

LANDMARK BUILDERS, INC. : IN THE COURT OF COMMON
 : PLEAS, LEBANON COUNTY
VS. : PENNSYLVANIA
ZONING HEARING BOARD OF : No. 2021-01402
NORTH LEBANON TOWNSHIP :

Amended

TO: ZONING HEARING BOARD OF NORTH LEBANON TOWNSHIP:

YOU ARE HEREBY NOTIFIED THAT LANDMARK BUILDERS, INC., has filed the attached Appeal in THE COURT OF COMMON PLEAS OF LEBANON COUNTY on NOVEMBER 12TH, 2021 and you are hereby commanded to file within twenty (20) days after receipt of this notice and writ, the entire record in the above matter certifying the same to the court in accordance with Section 1008 of the Pennsylvania Municipal Planning Code.

Dated at Lebanon, Pennsylvania, This 12th day of NOVEMBER, 2021.

(SEAL)

Barbara A. Smith

(Prothonotary)

By: *Michelle Sanger*
 (Deputy)

.....
TO THE COURT OF COMMON PLEAS OF LEBANON COUNTY:

The record aforementioned, with all things touching the same so full and Entire as before this board they remain, I hereby respectfully certify and send, as within I am commanded together with this writ.

PLEASE RETURN COPY OF WRIT SIGNED WITH RECORD

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LEBANON, PA

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IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY, PENNSYLVANIA

LANDMARK BUILDERS, INC.	:	
Appellant,	:	
	:	
v.	:	No. <u>2021-01402</u>
	:	
NORTH LEBANON TOWNSHIP	:	LAND USE APPEAL
ZONING HEARING BOARD,	:	
Appellee.	:	

NOTICE OF LAND USE APPEAL

Landmark Builders, Inc., by and through its counsel, McNeese Wallace & Nurick LLC, respectfully files this land use appeal, and in support thereof states as follows:

The Parties and the Property

1. Appellant Landmark Builders, Inc. ("Landmark") is a Pennsylvania corporation with offices located at 1737 W. Main Street, Ephrata, Pennsylvania 17522.
2. Appellee North Lebanon Township Zoning Hearing Board (the "ZHB") is a municipal body with an address of 725 Kimmerlings Road, Lebanon, Pennsylvania 17046.

3. The Property at issue in this appeal is approximately 20.29 acres located in North Lebanon Township (the "Township") along N. Eighth Avenue and Kimmerlings Road, including all portions of four (4) tracts of land identified as Lebanon County UPI Nos. (and addresses): (i) 7-2342862-378819-0000 (ES N. Eighth Avenue); (ii) 27-2342782-378713-0000 (1656 N. Eighth Avenue); (iii) 27-2343089-379564-0000 (SS Kimmerlings Rd.); and (iv) 27-2343516-379759-0000 (836 Kimmerlings Rd.) (the "Property").

4. Landmark is the equitable owner of the Property.

5. The Property is located in the central portion of the Township. The Property is surrounded completely by residentially planned, zoned, or developed land or street rights of way.

6. The Property is located mostly in the R-2 Zoning District. Smaller portions of the Property that abut N. Eighth Avenue or Kimmerlings Road are zoned as part of the R-1 Zoning District.

7. Landmark seeks to develop an approximately 17.28-acre portion of the Property for garden apartments to be known as Briar Ridge Commons.

8. Landmark proposed to subdivide the property into six lots. Five of those lots would be small lots improved by single-family residential dwellings. The sixth, larger lot would be developed with 144 garden apartment units located in twelve proposed buildings. Landmark also proposed to construct a community center.

Jurisdiction and Standing

9. This Court has jurisdiction over this appeal pursuant to Section 1002-A of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101 *et seq.* (the "MPC").

10. Landmark has standing to file this appeal in its capacity as the equitable owner of the Property.

Factual and Procedural Background

11. In June 2020, Landmark submitted an application to the ZHB, requesting zoning relief to construct garden apartment buildings on a portion of the Property (the “Application”). The zoning relief sought included a special exception and a number of variances.

12. On December 23, 2020, Landmark submitted a revised application to the ZHB to reduce the amount of zoning relief requested (the “Revised Application”).

13. In the Revised Application, Landmark specifically requested the grant of the following relief, the denial of which is the subject of this appeal:

a. A special exception under Section 27-603.2 of the Township’s Zoning Ordinance (the “Zoning Ordinance”) to permit the heights of the garden apartment buildings to be up to three stories and approximately 36 feet, 1 inch, later corrected to 36 feet, 10 inches (the “Special Exception Request”); and

b. A dimensional variance from Section 27-1407 of the Zoning Ordinance to permit access driveways onto N. Eighth Avenue and Kimmerlings Road to be located distances less than 150 feet from Josephine Ann Drive or driveways on adjacent lots, as generally depicted on a revised site plan prepared by Steckbeck Engineering & Surveying, Inc submitted along with the Revised Application (the “Plan”) (the “Dimensional Variance Request”).

14. On September 28, 2021, the ZHB held a public hearing on the Revised Application (the “Hearing”).

The Special Exception Request

15. Section 27-603.2 of the Zoning Ordinance provides that building heights cannot exceed two and one-half stories or thirty-five feet in height unless authorized by the ZHB by special exception.

16. At the Hearing, Landmark clarified that while the Revised Application includes a Special Exception Request to permit the proposed garden apartment buildings to have a height of up to three stories and 36 feet, 1 inch, the proposed heights of the buildings are actually 36 feet, 10 inches.

17. Landmark's Revised Application includes a Narrative, part of which explains in detail that the Special Exception Request complies with all general standards applicable to special exceptions as set forth in Section 21-2002 of the Zoning Ordinance.

18. At the Hearing, Landmark's Director of Land Acquisitions, Patrick Dennis, testified that the proposed development is designed to accommodate emergency vehicles, including fire trucks, access and circulation, and that the proposed development complies with all the general standards for a special exception set forth in Section 21-2002.1 of the Zoning Ordinance. Mr. Dennis specifically testified that the development is "designed to provide satisfactory arrangements for ingress and egress to the property and proposed structures therein, with specific reference to automotive and pedestrian safety, convenience, traffic flow and control, and the access in case of fire or catastrophe." Hearing Transcript, p. 33.

19. Landmark also called Craig Mellott, Vice President of Traffic Planning and Design, as an expert witness at the Hearing. Mr. Mellott prepared a Traffic Impact Assessment for the proposed development. The ZHB accepted Mr. Mellott as an expert witness on traffic impact studies and transportation planning.

20. Mr. Mellott testified that the proposed development would not require any improvements and that, in Mr. Mellott's professional opinion, the peak traffic generated by the proposed development is accommodated for in a safe and efficient manner and would not create any adverse impacts on the adjacent roadway network.

21. During the time allotted for public comment at the Hearing, members of the public expressed general, subjective concerns focused on increased traffic and the safety of children with respect to traffic, the proximity of the proposed development to senior housing, and the construction of apartments as opposed to single-family dwellings. The public did not present any objective evidence that the proposed development would result in traffic problems or unsafe conditions for children.

22. At the end of the Hearing, the ZHB voted to deny the Special Exception Request.

23. On October 14, 2021, the ZHB issued a written Decision (the "Decision"). In the Decision, the ZHB stated as follows in denying the Special Exception Request:

First, pursuant to Section 27-2002(A) of the North Lebanon Township Zoning Ordinance, "The Special Exception shall be compatible with adjacent and nearby properties and shall not adversely affect the public health, safety or interest." Several members of the community testified as to their concerns regarding the increased traffic in an already congested traffic area that would result if the Special Exception was granted. The addition of several hundred additional vehicles will worsen traffic congestion. Also, serious safety concerns were raised regarding bus stops in the affected area and the danger to school children by the introduction of the additional vehicles in that area. The ZHB is concerned that the granting of a Special Exception would adversely affect the public health, safety and welfare of the local residents by increasing traffic congestion and posing a risk to the safety not only of neighborhood residents but also of the children.

Second, the proposed 3 story, 36 feet, 10 inch Garden Apartments would be surrounded by single-family residences with a strong residential character. Further, numerous senior citizens reside near the Apartment Lot property, including 55 plus communities at Briar Lake and The Crossings at Sweetbriar. Placing the increased in size Garden Apartments in this overwhelmingly residential area is not compatible with the community.

Decision at 12-13.

24. With respect to Section 27-2002(B)(1) of the Zoning Ordinance, the ZHB asserted that: “Based upon significant concerns raised regarding increased traffic flow in this congested area, the ZHB is not satisfied that the Special Exception use provides satisfactory arrangement for ingress and egress.” Decision at 13.

The Dimensional Variance Request

25. Section 27-1407 of the Zoning Ordinance provides in relevant part that “[t]he center line of... access driveways on the frontage street shall be at least 150 feet from the right-of-way line of the nearest intersecting street or any other driveway.”

26. Landmark sought the Dimensional Variance Request to permit two proposed access driveways, one onto N. Eighth Avenue and the other onto Kimmerlings Road, to be located distances less than 150 feet from Josephine Ann Drive or driveways of adjacent lots.

27. At the request of the Township, Landmark relocated the access driveway onto N. Eighth Avenue from Landmark’s original proposed location to a location that is directly across N. Eighth Avenue from Josephine Ann Drive, such that the proposed access driveway and Josephine Ann Drive are aligned.

28. The proposed access driveway onto Kimmerlings Road is also directly across Kimmerlings Road from an existing driveway and approximately forty feet away from another driveway.

29. Placing these two access driveways in any location that is more than 150 feet from the right-of-way line of the nearest intersecting street or any other driveway causes an unnecessary hardship.

30. The Property possesses unique physical constraints in that it is an irregularly shaped and dimensioned, multi-frontage interior lot, with a narrow width along the N. Eighth Avenue and Kimmerlings Road frontages.

31. The location of the access driveways is also constrained because of the presence of existing wetlands, drainage channels and wooded areas in close proximity to N. Eighth Avenue.

32. The Property is also split-zoned and subject to two separate sets of zoning and use regulations, providing a further challenge to development in strict conformity with the Zoning Ordinance.

33. Chad Smith, Project Manager and Designer at Steckbeck Engineering, provided expert testimony at the Hearing that due to the Property's unique physical characteristics, the Property cannot be developed in strict conformity with the Zoning Ordinance.

34. At the Hearing, members of the public expressed general concerns about the potential impact of the Dimensional Variance Request. There was no public comment, or any other evidence submitted into the record (other than that submitted by Landmark in favor of the Dimensional Variance Request) addressing the issue of whether Landmark had demonstrated an unnecessary hardship with respect to the Dimensional Variance Request.

35. At the end of the Hearing, the ZHB voted to deny the Dimensional Variance Request.

36. In the Decision, the ZHB asserted that Landmark had not demonstrated an unnecessary hardship with respect to the location of the access driveways.

Legal Grounds for Appeal

37. Landmark asserts that the ZHB erred at law and abused its discretion in denying the Special Exception and Dimensional Variance Request for the following reasons.

A. The ZHB erred at law and abused its discretion by denying the Special Exception Request.

38. Section 27-602.4 of the Zoning Ordinance provides that garden apartment developments are permitted by right in the R-2 Zoning District. By allowing garden apartments by right, the Township Board of Supervisors (“Board of Supervisors”) considered and accepted the specific impacts of the development of garden apartments in the R-2 Zoning District.

39. The garden apartment buildings proposed by Landmark in the Revised Application are entirely within the portion of the Property that lies in the R-2 Zoning District.

40. The density of the proposed garden apartment development is less than the maximum density allowed under the Zoning Ordinance.

41. The ZHB erred at law and abused its discretion by denying the Special Exception Request because of the proposed development’s proximity to single-family housing and senior housing, as garden apartment buildings are expressly permitted by right in the R-2 Zoning District.

42. The height of the garden apartment buildings proposed by Landmark would only exceed the R-2 Zoning District limitation by one-half story or one foot, ten inches.

43. The increase in building height will not increase the density of the proposed development.

44. Section 27-603.2 of the Zoning Ordinance expressly permits building heights in the R-2 Zoning District to exceed the maximum permitted height limitation by special exception. The fact that a use is permitted as a special exception evidences a legislative decision that the use

(in this case, increasing the permitted building height) is consistent with the zoning plan and presumptively consistent with the health, safety, and welfare of the community. *See Northhampton Area Sch. Dist. V. East Allen Twp. Bd. Of Supervisors*, 824 A.2d 372, 376 (Pa. Commw. 2003).

45. The evidence presented by Landmark met the objective standards of the Zoning Ordinance for the grant of the special exception for the increased building height.

46. A special exception application that satisfies the objective standards of the applicable zoning ordinance must be granted unless opponents present sufficient evidence that the use will generate adverse impacts not normally generated by the particular type of use and that the impacts will pose a substantial threat to the health, safety, and welfare of the community. *Greaton Props, Inc. v. Lower Merion Twp.*, 796 A.2d 1038, 1045 (Pa. Commw. 2002). Such evidence cannot consist of mere speculation, bald assertions, or personal opinions and perceptions of the effect of the use on the community. *Id.* Rather, opponents must demonstrate that there is a high degree of probability that the use will cause a substantial harm that is not normally associated with the proposed use. *Id.*

47. The ZHB erred at law and abused its discretion in that there was no evidence that an additional one-half story or increased height of only twenty-two inches would cause a use that is expressly permitted in the R-2 Zoning District to be incompatible with the community or a threat to the health, safety and welfare of the local residents.

48. The ZHB erred at law and abused its discretion by arbitrarily and capriciously ignoring the undisputed expert evidence in the record as to the lack of adverse impacts of the development and increased building height and instead relying on only general concerns of the public.

B. The ZHB erred at law and abused its discretion by denying the Dimensional Variance Request.

49. In *Dunn v. Middletown Tp. Zoning Hearing Bd.*, 143 A. 3d 494 (Pa. Commw. 2016), the Commonwealth Court of Pennsylvania articulated the criteria for granting a variance:

A ZHB may grant a variance when the following criteria are met: *(1) an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions of the property*; (2) because of such physical circumstances or conditions the property cannot be developed in strict conformity with the provisions of the zoning ordinance and a variance is necessary to enable the reasonable use of the property; (3) the hardship is not self-inflicted; (4) granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and (5) the variance sought is the minimum variance that will afford relief.

Id. at 500 (citations omitted) (emphasis added).

50. Section 27-2003 of the Zoning Ordinance describes an unnecessary hardship that justifies a variance as follows:

That there are *unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property* and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of this chapter in the neighborhood or district in which the property is located.

(Emphasis added).

51. The Pennsylvania Supreme Court stated in *Hertzberg v. Zoning Bd. of Adj. of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1998), that dimensional variances require a lesser quantum of proof:

When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner that is consistent with the applicable regulations. Thus, the grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulations.... *the quantum of proof required to establish unnecessary hardship is indeed lesser when a dimensional variance, as opposed to a use variance, is sought*.... To justify the grant of a dimensional

variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

Id. at 47-50 (emphasis added).

52. The Pennsylvania Supreme Court also noted in *Hertzberg* that unnecessary hardship usually relates to the physical characteristics of the land. *Id.* at 49.

53. Here, the ZHB erred at law and abused its discretion by ignoring the undisputed evidence in the record of unnecessary hardship, including that the Property possesses unique physical constraints as an irregularly shaped and dimensioned, multi-frontage interior lot; the Property has a narrow width along the N. Eighth Avenue and Kimmerlings Road; and the Property is affected by existing wetlands, drainage channels and wooded areas in close proximity to N. Eighth Avenue.

54. The fact that Landmark changed the location of the access driveway onto N. Eighth Avenue to align with Josephine Ann Drive is not evidence that Landmark is able to comply with the 150-foot distance requirement without any unnecessary hardship.

55. Landmark met the lesser burden of proof with respect to unnecessary hardship as set forth in *Hertzberg*.


56. No evidence was presented at the Hearing, in the form of public comment or otherwise, that addressed or countered the evidence of unnecessary hardship with respect to the location of the driveways.

Request for Relief

58. For the foregoing reasons, Landmark respectfully requests that this Court grant its appeal, find that the ZHB erred at law and abused its discretion in denying the Special Exception Request and the Dimensional Variance Request, and reverse and vacate the ZHB Decision with respect to the ZHB's denial of the Special Exception Request and the Dimensional Variance Request.

Respectfully submitted,

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Dated: November 12, 2021

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY, PENNSYLVANIA

LANDMARK BUILDERS, INC.

Appellant,

v.

NORTH LEBANON TOWNSHIP
ZONING HEARING BOARD,

Appellee.

No. _____

LAND USE APPEAL

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

MCNEES WALLACE & NURICK LLC

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Dated: November 12, 2021