provision of public water service. N.T. 1/7/10, p. 23; Exhibit A-16; plan relocation of water service main: Exhibit A-25; a traffic impact study and testimony from a traffic expert that the levels of service of the intersections at Norwood Road and Wallace Road will remain the same with only slight increases in traffic volumes generated by the development. N.T. 2/4/10, pp. 58-61 & Exhibit A-9, 9A, 9B; open space calculations: N.T. 12/15/09, p. 73; 1/7/10, p. 20 complaint with ordinance § 225-7.F(4); trail and parking improvements: N.T. 12/15/09, pp. 74-82; Exhibit A-3; open space ownership and maintenance. N.T. 4/5/10, p. 36; design details will be provided during the land development phase, as is required by both the ordinance's conditional use provisions and by the Board in their conditions of approval for this application. Ordinance § 225-35.A(4)(b).

heard the witnesses and examined the exhibits submitted on Appellees' behalf concluded in the exercise of their discretion that they had satisfied that burden, and we cannot substitute our judgment for theirs. Having reviewed the record as referenced above, we find no abuse of that discretion.

Appellant finally contends the application fails to comply with the Township's Comprehensive Plan, in two respects: it is allegedly inconsistent with the Plan's goal of protecting the Brandywine Creek and the floodplain areas surrounding it, and is contrary to the Plan's reference to Fourth Lake and Kardon Park as community facilities. Having addressed already the latter concern, we pause to observe that a zoning ordinance takes the general goals laid out in the comprehensive plan and converts them into the regulation of specific uses in implementing that plan. However, conditional use applications are generally not denied on the grounds the use is inconsistent with a municipality's comprehensive plan. *Aldridge v. Jackson Tp.*, supra; *In re Cutler Group, Inc.*, supra. While an ordinance must be generally consistent with that plan, though not precisely so, the municipality can always amend its comprehensive plan to match subsequent amendments. Section 603(j) of the MPC, 53 P.S. § 10603(j). *Main Street Development Group, Inc. v. Tinicum Twp.*,

19 A.3d 21 (Pa.Cmwlt.2011). There is no hard evidence in this record that use of the park parcels is inconsistent with the Township's comprehensive plan, or will have a detrimental affect on the Brandywine Creek or its floodplain. Implicit in the Board's adoption of Ordinance 2010-01 is its contrary conclusion, noting as we do that with one minor exception, the subject parcels located in the Township were previously zoned for R-4 uses. A municipality's adoption of zoning amendments is legislative acceptance that the use is consistent with its comprehensive plan. *In re Cutler Group, Inc.*, supra., (citing *Northampton Area Sch. District v. East Allen Twp. Bd. of Supervisors*, 824 A.2d 372 (Pa. Cmwlt. 2003); *In re Application of Conditional Use Approval of Saunders*, 636 A.2d 1308 (Pa. Cmwlt. 1994). Further, when an applicant can reasonably be expected to meet objective conditions for approval, he should not be required to prove accord with the principals or goals of the township. *Bray*, 410 A.2d at 911. (citing *In re Appeal of George Baker*, 339 A.2d 131 (Pa. Cmwlt. 1975)).

Finding no error of law or abuse of discretion on the Board's part, we enter the accompanying order.

ANN FELDMAN  
Appellant

VS.

BOARD OF SUPERVISORS  
OF EAST CALN TOWNSHIP  
and  
PROGRESSIVE HOUSING  
VENTURES, LLC.

and  
J. LOEW & ASSOCIATES,  
INC.

and  
BOROUGH COUNCIL OF  
THE BOROUGH OF  
DOWNINGTOWN

Appellees

IN THE COURT OF COMMON PLEAS  
CHESTER COUNTY, PENNSYLVANIA

NO. 2010-08836

CIVIL ACTION – LAND USE APPEAL

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CHESTER CO. PA.

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Louis J. Colagrecó, Jr., Esquire, Attorney for Progressive Housing Ventures, LLC. and  
J. Loew & Associates  
Patrick C. O'Donnell, Esquire, Attorney for Borough of Downingtown

**ORDER OF COURT**

AND NOW, this 27<sup>th</sup> day of June 2011, upon consideration of the record made before the Board, together with the briefs and arguments of able counsel, it is ORDERED and DIRECTED that the Decision and Order of the Board of Supervisors of East Caln Township dated July 5, 2010 is

hereby AFFIRMED, and the appeal of Ann Feldman is DISMISSED.

BY THE COURT:

  
Ronald C. Nagle S.J.