

COPY

IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY,  
PENNSYLVANIA

CIVIL DIVISION

LANDMARK BUILDERS. INC. :  
Appellant :  
v. : No: 2021-01402  
NORTH LEBANON TOWNSHIP :  
ZONING HEARING BOARD :  
Appellee :

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LEBANON, PA  
2022 APR 14 P 1:33

ORDER

And now, this 14<sup>th</sup> day of APRIL, 2022, upon consideration of Appellants Land Use Appeal, and parties Briefs in Support/Opposition, Appellants Motion is **DENIED** as to the Special Exception and **REMANDED** for further proceedings on the Dimensional Variance.

BY THE COURT

  
\_\_\_\_\_, J.  
SAMUEL A. KLINE

PURSUANT TO RULE 236  
You are hereby notified  
that this order has been  
entered in this case.

rnr  
Cc: Andrew Morrow, Esq.  
Helen L. Gemmill, Esq. (100 Pine St. Harrisburg, PA 17101)

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APPEARANCES:  
HELEN L. GEMMILL ESQ. - for the Appellant  
ANDREW J. MORROW ESQ. - for the Appellee

OPINION, KLINE, J., APRIL 14, 2022

Facts

Landmark Builders, Inc. (“Appellant”) submitted an application in June 2020 to the North Lebanon Township Zoning Board (“Appellee”) requesting zoning relief for a planned garden apartment they hope to build along North Eighth Avenue and Kimmerlings Road. The zoning relief requested included a Special Exception for the height of the building and a Dimensional Variance so that ingress and egress roadways could be constructed.

Appellant filed a revised application on December 23, 2020, which led to a hearing before the Appellee on September 8, 2021. The Appellee denied the Special Exception and Dimensional Variance at the conclusion of this

hearing. Appellee then issued a decision on October 14, 2021, reaffirming this denial. Appellant filed their appeal on November 12, 2021, stating that the Appellee had abused its discretion in denying the requested exception and variance.

### Standard of Review

“... [W]here the Court of Common Pleas has taken no additional evidence, [the standard of review] is limited to determining whether the zoning hearing board abused its discretion or committed an error of law.” *Zoning Hearing Bd. Of Sadsbury Township v. Board of Supervisors of Sadsbury Township*, 804 A.2d 1274, 1278 (Pa. Commw. 2002). “Upon reviewing a decision of a zoning hearing board, a court may not substitute its judgment for that of the board; and assuming the record demonstrates substantial evidence, the court is bound by the board’s findings which result from resolutions of credibility and the weighing of evidence rather than a capricious disregard for the evidence.” *Id.*

### Argument

The specific property in question is an irregular shaped property with limited access to nearby roadways. Appellant submitted a map of the property showing nearby properties, environmental obstacles, and a layout of the proposed development of the property including buildings and roadways. (Materials and Exhibits from the September 8, 2021 hearing, Exhibit 17).

The intent of Appellant is to divide the property into six lots, with five being used for single family residential dwellings and the final largest lot being used for 144 garden apartment units, split into 12 (twelve) separate buildings.

**A. Whether the Zoning Hearing Board abused its discretion by denying the Special Exception of the Appellant to allow an additional 22 (twenty-two) inches of height on their proposed buildings?**

The Appellee did abuse its discretion when it denied the Special Exception to Appellant that would allow them to increase the height of their garden apartments from 35 feet to 36 feet 10(ten) inches. “An abuse of discretion is not merely an error of judgment but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record.” *Commonwealth v. Santos*, 176 A.3d 877, 882 (Pa. Super. 2017). “If the record adequately supports the trial court’s reasons and factual basis, the court did not abuse its discretion.” *Ambrogi v. Reber*, 932 A.2d 969, 974 (Pa. Super. 2007). Here the record does not adequately support the zoning board’s reasons for denying the Special Exception.

In its written opinion the Appellee provides three primary reasons as to why it denied the Special Exception to Appellant. The Appellee states that the Special Exception does not comply in two ways with the requirement

that; “The Special Exception shall be compatible with adjacent and nearby properties and shall not adversely affect the public health, safety, or interest.” (Decision of the Zoning Hearing Board of North Lebanon Township, p. 12, citing §27-2002(A) of the North Lebanon Township Zoning Ordinance). First, the Appellee argues that allowing the increase in height would cause a significant increase in traffic in the local area, adversely affecting public health and safety. *Id.* Second, the Appellee argues that the additional height requested in the Special Exception would not be compatible with the community. *Id.* at p. 13. Finally, the Appellee argues that “The Special Exception would not provide satisfactory arrangement for: Ingress and egress to property and proposed structure thereon, with particular reference to automotive and pedestrian safety and conveniences, traffic flow and control, and the access in case of fire or catastrophe.” *Id.* citing § 27-2002(B)(1) of the North Lebanon Township Zoning Ordinance.

First, the Appellee argues that allowing the increase of 22(twenty-two) inches in the garden apartments would create a significant increase in traffic and congestion in the surrounding area, and this increase would also endanger school children in the area. (Decision of the Zoning Hearing Board of North Lebanon Township, October 14, 2021, p. 12). At the hearing before the Zoning Board the Appellant provided an expert witness in the field of traffic impact studies and transportation planning. Appellant’s expert

witness testified that the building of the garden apartments would not create any significant increase traffic in the area. The Zoning Board chose to place more credibility on the multiple local citizens who appeared to testify as to their concerns about the increase in traffic. The Zoning Board has exclusive authority to determine matters of witness credibility and evidentiary weight. *Pham v. Upper Merion Township Zoning Hearing Board*, 113 A.3d 879, 893 (Pa. Commw. 2015). The Zoning Board stated that it believed the report by the expert witness did not accurately reflect the real circumstances on the ground raised by the citizens. The Court does not take issue with the Zoning Board placing more credibility on lay witnesses over an expert witness.

The Court rejects the Zoning Board's reasoning based on increased traffic because the increase in traffic would happen regardless of whether the Special Exception was granted or not. The Zoning Board states that if they granted the Special Exception then it would result in a significant increase in the amount of apartments that could be built. (Brief of Appellee in Support of the Decision of the North Lebanon Township Zoning Hearing Board, 1/20/22, p. 17). However, the Court believes this is based upon a statement made by Appellant's expert witness when asked about the possible increase during the hearing.

**THE CHAIRMAN:** Understood. Is that a correct statement that if you lost the half story, would you be losing 48 units?

**MR. DENNIS:** I'm not sure about that.

**MR. SMITH:** It's hard to say definitively, but its probably not. It's hard to say. I need to look at the site.  
(Hearing Transcript, 9/8/21, p. 146)

Mr. Smith is the appellant's expert witness on land development matters. He and his firm prepared the site plan which details Appellant's planned building proposals. At oral argument Appellant's counsel clarified that the plan is to build twelve (12) buildings which total will contain one hundred forty-four (144) units, if the Special Exception is not granted the amount of units will not change, the buildings will simply have a larger footprint which will take away from the community spaces between the buildings. The amount of units will not change based upon whether the Special Exception is granted; the Special Exception will only change whether the buildings are taller and allow more community space or are wider and provide less community space. This is what Mr. Smith meant by his statement at the hearing; that the extra half story would not grant them additional units or lose them units, it would simply require them to redesign the buildings to accommodate that amount of units within the height restrictions. One hundred forty-four (144) units is within the allowed amount of units for this sized property and zoning area, just as Garden Apartments are allowed in this zoning area. Therefore, the traffic argument is moot as the

Appellant can still create the same amount of garden apartment units whether they receive the Special Exception or not.

Second, the argument that the buildings would not be compatible with the community is a *de minimis* argument for denying the Special Exception. Under the current zoning regulation the construction of garden apartments is allowed. The additional height of the garden apartments if the Special Exception is granted would be twenty-two (22) inches. The additional height in this case is not significant enough that there would be a noticeable difference in the height of the garden apartments and other surrounding buildings. Therefore, the Court does not believe that the garden apartments would not be compatible with the surrounding community and this argument does not support denying the Special Exception.

Finally, the Appellee argues that the Special Exception cannot be granted because the development plan itself does not provide for proper Ingress and Egress roadways. The Appellee's basis for this is because the current ingress and egress roadways proposed by the Appellant require a variance in order for them to be constructed as currently designed. The Appellee has denied that variance for various reasons, and the Appellant has also appealed that denial. The Court will address that appeal in the following section. However, because the Court is remanding the denial of the variance



to the Zoning Board for a further hearing the Court is upholding the denial of the Special Exception.

Therefore, solely for the reason that the garden apartment development will not have proper ingress and egress roadways does the Court uphold the Appellees denial of the Special Exception. Should the matter of the ingress and egress roadways be resolved, then the Court sees no reason why the Appellees denial of the Special Exception should be upheld.

**B. Whether the denial of the dimensional variance by the Zoning Board was an abuse of discretion or error of law?**

The Appellant sought a dimensional variance for its ingress and egress roadways, because the zoning ordinance requires that “the 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.” North Lebanon Township Zoning Ordinance §12-1407. Under the current plan the Appellant has access driveways connecting to North Eighth Street and Kimmerlings Road, whose center lines are within 150 feet of either an intersecting street or driveway. When granting a dimensional variance the zoning board looks to see if specific criteria has been 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.”

*Dunn v. Middletown Township Zoning Hearing Board*, 143 A.3d 494, 500 (Pa. Commw. 2016).

The Appellee denied the Dimensional Variance based upon the first prong of the test, stating that the Appellant did not demonstrate there was an unnecessary hardship. The Appellee relies solely on the fact that the Appellant amended the positioning of the access driveway to North Eighth Avenue roughly fifty (50) feet so that it aligned with another cross street creating a four way intersection instead of two “T” intersections. **Appellant made this change at the request of the Township.** At oral argument Appellant’s counsel clarified that there was no other locations for the access driveways to go, and that the driveway to North Eighth Avenue would have been in violation of the ordinance whether at its original location or its new location. Appellee’s counsel stated that Appellant had not raised this issue during the hearing before the zoning board. However, the Appellant had provided maps and plans showing the layout of the entire property and surrounding area. These maps were entered as exhibits to the zoning board, specifically Exhibit 17. Even a brief review of these maps shows that the current location of the access driveways are the only locations for these

driveways. Therefore, the Court finds that there is an unnecessary hardship that will result if the variance is denied because the Appellant cannot place the access driveways anywhere else with the current plan.

However, the Zoning Board failed to address the remaining four prongs of the variance criteria. Review of the maps provided by Appellant shows that the driveways on Kimmerlings Road that would be within 150 feet of the access driveway belonging to the residential properties Appellant plans to build. This may violate prong three (3) of the criteria that the hardship was self-inflicted. Without further information on this issue or an analysis of the remaining four prongs the Court cannot make a valid review of the Appellee's decision.

For this reason the Court remands the issue to the Zoning Board for a further hearing on the remaining four prongs of the variance criteria. If the Zoning Board upon further testimony finds that the Dimensional Variance should be granted, then a further review of the Special Exception should be done as the only current reasoning for denial of the Special Exception is because of the issue with Ingress and Egress roadways.