

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

PENNSYLVANIA REAL ESTATE INVESTMENT TRUST

vs.

PLYMOUTH TOWNSHIP ZONING HEARING BOARD

NO. 2021-23520

CIVIL COVER SHEET

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Name of Plaintiff/Appellant's Attorney: MARC B KAPLIN, Esq., ID: 4465

Self-Represented (Pro Se) Litigant

Class Action Suit Yes No

MDJ Appeal Yes No

Money Damages Requested

Commencement of Action:

Amount in Controversy:

Notice of Appeal

Case Type and Code

Civil Appeals:

Zoning Board

Other: _____

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KAPLIN STEWART MELOFF REITER & STEIN, P.C.

BY: Marc B. Kaplin, Esquire
Robert M. Tucker, Esquire
I.D. Nos: 4465, 318586

Union Meeting Corporate Center
910 Harvest Drive
P.O. Box 3037
Blue Bell, PA 19422-3037
(610) 260-6000
mkaplin@kaplaw.com
rtucker@kaplaw.com

Attorneys for Appellant,
Pennsylvania Real Estate Investment Trust

IN RE: APPEAL OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS OF
REAL ESTATE INVESTMENT : MONTGOMERY COUNTY, PENNSYLVANIA
TRUST FROM THE DECISION :
DATED NOVEMBER 3, 2021 : No. 2021 -
OF THE ZONING HEARING BOARD OF :
PLYMOUTH TOWNSHIP : LAND USE APPEAL

NOTICE OF APPEAL

Appellant, Pennsylvania Real Estate Investment Trust (“PREIT” or “Appellant”) by and through its attorneys, Marc B. Kaplin, Esquire and Robert M. Tucker, Esquire, hereby appeals the Decision of the Zoning Hearing Board of Plymouth Township denying PREIT’s Application for a special exception (“Special Exception”) pursuant to Section 1100.R. of the Plymouth Township (“Township”) Zoning Ordinance (“Zoning Ordinance”) to permit PREIT to construct and operate an apartment building (“Proposed Apartment Building”) on a lot located within the Plymouth Township SC-Shopping Center Zoning District (“SC District”). In support thereof, PREIT states as follows:

I. The Parties and the Property.

1. Appellant, Pennsylvania Real Estate Investment Trust, is a Pennsylvania real estate investment trust with a principal place of business of One Commerce Square, 2005 Market Street, Suite 1000, Philadelphia, PA 19103.

2. Appellee, the Plymouth Township Zoning Hearing Board (“ZHB”), is the Zoning Hearing Board of the Township, with its principal place of business located at 700 Belvoir Road, Plymouth Meeting, PA 19462.

3. The ZHB is charged with the adjudication of requests for special exceptions under the Zoning Ordinance and pursuant to the Pennsylvania Municipalities Planning Code (“MPC”). *53 P.S. § 10912.1.*

4. This appeal arises under Section 1002-A(a) of the MPC, which grants exclusive jurisdiction to the Courts of Common Pleas to hear appeals from decisions of Zoning Hearing Boards. *53 P.S. § 11002-A.*

5. Appellant’s appeal is timely filed within thirty (30) days of the date the Decision was mailed to PREIT.

6. Appellant is the owner of a ±71.1-acre parcel of land located at 500 W. Germantown Pike upon which the Plymouth Meeting Mall is located (“Mall Property”).

7. Appellant is also the owner of a ±4.50-acre parcel of land abutting the south side of the Plymouth Meeting Mall, which is presently improved with a two-story, 60,000 square foot (+/-) office building that served as the offices for IKEA when IKEA was located on the Mall Property (“IKEA Parcel”).

8. Pursuant to Section 1103.A. of the Zoning Ordinance, the Mall Property and the IKEA Parcel constitute a single lot.

9. The Mall Property and the Ikea Parcel are already developed areas, and are served by both public sanitary sewer service and public water.

10. Pursuant to the Township Zoning Map, both the Mall Property and the Ikea Parcel are located in the Township's SC Shopping Center Zoning District ("SC District").

II. The Zoning Ordinance and the Comprehensive Plan.

11. The use regulations governing the SC District are set forth in Section 1100 of the Zoning Ordinance.

12. Section 1100.K. of the Zoning Ordinance allows a "motel or motor court" as a use permitted by right in the SC District.

13. Section 200 of the Zoning Ordinance defines a "motel or motor court" as:

A building or a group of two (2) or more detached or semidetached buildings **containing rooms or apartments** having separate ground floor entrances provided directly or closely in connection with automobile parking or storage space serving such rooms or apartments, which building or group of buildings is designed, intended or used principally for the providing of sleeping accommodations for automobile travelers and is suitable for occupancy at all seasons of the year.

14. Section 1100.L. of the Zoning Ordinance allows an "elderly housing/assisted living facility" as a use permitted in the SC District.

15. Section 200 of the Zoning Ordinance defines "elderly housing/assisted living facility" as:

A **multiple-family structure** that shall include, without limitation, common dining and social and recreation features, special safety and convenience features designed for the needs of the elderly, such as emergency call systems, grab bars and handrails, and the provision of social services for residents which must include at least two of the following: two meals per day; transportation; housekeeping and linen service; and/or organized social activities.

16. Section 1100.R. of the Zoning Ordinance permits, by special exception, uses which are of the “same general character” as permitted uses in the SC District. Specifically, Section 1100.R. of the Zoning Ordinance permits:

Any use of the **same general character** as any of the above permitted uses, when authorized as a special exception by the zoning hearing board, provided that such use shall be permitted subject to such reasonable restrictions as the zoning hearing board may determine and further provided that no trade or business shall be permitted which is either noxious or hazardous.

17. Section 200 of the Zoning Ordinance defines an “**apartment house**” as “a **multiple dwelling** with common outside access”.

18. Section 200 of the Zoning Ordinance also defines a “**multiple dwelling**” as:

“a building not a single-family, duplex, twin, townhouse, triplex or quadraplex dwelling, designed for and **occupied primarily for dwelling purposes by three (3) or more families** living independently of one another.”

19. Based upon the applicable definitions contained in the Zoning Ordinance, an apartment house is “of the same general character” as a “motel” in that both a motel and an apartment house contain apartments, each of which contain sleeping facilities that are used during all seasons of the year and provide automobile storage and storage space that serve such apartments.

20. Based upon the definitions contained in the Zoning Ordinance, an apartment house is “of the same general character” as an “elderly housing/assisted living facility” in that:

- a. Both an elderly housing/assisted living facility and an apartment house contain living facilities for residents.

- b. An elderly housing/assisted living facility is defined as a “multiple family structure” and an apartment house is defined as a “multiple dwelling with common outdoor access”.
- c. A multiple family structure and a multiple dwelling with common outdoor access are identical.
- d. Apartments and elderly housing/assisted living facilities are both facilities designed for and occupied primarily for dwelling purposes for three or more families living independently.
- e. Apartments and elderly housing/assisted living facilities have central lobbies and not individual outdoor accesses.
- f. Apartments and elderly housing/assisted living facilities are structures designed for long term residency.
- g. An elderly housing/assisted living facility has the same exterior appearance as an apartment building, and people would come and go in a similar fashion.

21. Moreover, while the Zoning Ordinance does not explicitly permit the construction or operation of the Proposed Apartment Development in the SC District, Section 1101.L. of the Zoning Ordinance appears to regulate apartment buildings in the SC District by limiting the height of high-rise apartment buildings to 140 feet.

22. Similarly, while the Zoning Ordinance does not explicitly permit the construction or operation of the Proposed Apartment Building in the SC District, Section 1101.F.(2)(b)4 of the Zoning Ordinance appears to regulate high-rise apartment buildings in the SC District by requiring that two (2) parking space be provided for each apartment unit constructed in the SC District.

23. The Plymouth2040 Comprehensive Plan (“**2040 Comprehensive Plan**”) is dated December 2019.

24. In its opening statement, the 2040 Comprehensive Plan indicates that the Comprehensive Plan “will serve as Plymouth Township’s long-range community vision and establish the policies, priorities, and guidelines to achieve that desired vision”.

25. The 2040 Comprehensive Plan indicates that “Focus Areas” in the Township were selected “because they are distinct transportation corridors and/or economic development opportunity areas within the township...”.

26. The Plymouth Meeting Mall Focus Area discusses the history of the Mall, the Existing Conditions of the Mall, Suggested Intersection Improvements, Germantown Pike Frontage Enhancements and Future Opportunities.

27. The 2040 Comprehensive Plan outlines the Future Opportunities for the Plymouth Meeting Mall specifically on page 129 and is recited as follows:

Overall Development Vision

New shopping centers are increasingly designed to mimic features of old-fashioned downtowns with pedestrian-scaled buildings built up to the sidewalk and central public green spaces. In addition, some chain stores have started using a range of building formats that can fit into traditional neighborhoods and mixed use developments with greater flexibility.

The much larger and well-known King of Prussia Mall is located less than 10 miles away from PMM and has the ability to draw shoppers away from the Plymouth Meeting Mall. However, some shoppers shy away from major destinations due to traffic, crowd size, parking, etc. and would rather visit a quieter shopping mall. Many shoppers are looking for family-friendly and convenient shopping and entertainment locations closer to their homes and work. The mall appears to be positioning itself as a convenient, family-friendly destination with businesses and programming that attract parents.

The Plymouth Meeting Mall (with the exception of the Boscov’s department store) is owned by PREIT which has indicated a desire to continue to develop the mall’s growing unique niche as a combination of destination entertainment and high-quality dining

with tenants such as P.F. Chang’s, Redstone American Grill, Dave and Buster’s, LEGOLand, and Whole Foods. Unique additions such as the LEGOLand Discovery Center could help expand the mall’s trade area to a larger drive time.

Increasingly, online shopping will reduce the need for in-person retail shops. Therefore, a shift towards “retail as experience” is being observed where shoppers prefer to visit shops that provide an experience rather than just a necessity.

Placemaking is the idea of building a community around a sense of place and a critical mass of activity and people. PREIT’s more recent additions to the mall including the north plaza restaurants and south plaza shops with a Whole Foods anchor reflects a trend towards “placemaking” by beginning to turn the mall outwards and incorporating visually-interesting architecture and distinctive and colorful signage that may draw shoppers into the mall. Overall, integrated attractive green spaces, distinctive shops with well-crafted window displays, and safe public spaces where people feel instinctively comfortable lingering help to create an environment where many businesses can thrive.

28. The 2040 Comprehensive Plan then makes the following recommendation:

Zoning Provisions and Design Standards

As the future of indoor shopping malls is still in question, it is important to consider allowing a range of uses on the mall site, including provisions for elderly housing and multi-family dwellings, so as not to constrain the market and allow the uses and building configurations on the site to continue to evolve. However, an overall shift towards more mixed use as redevelopment of traditional indoor shopping malls occurs has been observed across the region and could be appropriate for the Plymouth Meeting Mall, especially given the site’s established transit access. (emphasis supplied.)

29. Section 603(j) of the MPC states that “Zoning Ordinances adopted by municipalities shall be generally consistent with the municipal or multimunicipal comprehensive plan...” 53 P.S. § 10603(j).

III. The Special Exception Application and the Hearing.

30. On September 30, 2020, PREIT submitted to the ZHB an application for special exception under Section 1100.E. of the Zoning Ordinance.

31. On October 15, 2020, PREIT submitted to the ZHB an amended Application for Special Exception under Section 1100.R. of the Zoning Ordinance, together with an Overall Zoning Plan (“**Application**”) for the redevelopment of the IKEA Parcel.

32. In its Application, PREIT proposed to demolish the existing office building located on the IKEA Parcel, and to construct a 503-unit, high-rise apartment building (“**Proposed Apartment Building**”) with an integrated parking deck, amenity deck and related improvements (“**Proposed Apartment Development**”).

33. The Proposed Apartment Building is an eleven-story structure, with two additional levels of building located completely below grade, to be utilized entirely as parking. The apartment building as proposed contains five hundred and three (503) residential units, together with one thousand and thirteen (1,013) parking spaces. The Proposed Apartment Building would be comprised of approximately 50% one-bedroom units and 50% two-bedroom units, though certain modifications including the addition of studio units as well as units with dens, could be integrated into the Proposed Apartment Development, based upon market trends.

34. The Application detailed how the Proposed Apartment Development use is of the “same general character” as uses permitted by right in the SC District. The Overall Zoning Plan detailed how the Proposed Apartment Development complied with all of the applicable, objective Zoning Ordinance requirements.

35. The ZHB held public hearings on the Application via Zoom on the following dates: November 16, 2020; December 21, 2020; January 18, 2021; February 15, 2021; March 15, 2021;

April 26, 2021; May 24, 2021; June 28, 2021; and August 3, 2021. The final public hearing on the Application was held in-person on September 21, 2021 (collectively, “Hearing”).

36. Over the course of five (5) nights of the Hearing, PREIT introduced substantial evidence to demonstrate how the Proposed Apartment Development is a use of the “same general character” as other uses permitted in the SC District and to demonstrate compliance with the applicable special exception standards of the Zoning Ordinance, including: testimony from Thomas J. Comitta, AICP, the Appellant’s land planner; testimony from John Alejnikov, P.E., Appellant’s civil engineer; testimony from Joseph J. DeSantis, P.E., PTOE, Appellant’s traffic engineer; testimony from Seth A. Shapiro, the architect for the Proposed Apartment Development; testimony from Robert M. Campbell, P.E., the Appellant’s sewer engineer; and testimony from Daniel Herman, the Appellant’s representative.

37. At the Hearing Mr. Comitta testified as to how the Proposed Apartment Development is of the “same general character” as an elderly housing/assisted living facility.

38. Mr. Comitta testified that the Proposed Apartment Development is of the same general character as an elderly housing/assisted living facility in that:

- a. An apartment building and an elderly living facility are both multiple family structures;
- b. An apartment building and an elderly living facility both contain living facilities for residents;
- c. An apartment building and an elderly living facility both have common outdoor access;
- d. An apartment building and an elderly living facility both have multifamily occupancy under the same roof; and
- e. An apartment building and an elderly living facility both are of a similar building type.

39. Mr. Comitta further testified that:

- a. The Proposed Apartment Development is consistent with the surrounding zoning and land uses;
- b. The Proposed Apartment Development would be complimentary to the existing uses at the Plymouth Meeting Mall and there would be a positive synergy between the existing stores, shops, restaurants, services and amenities at the Plymouth Meeting Mall and the Proposed Apartment Development;
- c. The Proposed Apartment Development would be a neighborhood connected to the Plymouth Meeting Mall as envisioned and described in the 2040 Comprehensive Plan in that the Proposed Apartment Development would: (i) be a family-oriented, multi-generational and inclusive community; (ii) provide housing to people of all ages and abilities; (iii) provide connections between neighborhoods, shopping and employment centers; (iv) create a walkable, pedestrian accessible, mixed-use community; (v) be accessible by all modes of transportation; (vi) enhance an established commercial corridor and shopping center; and (vii) meet a portion of the housing needs of the forecasted population with a variety of housing types and densities; and
- d. The Proposed Apartment Development would help to ensure the future viability of the Plymouth Meeting Mall by providing a built-in customer base to support the existing uses at the Mall and to improve future leasing opportunities at the Mall.

40. At the Hearing, Mr. Alejnikov testified at length concerning the Proposed Apartment Building's compliance with the development regulations of the SC District found at Section 1101, as well as all of the applicable objective requirements of the Zoning Ordinance.

41. In particular, Mr. Alejnikov testified that:

- a. The Proposed Apartment Building complies with § 1101.A. of the Zoning Ordinance in that the distance at the closest point between buildings is not less than 50 feet;
- b. The Proposed Apartment Building does not abut any residential district, so no specific plant screening or lighting facilities are required in accordance with § 1101.B. of the Zoning Ordinance;
- c. The Proposed Apartment Building will be served by the Township's sanitary sewer system and public water as required by § 1101.C. of the Zoning Ordinance;

- d. In accordance with § 1101.D. of the Zoning Ordinance, the Ikea Parcel does not have any direct access to any public streets in the Township and all points of vehicular access for the Proposed Apartment Development are located more than 250 ft. from the intersection of any public street;
- e. The Proposed Apartment Building will have safe and efficient pedestrian and vehicular traffic circulation pursuant to § 1101.E. of the Zoning Ordinance;
- f. The Proposed Apartment Building will provide one thousand and thirteen (1,013) parking spaces for its five hundred and three (503) units, in compliance with § 1101.F.(2)(b)4 of the Zoning Ordinance, which contains the off-street parking requirements for high rise apartment buildings in the SC District;
- g. Although the requirements of the Subdivision and Land Development Ordinance (“SALDO”) are not applicable to the Application, all access roads, parking areas, and other areas for vehicular use are proposed to be paved with bituminous or concrete material pursuant to § 1101.G. of the Zoning Ordinance;
- h. Likewise, while more of a SALDO item, all utilities serving the Proposed Apartment Development are proposed to be placed underground in accordance with § 1101.H. of the Zoning Ordinance;
- i. The development of the Proposed Apartment Development will not be carried out in stages and as such, § 1101.I. of the Zoning Ordinance is not applicable;
- j. The Proposed Apartment Building either complies with the applicable area and bulk dimensional requirements of the SC District as contained in § 1101.J. of the Zoning Ordinance, or it reduces the existing nonconformities as follows: (i) the required district area is 10 acres and 75.6 are proposed; (ii) the required lot area is 4 acres and 75.6 are proposed; (iii) the required front yard setback is 100 ft., and the existing nonconformity of 52.9 ft. will be maintained; (iv) the required side yard setback is 50 ft. and 68.2 ft are proposed; (v) the required rear yard setback is 50 ft. and 63.4 ft. are proposed; (vi) the maximum impervious coverage permitted is 75% and Appellant is proposing to reduce the existing nonconformity of 83.69% to 83.30%; and (vii) the required minimum frontage along a public street is 300 ft. and PREIT is proposing 860 ft. along Germantown Pike and 1,253 ft along Hickory Road;
- k. The building coverage of the Proposed Apartment Building will be 24.99% where 25% is permitted in compliance with § 1101.K. of the Zoning Ordinance; and
- l. The Proposed Apartment Building will comply with the 140 ft. maximum height requirement for high rise apartment buildings as set forth in § 1101.L. of the Zoning Ordinance as the height of the Proposed Apartment Building is 118 ft.

42. In sum, Mr. Alejnikov testified that the Proposed Apartment Development will comply with each and every applicable objective requirement of the SC District in which it is located.

43. At the Hearing, Mr. Shapiro testified as to the design standards of the Proposed Apartment Development and how the Proposed Apartment Development complies with the 2040 Comprehensive Plan.

44. Mr. Shapiro testified that:

- a. The height and density proposed is appropriate for the location of the Proposed Apartment Building and is consistent with future land use trends;
- b. The size and mix of units and amenity spaces proposed for the apartment building is very similar to those found in age-restricted and assisted living facilities;
- c. The parking for the Proposed Apartment Development is provided at two (2) parking spaces per unit in compliance with the applicable provisions of the Zoning Ordinance; however, the parking provided is in excess of the actual parking demand that the apartment building would create;
- d. The Proposed Apartment Development is highly amenitized, as is typical with contemporary, luxury, multifamily communities, which amenities include: (a) 13,000 sq. ft. (+/-) indoor community space on the fourth floor of the proposed building; (ii) an outdoor amenity deck directly connected to the indoor community space; (iii) a swimming pool; (iv) community features which could include pub spaces, coffee shops, clubrooms or office spaces; and (v) social and recreational features, to include organized social activities and transportation; and
- e. The Proposed Apartment Development has been designed so that the Plymouth Meeting Mall itself would become an amenity to the future residents of the apartments and as such, Mr. Shapiro testified that pedestrian connectivity to the uses on the Mall Parcel is of the utmost importance and thus the apartment building has been specifically designed to facilitate pedestrian connectivity between the Proposed Apartment Building and the uses on the Mall Property.

45. Mr. Shapiro further testified that that zoning that segregates uses is based on an industrial economic society and is an antiquated methodology no longer appropriate for today's

society. Instead, the proposed integration of residential uses into a commercial center can help to ensure that the retail components on the Mall Property remain healthy into the future. Furthermore, the inclusion of the Proposed Apartment Development into what was effectively a single use commercial district is consistent with current and likely future land use trends.

46. Mr. Shapiro testified that the Proposed Apartment Development furthers the goals of the 2040 Comprehensive Plan in that:

- a. It provides a **walkable, modern and mixed use commercial center**;
- b. It offers quality shopping, dining and entertainment for all who live in or visit the Township;
- c. It is proposed in “That area of the township previously referred to as the ‘core area’ around the interchange, as well as the large shopping area along Chemical Road and a portion of the riverfront area where a mix of high-intensity office, retail, hotel, restaurant, and entertainment uses are desired. **Multi-family residential may also be appropriate when integrated with a mixed-use development served by a transit station. (emphasis supplied)**;
- d. It proposes a **mixed-use development that provides options for walking to lunch, using public transit, and living within proximity to your workplace**;
- e. It is proposed on a “large developable tract with existing access to arterial roadways”; and
- f. The 2040 Comprehensive Plan specifically indicates that “... an overall shift towards more mixed use as redevelopment of traditional indoor shopping malls occurs has been observed across the region and could be appropriate for the Plymouth Meeting Mall, especially given the site’s established transit access’.

47. At the Hearing, Mr. DeSantis, who has been involved with the redevelopment efforts at the Plymouth Meeting Mall for over ten years, testified that he prepared a Transportation Impact Assessment (“TIA”) in connection with PREIT’s Application for the Proposed Apartment Development wherein he conducted an evaluation of the existing weekday morning, weekday afternoon, and Saturday midday peak hour traffic volumes, as well as future traffic projections, both with and without the Proposed Apartment Building added to the Plymouth Meeting Mall.

48. Mr. DeSantis testified that:

- a. Overall intersection levels of service generally remain unchanged when comparing without-development traffic conditions to projected conditions with-development of 503 apartment units;
- b. Overall delays at the adjacent off-site intersections and all site access intersections with public roads increased less than nine (9) seconds, with all but one (1) intersection increasing less than four (4) seconds, during all periods analyzed and well below PennDOT's threshold of impact that would require mitigation measures; and
- c. With the Proposed Apartment Building, the overall intersection levels of service generally remained unchanged between without and with development conditions, and at most, any overall delay changes at the off-site intersections and the access intersections with public roads is less than nine (9) seconds.

49. Additionally, Mr. DeSantis testified that while the redevelopment initiatives on the Mall property over the years have resulted in increased interest at the Mall, the total Mall site traffic volumes are less today than Mall traffic volumes during the mid-2000s, when other uses began replacing standard retail space within the Mall. Mr. DeSantis testified that a key contributing factor for this reduction in site traffic is the result of the increased diversity and various mix of uses on the Mall site today, which promotes interaction and internalization of trips between the land uses, while decreasing the external generation of new outside trips to the Mall, and thereby minimizing the area traffic impacts.

50. Mr. DeSantis testified that as the volumes in and out of the mall have decreased, any traffic increase from the Proposed Apartment Development would still fall far short of reaching the traffic levels from the mid-2000s.

51. Mr. DeSantis also testified that the analysis for the TIA was conducted assuming that the Ikea Parcel was vacant land. In reality, a 60,000 sq. ft. (+/-) office building exists on the Ikea Parcel, which would have been generating vehicular trips if occupied. Accounting for a 60,000 sq. ft. (+/-) office building on the Ikea Parcel, construction of the Proposed Apartment

Building would result in even fewer net new trips than assumed in the TIA and a reduction in overall delay increases to five (5) seconds or less for all intersections.

52. Mr. DeSantis testified that:

- a. The analysis contained in the TIA confirms that site generated traffic can be accommodated at the study area intersections with little change in level of service delays;
- b. The analysis contained in the TIA revealed that efficient access to and from the Proposed Apartment Building can be provided safely and efficiently without any undue congestion or interference with normal traffic flow in accordance with Section 1101.D. of the Zoning Ordinance;
- c. Internal circulation on the internal Mall Ring Road could be significantly enhanced with certain on-site modifications at seven (7) different locations around the Mall Ring Road; and
- d. With the aforesaid improvements, the Proposed Apartment Development will operate with significantly improved levels of service and queues in the future with the apartment redevelopment project.

53. At the Hearing, Mr. Campbell testified that he evaluated the capacity of the sanitary sewer system downstream of the discharge from the Plymouth Meeting Mall in order to determine the available capacity in the Plymouth Township sewer system to accommodate the Proposed Apartment Development.

54. Mr. Campbell's evaluation included: (i) analysis of the Township Sewer Map to determine the available options for sewer discharge from the Proposed Development; (ii) analysis of flow monitoring performed by CSL Services, Inc., in July and August 2019 ("**2019 Flow Monitoring**") and August and September 2020 ("**2020 Flow Monitoring**"), at the recommendation of the Township to determine peak flow rates and the potential for increase in flow during rainstorms; and (iii) consultation with the Township Engineer to identify areas deemed to be near capacity and proposed alternatives for sewer discharge from the Proposed Development.

55. Mr. Campbell determined that there is plenty of capacity available within the Township sanitary sewer system to accommodate the additional flow from the Proposed Development in that:

- a. The significant rain events that occurred during the 2019 Flow Monitoring and the 2020 Flow Monitoring had no impact on the flow rates and that the peak and average flow rates during the rain events were comparable to the average flow rates on a typical dry day;
- b. There is an alternative sewer connection at Manhole 918, which runs from Manhole 918 down Launfall into Manhole 915, available for the Proposed Apartment Development. The alternative sewer connection, which currently collects from a small volume of low-flow commercial properties has a line capacity of approximately two million gallons a day and is currently running about less than half full; and
- c. By calculating the sanitary sewer discharge from comparable facility water usage information, the 503 residential units anticipated in the Proposed Apartment Development would discharge an estimated 35,000 to 65,000 gallons per day into the Plymouth Township sanitary sewer system. There is a calculated 875,000 gallons per day of available capacity in the Plymouth Township sanitary sewer system.

56. Mr. Campbell testified that the discharge from the Proposed Apartment Development into the Plymouth Township sewer collection system would be into or downstream of Manhole 918 at Launfall Road. There are no issues in the Plymouth Township sewer system from Manhole 918 all the way to the Sussex Square Apartments.

57. At the conclusion of the Hearing, the ZHB held the record open until September 21, 2021, in order to receive Findings of Fact, Conclusions of Law and Legal Memoranda detailing the grounds for the approval or disapproval of the Application.

58. On September 21, 2021, the ZHB orally voted to deny the Application.

59. Thereafter, on November 3, 2021, the ZHB issued a written decision denying PREIT's Application ("**ZHB Decision**"). A copy of the ZHB Decision is attached hereto as **Exhibit "A"**.

60. The ZHB denied PREIT's Application based upon its conclusion that the Proposed Apartment Development is not a "use of the same general character" as any of the permitted uses in the SC District. *ZHB Decision, p. 28.*

61. The ZHB further denied PREIT's Application based upon its conclusion that "if it is determined that the proposed use is permitted by special exception in the SC-Shopping Center District, the Applicant has failed to meet its burden of proving that the use will not substantially increase traffic congestion in the streets, not unduly burden the sewer system, and not endanger the safety of persons or property by improper location of design of facilities for ingress or egress". *ZHB Decision, p. 28.*

IV. **Grounds for Appeal.**

62. Whether a use of "of the same general character" as permitted use is a question of law. *Cook v. Zoning Hearing Bd. of Twp. of Ridley*, 408 A.2d 1157, 1158-59 (Pa. Cmwlth. 1979).

63. The Commonwealth Court has held that, where an ordinance requires that a proposed use be of the "same general character," the ordinance "does not require the [p]roposed [use] to have the 'same character,' but rather a similarity to other uses permitted...." *MarkWest Liberty Midstream & Res., LLC v. Cecil Twp. Zoning Hearing Bd.*, 102 A.3d 549, 558 (Pa. Cmwlth. 2014).

64. Under Pennsylvania law governing matters of zoning ordinance interpretation, an ordinance must be construed, if possible, to give effect to all its provisions. *Mann v. Lower Makefield Township*, 634 A.2d 768 (Pa. Cmwlth. 1993); *Heritage Bldg. Group, Inc. v. Plumstead Tp. Bd. of Sup'rs*, 1387 C.D. 2007, 2008 WL 9398680, at *4 (Pa. Cmwlth. 2008).

65. The principles of statutory construction require that the broadest interpretation of the Zoning Ordinance must be applied so that the property owner may have the benefit of the least restrictive use of its land. *Hafner v. Zoning Hrg. Bd. of Allen Tp.*, 974 A.2d 1204 (Pa. Cmwlth. 2009); *Burgoon v. Zoning Hrg. Bd. of Charlestown Tp., Chester County*, 277 A.2d 837, 841 (Pa. Cmwlth. 1971).

66. A special exception is not an exception to a zoning ordinance, but rather is a use to which an applicant is entitled unless objectors demonstrate, according to standards set forth in the zoning ordinance, that the proposed use would adversely affect the community.

67. An applicant for special exception only has the burden of establishing that the proposed use complies with the *objective* requirements of the zoning ordinance. *41 Valley Associates v. Board of Supervisors of London Grove Township*, 882 A.2d 5 (Pa.Cmwlth. 2005), *Appeal of Neill*, 634 A.2d 749 (Pa. Cmwlth. 1993).

68. Once an applicant for a special exception shows compliance with the specific, objective requirements of the zoning ordinance the burden shifts to the objectors (if any) to prove that there is a high probability that the proposed use will generate adverse impacts not normally generated by the type of use in question and that those atypical impacts pose a substantial threat to the health and safety of the community. *Heck v. Zoning Hearing Board for Harvey's Lake Borough*, 397 A.2d 15 (Pa. Cmwlth. 1979).

69. In reviewing the ZHB Decision, the Court of Common Pleas' function, where it does not take additional evidence, is to determine whether the ZHB committed an abuse of discretion or an error of law. *Pyzdrowski v. Board of Adjustment of City of Pittsburgh*, 437 Pa. 481, 263 A.2d 426 (1970).

70. An abuse of discretion occurs when the findings of the ZHB are not supported by substantial evidence. *Milne v. Crossett*, 554 Pa. 249, 721 A.2d 43 (1998). Substantial evidence is that evidence required by a reasonable person to support the conclusion reached. *Id.*

71. Therefore, PREIT hereby appeals all aspects of the Decision setting forth any and all reasons for denial of the Application, including the reasons given in the Discussion section of the ZHB Decision and in its Conclusions of Law, including in numbers: 4, 5, 6 and 7.

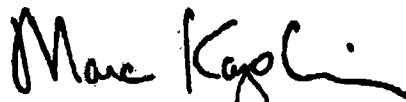
72. PREIT avers that the Decision was arbitrary, irrational and constitutes an abuse of discretion and/or error of law in, inter alia, the following respects:

- a. The ZHB's conclusion that the Proposed Apartment Development is not a use of the "same general character" as any of the permitted uses in the SC District is erroneous as a matter of law;
- b. The ZHB's Decision concerning traffic and sewer capacity were not supported by substantial credible evidence and were, in fact, contrary to the incontrovertible evidence presented at the Hearing;
- c. The ZHB abused its discretion by failing to conclude that PREIT met its burden for the special exception with respect to the objective requirements of the Zoning Ordinance related to development in the SC District;
- d. The ZHB applied incorrect legal standards and principles to reach its Decision, including, inter alia, improper burden shifting, and in holding that Appellant must satisfy the conditional use requirements of the Zoning Ordinance for an elderly/assisted living facility; and
- e. The ZHB Decision was based on groundless concerns about general health, safety, and welfare.

WHEREFORE, for all the foregoing reasons, Appellant respectfully requests that this Court enter an Order sustaining the within Appeal and reversing the Decision of the ZHB denying the Special Exception Application.

Respectfully submitted,

**KAPLIN STEWART MELOFF REITER
& STEIN, P.C.**



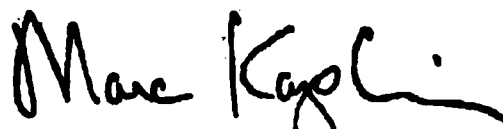
By:

Marc B. Kaplin, Esquire
Robert M. Tucker, Esquire
Attorneys for Appellant, PREIT

Dated: November 24, 2021

VERIFICATION

I, Marc B. Kaplin, Esquire, attorney for Pennsylvania Real Estate Investment Trust, subject to the penalties of 18 Pa. Cons. Stat. Ann. § 4904 relating to unsworn falsification to authorities, aver that I am authorized to make this Verification on behalf of Pennsylvania Real Estate Investment Trust, and that the facts set forth in the foregoing Notice of Appeal are true and correct to the best of my knowledge, information and belief .



MARC B. KAPLIN, ESQUIRE

Dated: November 24, 2021

Exhibit "A"

Case# 2021-23520-0 Docketed at Montgomery County Prothonotary on 11/24/2021 3:59 PM. Fee = \$294.25. The filer certifies 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.

PLYMOUTH
MONTGOMERY COUNTY



TOWNSHIP
PENNSYLVANIA

ADDRESS REPLY TO

David Conroy
Zoning Officer

CODE ENFORCEMENT

700 BELVOIR ROAD
PLYMOUTH MEETING, PA 19462
PHONE: 610-277-4104
FAX: 610-277-4335

November 3, 2021

Pennsylvania Real Estate Investment Trust
c/o Dan Pascale
2005 Market Street
Philadelphia, PA 19103

Re: Plymouth Township Zoning Hearing Board Decision –Pennsylvania Real Estate Investment Trust –Germantown Pike and Hickory Road - Hearing Held on multiple dates with final hearing held September 21, 2021

Dear Mr. Pascale:

Enclosed please find your copy of the Decision of the Plymouth Township Zoning Hearing Board for your Appeal heard on multiples dates, with final hearing held September 21, 2021.

Please call me at 610-277-4100 extension 4127 should you have any questions.

Sincerely,


David Conroy
Zoning Officer

Db
Enclosure
germantownpike&hickoryroadzhbdecision.ltr

**BEFORE THE
PLYMOUTH TOWNSHIP ZONING HEARING BOARD
MONTGOMERY COUNTY, PENNSYLVANIA**

**IN RE: APPLICATION OF PENNSYLVANIA
REAL ESTATE INVESTMENT TRUST FOR A
SPECIAL EXCEPTION** :

DECISION

I. FINDINGS OF FACT

1. On September 30, 2020, Pennsylvania Real Estate Investment Trust (the "Applicant" or "PREIT"), by its attorney, Marc B. Kaplin, Esquire, filed an application to the Plymouth Township Zoning Hearing Board (the "ZHB") for a special exception pursuant to Section 1100.E. of the Plymouth Township Zoning Ordinance (the "Ordinance").

2. On October 15, 2020, prior to a hearing being scheduled for the September 30, 2020 application, the Applicant filed an amended application (the "Application") to the ZHB for a special exception pursuant to Section 1100.R. of the Ordinance. See Exhibit B-1; Notes of Testimony ("N.T.") 11/16/20 at p. 5.

3. A public hearing was duly advertised for November 16, 2020 in both the Times Herald and the Times Herald Digital on October 30, 2020 and again on November 6, 2020. See Exhibit B-3; N.T. 11/16/20 at p. 5.

4. The Property (defined below) was posted with notice of the hearing in compliance with the Pennsylvania Municipalities Planning Code ("MPC"). See Exhibit B-4; N.T. 11/16/20 at pp. 5-6.

5. A public hearing commenced before the ZHB on November 16, 2020 at 7:00 PM via Zoom remote meeting platform due to the on-going COVID-19 pandemic. All subsequent hearings in the matter were held via Zoom remote meeting platform until September 21, 2021, on which the final hearing was held at the Plymouth Township Building, 700 Belvoir Road, Plymouth Meeting, PA 19406.

6. Appearances were entered by Marc B. Kaplin, Esquire for the Applicant, and by Peter Amuso, Esquire for Plymouth Township. Plymouth Township participated in opposition to the Application. N.T. 11/16/20 at pp. 9-10.

7. The ZHB marked the following Board exhibits:

- a. B-1 – Application
- b. B-2 – Overall Zoning Plan dated September 28, 2020
- c. B-3 – Proof of Publication

- d. B-4 – Proof of Posting of the Property
- e. B-5 – Plymouth Township Planning Commission Minutes – 11/4/20
- f. B-6 – Letter from counsel to Plymouth Meeting KPG, III, LLC to Zoning Officer dated May 14, 2021 requesting party status.
- g. B-7 – Letter from counsel to Plymouth Meeting KPG, III, LLC to Zoning Officer dated May 24, 201 reiterating request for party status.

8. The Applicant is the legal owner of an approximately 71.1-acre parcel of land (the "Mall Property") located in Plymouth Township on which the Plymouth Meeting Mall (the "Mall") is currently located. See Exhibit B-1; N.T. 11/16/20 at p. 10.

9. The Applicant is also the legal owner of an approximately 4.5-acre parcel of land (the "Property") located in Plymouth Township abutting the east side of the Mall Property. The Property is currently improved with a 2-story, 60,000 square-foot office building that the Applicant proposes to demolish. The Applicant proposes to erect an 11-story (118 foot high) high-rise apartment building containing 503 units on the Property. See Exhibit B-1; N.T. 11/16/20 at p. 10; N.T. 12/21/20 at pp. 56, 64.

10. Both the Mall Property and the Property are located in the SC – Shopping Center Zoning District. See Exhibit B-1; N.T. 11/16/20 at p. 21.

11. Section 1100.R. of the Ordinance states in applicable part as follows:

"A building or combinations of buildings may be erected, altered or used, and a lot may be used or occupied, for any of the following purposes, and not others:

... R. Any use of the same general character as any of the above permitted uses, when authorized as a special exception by the zoning hearing board, provided that such use shall be permitted subject to such reasonable restrictions as the zoning hearing board may determine and further provided that no trade or business shall be permitted which is either noxious or hazardous;"

12. The Applicant argues that its proposed 11-story high-rise apartment building with 503 living units is a use of the same general character as a "Motel or Motor Court", a use permitted by right in the SC Zoning District pursuant to Section 1100.K. of the Ordinance, and/or of the same general character as an "Elderly Housing/Assisted Living Facility when authorized as a conditional use subject to the provisions of Article XXXVI of this ordinance and the specific development standards of Section 1101.1", pursuant to Section 1100.L. of the Ordinance. N.T. 11/16/20 at p. 14.

13. Thomas J. Comitta ("Comitta") was qualified as an expert in zoning and planning and testified in support of the Application. N.T. 11/16/20 at p. 20.

14. The definition of "Motel or Motor Court" in the Ordinance reads as follows:

"A building or a group of two (2) or more detached or semidetached buildings containing rooms or apartments having separate ground floor entrances provided directly or closely in connection with automobile parking or storage space serving such rooms or apartments, which building or group of buildings is designed, intended or used principally for the providing of sleeping accommodations for automobile travelers and is suitable for occupancy at all seasons of the year." Zoning Ordinance Section 200; N.T. 11/16/20 at pp. 25, 26.

15. Comitta testified that the proposed apartment building will not have separate ground-floor entrances for each living unit. N.T. 12/21/20 at p. 9.

16. Comitta testified that the proposed apartment building will not have at least 25% of the living units providing direct access to the outside without going through a lobby. N.T. 12/21/20 at p. 9.

17. While Comitta originally testified on direct examination that in his opinion the proposed apartment building is of the same general character as a "motel or motor court" use (N.T. 11/16/20 at pp. 26-27), Comitta ultimately agreed that the proposed apartment building is not of the same general character as a "motel or motor court" as defined in the Ordinance, to wit:

"Q. All right. So the high-rise apartment building is not of the same general character of the hotel or motel court as defined in the Plymouth Zoning Code?"

A. Correct." N.T. 12/21/20 at p. 11.

18. Comitta testified that if a municipality deletes a particular use as a permitted use from a zoning ordinance, the municipality does not want that use to be permitted in the applicable zoning district. N.T. 12/21/20 at p. 7.

19. The definition of "Elderly Housing/Assisted Living Facility" in the Ordinance reads as follows:

"A multiple-family structure that shall include, without limitation, common dining and social and recreation features, special safety and convenience features designed for the needs of the elderly, such as emergency call systems, grab bars and handrails, and the provision of social services for residents which must include at least two of the following: two meals per day; transportation; housekeeping and linen service; and/or organized social activities." Zoning Ordinance Section 200; N.T. 11/16/20 at pp. 27-28.

20. Comitta based his conclusion that the proposed apartment building is of the same general character as an "Elderly Housing/Assisted Living Facility" on the fact that both uses, "contain living facility [sic] for residents" and "... is the building type that houses residents similar to the way a building houses residents for elderly housing and assisted living facility occupants." N.T. 11/16/20 at pp. 28-29.

21. An "Elderly Housing/Assisted Living Facility" use is permitted by conditional use pursuant to Section 1100.L of the Ordinance. Section 1100.L of the Ordinance; N.T. 12/21/20 at p. 12.

22. Section 1101.1. of the Ordinance contains provisions governing the development of an "Elderly Housing/Assisted Living Facility" in the SC – Shopping Center District. Section 1101.1. of the Ordinance; N.T. 12/21/20 at p. 12.

23. Section 1101.1. of the Ordinance reads in its entirety as follows:

"Elderly housing/assisted living facilities shall comply with the applicable requirements of the Shopping Center District except as specifically modified by this section, as follows:

A. Minimum district area. The minimum size of a Shopping Center District in which an elderly housing/assisted living facility is located shall be 50 acres.

B. Setbacks. The facility shall be located a minimum of 500 feet from the boundary of the Shopping Center District.

C. Maximum number of dwelling units. The maximum number of elderly housing/assisted living dwelling units in any one Shopping Center District shall not exceed 150.

D. Parking. Off-street parking spaces for an elderly housing/assisted living facility shall be provided at the rate of 0.6 space per dwelling unit." Section 1101.1. of the Ordinance.

24. The proposed apartment building use complies with Section 1101.1.A. of the Ordinance in that the existing shopping center district is more than 50 acres. N.T. 11/16/20 at p. 10.

25. Comitta testified that the proposed apartment building use does not comply with Section 1101.1.B. of the Ordinance which requires that an Elderly Housing/Assisted Living Facility use be located a minimum of 500 feet from the boundary of the Shopping Center District because the proposed apartment building is not located at least 500 feet from the boundary of the Shopping Center District. N.T. 12/21/20 at p. 13.

26. Comitta testified that the proposed apartment building use does not comply with Section 1101.1.C. of the Ordinance which requires that the maximum number of elderly housing/assisted living dwelling units in any one Shopping Center District shall not exceed 150 because the proposed number of apartment units is 503, a number of units that is more than 3 times the maximum number of units permitted in an elderly housing/assisted living facility use. N.T. 12/21/20 at pp. 13-14.

27. Comitta testified that he supposes that the proposed apartment building use will not provide common dining, as required by the definition of "Elderly Housing/Assisted Living Facility". N.T. 12/21/20 at p. 15.

28. Comitta testified that the proposed apartment building use will probably not provide its residents with two (2) meals a day, as set forth in the definition of "Elderly Housing/Assisted Living Facility". N.T. 12/21/20 at p. 17.

29. Comitta testified that he does not recall seeing information relating to the proposed apartment building use providing its residents emergency call systems, grab bars and handrails, as stated in the definition of "Elderly Housing/Assisted Living Facility". N.T. 12/21/20 at p. 17.

30. There was no evidence presented by the Applicant to show that the proposed apartment building use would be providing social services for residents which must include at least two of the following: two meals per day; transportation; housekeeping and linen service; and/or organized social activities, as required by the definition of "Elderly Housing/Assisted Living Facility".

31. John Alejnikov ("Alejnikov") was qualified as an expert in civil engineering and testified in support of the Application. N.T. 12/21/20 at pp. 49-51; Exhibit A-2.

32. Alejnikov testified that the proposed apartment building use meets the requirements of Section 1101 (Development Requirements in the SC – Shopping Center District) but he testified that it does not meet the requirement of Section 1101.1.B. that an "Elderly Housing/Assisted Living Facility", which the Applicant contends is of the "same general character" as the proposed apartment building use, be located a minimum of 500 feet from the boundary of the Shopping Center District, nor does it meet the requirement of Section 1101.1.C. that an "Elderly Housing/Assisted Living Facility" have no greater than 150 units. N.T. 12/21/20 at pp. 66-67; N.T. 1/18/21 at pp. 13-14.

33. Joseph DeSantis ("DeSantis") was qualified as an expert in traffic engineering and testified in support of the Application. N.T. 12/21/20 at p. 72; Exhibit A-4.

34. DeSantis testified that the proposed 503 apartment units would cause "no significant change to the level of service" as compared to the levels of service at surrounding intersections without the 503-unit apartment building use. N.T. 12/21/20 at pp. 74-75.

35. DeSantis testified that the development of the proposed apartment building would not substantially increase traffic congestion in the streets or within the mall property. N.T. 12/21/20 at p. 88.

36. DeSantis testified that he did not perform an analysis of the traffic trips that would be generated by a "Senior Adult Housing – Attached" development, nor the trips that would be generated by an "Assisted Living" development, nor the trips that would be generated by a "Continuing Care Retirement Community" development. N.T. 12/21/20 at pp. 88-89.

37. DeSantis testified that there are different trip generation rates for an apartment building use than there are for a continuing care retirement community or senior adult housing. N.T. 12/20/21 at pp. 89-90.

38. Seth Shapiro ("Shapiro") was qualified as an expert in architectural design and urban planning and testified in support of the Application. N.T. 12/21/20 at p. 101; Exhibit A-8.

39. Shapiro testified regarding the proposed architectural features of the proposed apartment building. N.T. 12/21/20 at pp. 102-105.

40. Robert Campbell ("Campbell") was qualified as an expert in civil engineering with a specialty in water and sewer engineering and testified in support of the Application. N.T. 12/21/20 at p. 115; Exhibit A-11.

41. Campbell evaluated whether there is available sewer capacity in the Township's sewer system to serve the proposed apartment building use. N.T. 12/21/20 at p. 116.

42. Campbell testified that the Township indicated that there are "problems, potential concerns downstream of the connection of the Plymouth Meeting Mall." N.T. 12/21/20 at pp. 116, 118.

43. Campbell used the figure of 100 gallons per day per apartment unit to calculate the anticipated flow rate that would be produced from the proposed apartment building use, which is equal to less than one-half of an EDU (equivalent dwelling unit) in Plymouth Township. N.T. 12/21/20 at pp. 127-128.

44. Campbell testified that he does not know how Plymouth Township applies EDU's to apartment complexes. N.T. 12/21/20 at p. 128.

45. Campbell testified that adding 65,000 gallons per day to the sewer system will not make the system better where a concern already exists as to the ability of the sewer line to handle flow at the railroad tracks. N.T. 12/21/20 at p. 131.

46. Kenneth Amey ("Amey") was qualified as an expert in land planning, zoning, and engineering, and testified as a witness for Plymouth Township in opposition to the Application. N.T. 1/18/21 at p. 6; Exhibit T-1.

47. Amey has worked as a planning consultant for Plymouth Township since 1997 and has done various projects for the Township over the years in the planning and zoning fields. N.T. 1/18/21 at p. 7.

48. Amey is familiar with the Ordinance and is aware that the Applicant is requesting a special exception pursuant to Section 1100.R., arguing that the proposed apartment building use is of the same general character as a motel/motor court use or an elderly housing/assisted living use. N.T. 1/18/21 at p. 8.

49. Amey testified that he does not think that the proposed 503-unit, 11-story high apartment building use is of the same general character as a motel or motor court as defined by the Zoning Ordinance. N.T. 1/18/21 at pp. 10, 22-23.

50. A motel or motor court involves transient visitors and is not occupied by permanent residents of the Township. N.T. 1/18/21 at p. 11.

51. Motel and motor court uses require that individual units have entrances directly to the outside, a feature that the proposed apartment building use does not have. N.T. 1/18/21 at p. 11.

52. Motel and motor court uses do not introduce children into the local school district whereas the proposed apartment building use would introduce school children into the local school district. N.T. 1/18/21 at p. 11.

53. If the proposed apartment building use is approved and constructed, the permanent population of the Township would increase by approximately 783 residents, including approximately 36 school-aged children, whereas there are no permanent residents created by a motel or motor court use. N.T. 1/18/21 at p. 12.

54. The parking requirement for a motel or motor court use is one parking space per unit, whereas the parking requirement for the proposed apartment building use is two parking spaces per unit. N.T. 1/18/21 at p. 12.

55. Amey testified that he does not think that the proposed 503-unit, 11-story high apartment building use is of the same general character as an elderly housing/assisted living facility use. N.T. 1/18/21 at pp. 12-13, 23.

56. Elderly housing/assisted living facilities are limited by the Federal Fair Housing Act to residents aged 55 and older, whereas the proposed apartment building use has no age limitation. N.T. 1/18/21 at p. 13.

57. Elderly housing/assisted living facilities are limited to 150 units per Section 1101.1.C. of the Ordinance whereas the proposed apartment building use proposes 503 apartment units. N.T. 1/18/21 at p. 13.

58. The population generated by a 150-unit elderly housing/assisted living facility would be approximately 209 with no school-aged children, whereas the population generated by a 503-unit apartment building use, as proposed by the Applicant, would be approximately 783 with approximately 36 school-aged children. N.T. 1/18/21 at p. 14.

59. The off-street parking requirement for a 150-unit elderly housing/assisted living facility would be 90 spaces, whereas the parking requirement for the proposed 503-unit apartment building use is 1,006 spaces. N.T. 1/18/21 at p. 14.

60. Amey testified that the proposed apartment building use is not of the same general character as an "Elderly Housing/Assisted Living Facility" use. N.T. 1/18/21 at p. 15.

61. Amey testified that in his planning, zoning, and engineering opinion, what occurs inside a building is just as important as how a building looks from the outside when considering whether a use is of the "same general character" as another permitted use. N.T. 1/18/21 at p. 15.

62. Amey testified that the proposed apartment building use does not meet either the setback from the Shopping Center property boundary line requirement or the number of units requirement (Sections 1101.1.B. and 1101.1.C. of the Ordinance, respectively) as would be required for an elderly housing/assisted living facility use as a conditional use in the SC District. N.T. 1/18/21 at p. 16.

63. Article 11, Subsection L. of the Plymouth Township Zoning Ordinance of 1960, as amended through August 9, 1976, provided for "high-rise apartment" as a use permitted by right in the Shopping Center District. N.T. 1/18/21 at p. 17; Exhibit T-2.

64. Plymouth Township Ordinance No. 840, enacted in September, 1980, *inter alia*, deleted "high-rise apartment building" as a permitted use in the Shopping Center district. N.T. 1/18/21 at p. 18.

65. Ordinance No. 840 also amended the parking requirements for hotels and high-rise apartments from 1 parking space per unit to 2 parking spaces for each one or two-bedroom unit or guest unit and 3 spaces for each three-bedroom apartment or guest room, thus increasing the parking requirement for high-rise apartments. N.T. 1/18/21 at p. 18.

66. Amey testified, based on research he performed of Township records, that in 1970, the Plymouth Park Apartments were built in the Shopping Center District, and that the 1980 amendment to the number of parking spaces for high-rise apartments in Ordinance No. 840 was enacted so that any future rebuilding of those apartments would be subject to the new parking requirement. N.T. 1/18/21 at pp. 21-22.

67. Amey testified that in his land planning, zoning, and engineering experience, when a municipality deletes a formerly permitted use, it means that the municipality no longer wants the deleted use to be permitted in the particular zoning district from which it was deleted. N.T. 1/18/21 at p. 19.

68. Amey testified that in his experience, he has never seen an instance where a municipality deleted a use yet intended to allow it in a catchall phrase as a use of the "same general character" as other permitted uses. N.T. 1/18/21 at p. 19.

69. Amey testified that the current height restrictions governing high-rise apartments in the Ordinance are still in the Ordinance to regulate the Plymouth Park Apartments if they were to be rebuilt. N.T. 1/18/21 at pp. 22, 73.

70. Elderly Housing/Assisted Living Facilities must provide certain amenities/services as stated in the definition of the use however apartment buildings are not required to provide those amenities/services. N.T. 1/18/21 at p. 68.

71. Amey testified that the comparison between 503 market rate apartments versus 150 elderly housing units is a dramatically different impact on the community, on Township services, on the School District, and on the infrastructure of the Township, and that the apartment building use and Elderly Housing/Assisted Living Facility use are dramatically different uses. N.T. 4/26/21 at pp. 126-127.

72. Allen B. Mason ("Mason") was qualified as an expert in sewage and wastewater engineering and testified as a witness for Plymouth Township in opposition to the Application. Mason is the Township's sewer engineer. N.T. 2/15/21 at p. 10; Exhibit T-4.

73. Mason testified that in his professional opinion, the peak sewage flow capacity as calculated by Campbell on behalf of the Applicant is exaggerated. N.T. 2/15/21 at p. 12.

74. Mason reviewed Campbell's November 2, 2020 report (Exhibit A-13) and determined that the flow capacity of the sewer is actually 1.6 million gallons per day, and not 2.6 million gallons per day as calculated by Campbell. N.T. 2/15/21 at p. 13.

75. Mason testified that the engineering capacity standard to be used for the design of sewer pipes that are 15" in diameter or more, based on both the Water Environment Federation and the American Society of Civil Engineers, is 50% (to allow for infiltration and inflow during rainfall events) and not 75% as was used by Campbell. N.T. 2/15/21 at pp. 14-16.

76. The capacity of the existing sewer segment identified by Campbell would be 0.78 million gallons per day, and not 1.95 million gallons per day. N.T. 2/15/21 at p. 16.

77. Using flow metering data from 2019, Mason testified that the current peak flows are 0.7 million gallons per day, and that using the standard 50% capacity calculation, which results in a peak flow pipe capacity of 0.78 million gallons per day, would only allow for an additional 0.08 million gallons of peak flow per day in the subject sewer pipe, or an additional 80,000 gallons per day of peak flow. N.T. 2/15/21 at pp. 16-17.

78. Converting peak flow capacity of a sewer pipe to an average daily flow requires dividing the peak flow by 4, resulting in an average daily flow capacity remaining in the pipe of 20,000 gallons per day. N.T. 2/15/21 at p. 18.

79. Plymouth Township uses a figure of 230 gallons per day per EDU (equivalent dwelling unit), resulting in the proposed apartment building use of 503 units producing in the order of 115,000 gallons per day. The added flow from the proposed apartment building use would result in the design capacity of the sewer being exceeded by 95,000 gallons per day. N.T. 2/15/21 at pp. 18-19.

80. An overflow event might manifest itself in sewers backing up into homes or overflowing out of manholes, thus creating an environmental problem. N.T. 2/15/21 at pp. 19-20.

81. The concern with exceeding the design capacity of the sewer by adding the flows anticipated to be generated by the proposed 503-unit apartment building use occurs along the stretch of sewer pipe from manhole 970 through manhole 978, located downstream of Arthur's Court, in the open space of a residential development. N.T. 2/15/21 at p. 20, 40.

82. Even using the Applicant's number of gallons per day per EDU generated by each proposed apartment unit (129 gallons per day), rather than the Township's 230 gallons per day per EDU, the capacity in the sewer segment between manholes 970 and 978 would be overburdened and could only handle the daily flows from approximately 87 apartment units. N.T. 2/15/21 at pp. 21-22.

83. In comparing the sewer flows generated by the proposed 503-unit apartment building use to the sewer flows generated by a maximum 150-unit Elderly Housing/Assisted Living Facility use, the proposed apartment building use would have a much greater impact on the sewer system than an Elderly Housing/Assisted Living use. N.T. 2/15/21 at pp. 24-25.

84. The proposed 503-unit apartment building use has the potential to have a detrimental impact on the community due to the increased probability that a sewer backup or overflow could occur in the 12" sewer pipe at or just downstream of Arthur's Court. N.T. 2/15/21 at pp. 25-26, 34; N.T. 4/26/21 at p. 120.

85. James Graham, III ("Graham") was qualified as an expert in traffic engineering and testified on behalf of Plymouth Township in opposition to the Application. Graham serves as the traffic engineer for Plymouth Township and has been practicing traffic engineering for 20 years. N.T. 2/15/21 at pp. 46, 51.

86. Graham prepared an exhibit comparing the traffic generated by a mid-rise apartment building use (up to 10 stories), and high-rise apartment building use (above 11 stories), a congregate care facility, an assisted living facility, and a continuing care retirement community. N.T. 2/15/21 at pp. 54-57; Exhibit T-6.

87. Exhibit T-6 shows trips generated by the various uses based on the ITE Trip Generation Manual, 10th Edition, which is the standard for calculating trip generation for specific uses. N.T. 2/15/21 at pp. 59, 66; Exhibit T-6.

88. A 503-unit mid-rise apartment building use (up to 10 stories) will generate a total of 2,740 trips per weekday, compared to a 150-unit assisted living (the highest traffic generator of the 3 "elderly housing" options considered by the ITE Manual), which would generate 390 trips per weekday. N.T. 2/15/21 at pp. 59-60; Exhibit T-6.

89. Based on AM, PM, and weekend peak hour trip generation, the proposed 503-unit apartment building use generates more traffic than any elderly housing options. N.T. 2/15/21 at pp. 61-62; Exhibit T-6.

90. Even if there were 503 units in an assisted living facility, as are proposed in the apartment building use, an assisted living facility would generate less traffic than a mid-rise apartment building use. N.T. 2/15/21 at pp. 62-64; Exhibit T-6.

91. An assisted living facility would generate less traffic than an apartment complex and provide less of a burden on the ring road circling the Mall property and on the surrounding intersections than an apartment complex. N.T. 2/15/21 at p. 67; Exhibit T-6.

92. Graham prepared an analysis of the "levels of service" or delay time for traffic at 4 intersections around the Plymouth Meeting Mall using 2006 traffic counts performed by the Applicant's traffic engineer and adding PennDOT growth factors for an urban non-interstate road in Montgomery County to bring the numbers to current day traffic volumes. N.T. 2/15/21 at pp. 67-72; Exhibit T-7.

93. The intersection of Germantown Pike and Launfall Road is the main intersection associated with the Plymouth Meeting Mall. N.T. 2/15/21 at p. 71.

94. Based on Graham's data, there is currently a 58.7 second delay at the intersection of Germantown Pike and Launfall Road, which is a level of service E. N.T. 2/14/21 at p. 73; Exhibit T-7.

95. Graham added the traffic that would be generated by the 503-unit apartment building to his calculations and used the Applicant's traffic engineer's proposed improvements to the ring road around the Mall and concluded that the delay for traffic at the intersection of Germantown Pike and Launfall Road increased 14 seconds from its current delay. N.T. 2/15/21 at p. 75; Exhibit T-7.

96. Graham testified that the traffic improvements proposed by the Applicant are substandard and that more improvements would be required based on the addition of traffic from the proposed apartment building use. N.T. 2/15/21 at p. 77.

97. Graham testified that in his professional opinion, the proposed 503-unit apartment building use would have a detrimental impact on the community because it would be adding traffic to an already-overloaded intersection and adding to existing queue length. N.T. 2/15/21 at p. 77.

98. Graham testified that the traffic volume in the area does not include services such as Door Dash and Amazon Prime and other trips that would be generated to serve the proposed apartment building use, thus he concluded that traffic queues and delay could get even worse. N.T. 2/15/21 at p. 78.

99. Graham testified that in his professional opinion, the development of a 503-unit apartment building use would significantly increase traffic and affect traffic on the streets and at the intersections surrounding the Mall. N.T. 4/26/21 at p. 33.

100. Plymouth Meeting KPG, III, LLC, the legal owner of Tax Parcel No. 49-00-04120-01-6, located at 502 Germantown Pike, Plymouth Meeting, PA 19462, appeared at the May 24, 2021 hearing by its attorney Robert Gundlach, Esquire, and requested party status via 2 letters to the Zoning Officer dated May 14, 2021 and May 24, 2021. N.T. 5/24/21 at pp. 3, 4; Exhibits B-6 and B-7.

101. The property owned by Plymouth Meeting KPG, III, LLC is located adjacent to the subject Property within the Plymouth Meeting Mall property, and the ZHB granted Plymouth Meeting KPG, III, LLC party status. N.T. 5/24/21 at p. 11.

102. Daniel Herman ("Herman"), the Senior Vice-President of the Applicant, testified in support of the Application on rebuttal. N.T. 6/30/21 at p. 17, *et seq.*

103. Herman testified about malls in general, and the Plymouth Meeting Mall in particular, noting its past, present, and future viability. N.T. 6/30/21 at pp. 17-61.

104. The Applicant marked the following exhibits for identification during the hearings:

- a. A-1 – Thomas J. Comitta – C.V.
- b. A-2 – John Alejnikov – C.V.
- c. A-3 – PR Plymouth Meeting Limited Partnership Overall Zoning Plan – 9/28/20
- d. A-4 – Joseph J. DeSantis – C.V.
- e. A-5 – Transportation Impact Assessment – Cover Sheet
- f. A-6 – Transportation Impact Assessment – Executive Summary
- g. A-6,A – Transportation Impact Assessment – complete with appendices
- h. A-7 – Vehicular Circulation Improvements
- i. A-8 – Seth A. Shapiro – C.V.
- j. A-9 – Building Renderings
- k. A-10 – Connectivity Plan
- l. A-11 – Robert M. Campbell – C.V.
- m. A-12 – Plymouth Township Sanitary Sewer Map
- n. A-13 – Sanitary Sewer Capacity Report
- o. A-14 – Plymouth Road Interceptor – Opinion of Probable Cost
- p. A-15 – Design and Construction of Sanitary Storm Sewers Manual
- q. A-16 – Design and Construction of Sanitary Storm Sewers Manual – Section 6.J.3.
- r. A-17 – Gravity Sanitary Sewer Design and Construction Manual – Section 6.9
- s. A-18 – Domestic Wastewater Facilities Manual
- t. A-19 – Domestic Wastewater Facilities Manual – Section 25
- u. A-20 – NOT ADMITTED
- v. A-21 – Intersection Capacity Utilization
- w. A-22 – Plymouth Meeting Mall – Total Peak Hour Driveway Volumes
- x. A-23 – Germantown Pike Corridor – 2004 Aerial Photo
- y. A-24 – Germantown Pike Construction Plan
- z. A-25 – Germantown Pike Corridor – 2020 Aerial Photo

- aa. A-26 – NOT ADMITTED
- bb. A-27 – Right-Turn-In at Lukoil – Concept
- cc. A-28 – Internal Intersection at Launfall Road – Concept
- dd. A-29 – Full Circulation Plan
- ee. A-30 – Overall Intersection Levels of Service Tables
- ff. A-31 – Traffic Simulations

105. The Township marked the following exhibits for identification during the hearings:

- a. T-1 – Kenneth Arney – C.V.
- b. T-2 – Plymouth Township Zoning Ordinance of 1960, as amended through 8/9/76
- c. T-3 – Advertisement of Zoning Ordinance Amendment in 1980
- d. T-4 – Allen B. Mason – C.V.
- e. T-5 – James Graham, III – C.V.
- f. T-6 – Traffic Exhibit
- g. T-7 – Level of Service Exhibit
- h. T-8 – Plan Depicting Germantown Pike/Launfall Road Intersection
- i. T-9 – Level of Service Chart
- j. T-10 – Intersection Capacity Chart
- k. T-11 – Level of Service Comparison Table
- l. T-12 – Chart Depicting Traffic Volumes
- m. T-13 – Apartment Trip Distribution 2023
- n. T-14 – Queuing at Germantown Pike/Launfall Road Intersection

106. On September 21, 2021, the ZHB voted 5-0 to deny the Application.

107. The hearing was closed on September 21, 2021.

II. **DISCUSSION**

A. **Background**

The Applicant seeks a special exception pursuant to Section 1000.R. of the Ordinance to allow a 503-unit apartment building use at the Plymouth Meeting Mall. The Application raises two (2) legal questions. The threshold question is whether the proposed apartment building use is “of the same general character” as either a “Motel or Motor Court” use or an “Elderly Housing/Assisted Living Facility” use. If that question is answered in the affirmative, the second question is whether the Applicant met the Ordinance’s requirements for a special exception. The ZHB finds that the proposed 503-unit apartment building use is **not** “of the same general character” as either a “Motel or Motor

Court” use or an “Elderly Housing/Assisted Living Facility” use and is thus not permitted in the SC – Shopping Center Zoning District, and further finds that the Applicant has not met the requirements for a special exception even if the proposed use is ultimately determined by a reviewing court to be “of the same general character” as either a “Motel or Motor Court” use or an “Elderly Housing/Assisted Living Facility” use.

- B. The Applicant’s proposed use is not of the same general character as a “Motel or Motor Court” or an “Elderly Housing/Assisted Living Facility” and is thus not permitted in the SC – Shopping Center Zoning District.**

The determination of whether a use is “of the same general character” as another use is a question of law. *Cook v. Zoning Hearing Board of Ridley Township*, 408 A.2d 1157 (Pa. Cmwlth. 1979). A zoning hearing board is required to, “determine the similarity of the proposed use to the *permitted* uses, not only its similarity to uses which are *not permitted*. *Zippy’s Car Wash v. Zoning Hearing Board of the Township of Ridley*, 2020 WL 57661 (Pa. Cmwlth. 2020) (Emphasis in original.) (Unreported opinion, but used herein as persuasive authority only, and not binding precedent.)

In this case, the Applicant only argues that the proposed apartment building use is “of the same general character” as two (2) of the permitted uses listed in Section 1100 of the Ordinance. Thus, the ZHB will limit its analysis to the two (2) uses specified by the Applicant. There is no evidence on which to base a conclusion that the proposed apartment building use is “of the same general character” as any of the *other* permitted uses listed in Section 1100 of the Ordinance, thus the ZHB will not undertake a “comprehensive, exhaustive review of all the listed permitted uses” and a “fact-sensitive analysis of how the proposed use is similar to, or different from, the permitted uses.” as required by the Commonwealth Court in *Zippy’s Car Wash*. *Id.* at 4. Rather, the ZHB will perform that analysis concerning the two (2) uses that the Applicant has identified as being “of the same general character” as the proposed apartment building use.

Further, the ZHB is cognizant of the fact that the proposed apartment building use is not required to be “of the same character” as a permitted use, but rather “of the same *general* character” as a permitted use. In its analysis, the ZHB will not make the same mistake as the zoning hearing board in *MarkWest Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board*, 102 A.3d 549, (Pa. Cmwlth. 2014), where the zoning hearing board erred in applying the former legal standard rather than the latter.

It is undisputed that the proposed apartment building use is not specifically permitted in the SC – Shopping Center Zoning District pursuant to the Ordinance. Thus, the Applicant relies on the argument that the proposed 503-unit apartment building use is permitted by special exception pursuant to Section 1100.R. of the Ordinance as a use “of the same general character” as either a “Motel or Motor Court” use (permitted by Section 1100.K. of the Ordinance) or an “Elderly Housing/Assisted Living Facility” use (permitted by Section 1100.L. of the Ordinance).

The Applicant’s own professional planning witness, Thomas Comitta, admitted that the proposed apartment building use is not of the same general character as a “Motel or Motor Court” use. Comitta testified on cross-examination as follows:

“Q. All right. So the high-rise apartment building is not of the same general character of the hotel or motel court as defined in the Plymouth Zoning Code?”

A. Correct.” N.T. 12/21/20 at p. 11.

Any additional argument that the proposed apartment building use is of the same general character as a “Motel or Motor Court” must fail based on the Applicant’s planner’s testimony at the hearing. The definition of “Motel or Motor Court” in the Ordinance reads as follows:

“A building or a group of two (2) or more detached or semidetached buildings containing rooms or apartments having separate ground floor entrances provided directly or closely in connection with automobile parking or storage space serving such rooms or apartments, which building or group of buildings is designed, intended or used

principally for the providing of sleeping accommodations for automobile travelers and is suitable for occupancy at all seasons of the year." Zoning Ordinance Section 200.

In comparing the proposed apartment building use with the "Motel or Motor Court" use, the Applicant's planner Thomas Comitta testified that the proposed apartment building will not have separate ground-floor entrances for each living unit as stated in the definition of "Motel or Motor Court". N.T. 12/21/20 at p. 9. In addition, the transient nature of a "Motel or Motor Court" use distinguishes it from the proposed apartment building use which would provide for permanent housing in 503 units.

The Township's planning, zoning, and engineering expert Kenneth Amey, buttressed Comitta's testimony. Amey testified that a Motel or Motor Court use involves transient visitors and is not occupied by permanent residents of the Township. N.T. 1/18/21 at p. 11. Further, Amey testified that a Motel or Motor Court use requires that individual units have entrances directly to the outside, a feature that the proposed apartment building use does not have. N.T. 1/18/21 at p. 11. In addition, Amey testified that a Motel or Motor Court use does not introduce children into the local school district whereas the proposed apartment building use would introduce school-aged children into the local school district. N.T. 1/18/21 at p. 11. More specifically, Amey testified that if the proposed apartment building use is approved and constructed, the permanent population of the Township would increase by approximately 783 residents, including approximately 36 school-aged children, whereas there are no permanent residents created by a Motel or Motor Court Use. N.T. 1/18/21 at p. 12. Finally, Amey testified that the parking requirement for a Motel or Motor Court use is one parking space per unit, whereas the parking requirement for the proposed apartment building use is double that, at two parking spaces per unit. N.T. 1/18/21 at p. 12. The only similarities between the proposed apartment building use and a Motel or Motor Court use are that people drive to them, park their vehicles, and sleep in them. The ZHB did not abuse its discretion or commit an error of law in determining that the proposed apartment building use is not of the same general character as a Motel or Motor Court use.

The Applicant also argues that the proposed apartment building use is of the same general character as an "Elderly Housing/Assisted Living Facility" use, which is defined in the Ordinance as follows:

"A multiple-family structure that shall include, without limitation, common dining and social and recreation features, special safety and convenience features designed for the needs of the elderly, such as emergency call systems, grab bars and handrails, and the provision of social services for residents which must include at least two of the following: two meals per day; transportation; housekeeping and linen service; and/or organized social activities." Zoning Ordinance Section 200.

The ZHB, in its discretion, finds the expert planning, zoning, and engineering testimony of Kenneth Amey to be persuasive. Amey highlighted the notable differences between the proposed apartment building use and an "Elderly Housing/Assisted Living Facility" use as follows:

1. Elderly Housing/Assisted Living Facilities are limited by the Federal Fair Housing Act to residents aged 55 and older, whereas the proposed apartment building use has no age limitation. N.T. 1/18/21 at p. 13.
2. Elderly Housing/Assisted Living Facilities are limited to 150 units per Section 1101.1.C. of the Ordinance whereas the proposed apartment building use proposes 503 apartment units. N.T. 1/18/21 at p. 13.
3. The population generated by a 150-unit Elderly Housing/Assisted Living Facility would be approximately 209 with no school-aged children, whereas the population generated by a 503-unit apartment building use, as proposed by the Applicant, would be approximately 783 with approximately 36 school-aged children. N.T. 1/18/21 at p. 14.
4. The off-street parking requirement for a 150-unit Elderly Housing/Assisted Living Facility would be 90 spaces, whereas the parking requirement for the proposed 503-unit apartment building use is 1,006 spaces. N.T. 1/18/21 at p. 14.
5. Amey testified that in his planning, zoning, and engineering opinion, what occurs inside a building is just as important as how a building looks from the outside when considering whether a use is of the "same general character" as another permitted use. N.T. 1/18/21 at p. 15.
6. The proposed apartment building use does not meet either the setback from the Shopping Center property boundary line requirement or the number of units requirement (Sections 1101.1.B. and 1101.1.C. of the Ordinance, respectively) as would be required for an Elderly Housing/Assisted Living Facility use as a conditional use in the SC District. N.T. 1/18/21 at p. 16.

This testimony provides substantial evidence that the proposed apartment building use differs in both form and function from an Elderly Housing/Assisted Living Facility use. Clearly, the impacts of the two uses on the community are disparate. The impact a proposed use has on the community is directly related to its "general character". The ZHB neither abused its discretion nor committed an error of law in determining that the proposed apartment building use is not of the same general character as an Elderly Housing/Assisted Living Facility.

Further, an Elderly Housing/Assisted Living Facility use is permitted in the SC – Shopping Center Zoning District predicated on two (2) conditions: (1) the use is authorized by conditional use by the Plymouth Township Council, and (2) the use adheres to the development requirements enumerated at Section 1101.1 of the Ordinance, which require as follows:

"Elderly housing/assisted living facilities shall comply with the applicable requirements of the Shopping Center District except as specifically modified by this section, as follows:

- A. Minimum district area. The minimum size of a Shopping Center District in which an elderly housing/assisted living facility is located shall be 50 acres.
- B. Setbacks. The facility shall be located a minimum of 500 feet from the boundary of the Shopping Center District.
- C. Maximum number of dwelling units. The maximum number of elderly housing/assisted living dwelling units in any one Shopping Center District shall not exceed 150.
- D. Parking. Off-street parking spaces for an elderly housing/assisted living facility shall be provided at the rate of 0.6 space per dwelling unit." Section 1101.1. of the Ordinance." Section 1101.1 of the Ordinance.

While the ZHB concedes that the proposed apartment building use meets Section 1101.1A. above ("Minimum district area"), it does not meet the other three (3) criteria. The Applicant's planning expert, Mr. Comitta, agreed by testifying that the proposed apartment building use does not comply with Section 1101.1.B. of the Ordinance which requires that an Elderly Housing/Assisted Living Facility use be located a minimum of 500 feet from the boundary of the Shopping Center District because the

proposed apartment building is not located at least 500 feet from the boundary of the Shopping Center District. N.T. 12/21/20 at p. 13, and that the proposed apartment building use does not comply with Section 1101.1.C. of the Ordinance which requires that the maximum number of elderly housing/assisted living dwelling units in any one Shopping Center District shall not exceed 150 because the proposed number of apartment units is 503, a number of units that is more than 3 times the maximum number of units permitted in an elderly housing/assisted living facility use. N.T. 12/21/20 at pp. 13-14.

Mr. Comitta further distinguished the proposed apartment building use from an Elderly Housing/Assisted Living Facility use by testifying that he supposes that the proposed apartment building use will not provide common dining, as required by the definition of "Elderly Housing/Assisted Living Facility", N.T. 12/21/20 at p. 15; that the proposed apartment building use will probably not provide its residents with two (2) meals a day, as set forth in the definition of "Elderly Housing/Assisted Living Facility", N.T. 12/21/20 at p. 17; and that he does not recall seeing information relating to the proposed apartment building use providing its residents emergency call systems, grab bars and handrails, as stated in the definition of "Elderly Housing/Assisted Living Facility", N.T. 12/21/20 at p. 17. In addition, there was no evidence presented by the Applicant to show that the proposed apartment building use would be providing social services for residents which must include at least two of the following: two meals per day; transportation; housekeeping and linen service; and/or organized social activities, as required by the definition of "Elderly Housing/Assisted Living Facility".

By the Applicant's own planner's admission, there are numerous differences between the proposed apartment building use and an Elderly Housing/Assisted Living Facility use. In fact, the ZHB determined that the only similarity between the two uses is that both of them are "multiple-family structures". The ZHB gives credence to the expert opinion of Mr. Amey that the proposed apartment

building use is not of the same general character as an "Elderly Housing/Assisted Living Facility" use. N.T. 1/18/21 at p. 15.

Another factor that the ZHB considered in making its decision is that in 1980, the governing body of Plymouth Township, the Township Council, enacted Ordinance No. 840 which amended the then-current zoning ordinance to delete, *inter alia*, "high-rise apartment building" as a permitted use in the Shopping Center district. N.T. 1/18/21 at p. 18. Ordinance No. 840 also amended the parking requirements for hotels and high-rise apartments from 1 parking space per unit to 2 parking spaces for each one or two-bedroom unit or guest unit and 3 spaces for each three-bedroom apartment or guest room, thus increasing the parking requirement for high-rise apartments. N.T. 1/18/21 at p. 18. The Township's planning, zoning, and engineering expert Kenneth Amey testified, based on research he performed of Township records, that in 1970, the Plymouth Park Apartments were built in the Shopping Center District, and that the 1980 amendment to the number of parking spaces for high-rise apartments in Ordinance No. 840 was enacted, despite the removal of high-rise apartments, so that any future rebuilding of the existing apartments would be subject to the new parking requirement. N.T. 1/18/21 at pp. 21-22. Amey also testified that in his land planning, zoning, and engineering experience, when a municipality deletes a formerly permitted use, it means that the municipality no longer wants the deleted use to be permitted in the particular zoning district from which it was deleted. N.T. 1/18/21 at p. 19. Amey testified that in his experience, he has never seen an instance where a municipality deleted a use yet intended to allow it in a catchall phrase as a use of the "same general character" as other permitted uses. N.T. 1/18/21 at p. 19. Finally, Amey testified that the current height restrictions governing high-rise apartments in the Ordinance are still in the Ordinance to regulate the Plymouth Park Apartments if they were to be rebuilt. N.T. 1/18/21 at pp. 22, 73.

For all of the above reasons, the ZHB neither abused its discretion nor committed an error of law in determining that the proposed apartment building use is not of the same general character as an Elderly Housing/Assisted Living Facility.

C. The Applicant's proposed use does not meet the criteria for a special exception under the Ordinance.

If, on appeal of this Decision, a reviewing court determines that the proposed apartment building use is of the same general character as either a "Motel or Motor Court" use or an "Elderly Housing/Assisted Living Facility" use, the Application must still be denied based on the fact that it does not meet the criteria for a special exception under the Ordinance.

Section 2101.D. of the Ordinance sets forth the following standards of proof in special exception cases:

"D. Standards of Proof.

1. An applicant for a special exception shall have the burden of establishing both:

(a) That his application falls within the provisions of the Ordinance which accords to the applicant the right to seek a special exception; and

(b) That allowance of the special exception will not be contrary to the public interest.

[Subsection 2. deals exclusively with variances and is thus inapplicable.]

3. In determining whether the allowance of a special exception or a variance is contrary to the public interest, the Board shall consider whether the application, if granted, will:

(a) Substantially increase traffic congestion in the streets;

(b) Increase the danger of fire or panic or otherwise endanger the public safety;

(c) Overcrowd the land or create an undue concentration of population;

(d) Impair an adequate supply of light and air to adjacent property;

- (e) Be consistent with the surrounding zoning and uses;
- (f) Adversely affect the comprehensive plan of the Township;
- (g) Unduly burden water, sewer, school, park or other public facilities;
- (h) Be detrimental to the appropriate use of adjacent property; or
- (i) Endanger the safety of persons or property by improper location or design of facilities for ingress or egress; or
- (j) Otherwise adversely affect the public health, safety morals or general welfare.

4. In all cases the applicant's burden of proof shall include the duty of presenting credible evidence sufficient to persuade the Board that applicant has satisfied the criteria set forth in subparagraphs D.1.(a) and D.2.(a) of this section. In any case where (i) the Board requests that the applicant produce evidence relating to the criteria set forth in subparagraph D.3. of the section, or (ii) any other party opposing the application shall claim that an allowance of the application will have any of the effects listed in subparagraph D.3. of this section, the applicant's burden of proof shall include the burden of presenting credible evidence sufficient to persuade the Board that allowance of a special exception or variance will not be contrary to the public interest with respect to the criteria so placed in issue." Ordinance Section 2101.D.

In this case, the Township presented credible evidence sufficient to persuade the ZHB that the proposed apartment building use will (1) substantially increase traffic congestion in the streets surrounding the Property (Section 2101.D.3.(a)), (2) unduly burden the Township's sewer system (Section 2101.D.3.(g)), and (3) endanger the safety of persons or property by improper location or design of facilities for ingress or egress (Section 2101.D.3.(i)). Per Section 2101.D.4. of the Ordinance, the burden then shifts to the Applicant to present credible evidence sufficient to persuade the ZHB that allowance of a special exception will not be contrary to the public interest with respect to these 3 criteria. The ZHB has determined that the Applicant did not meet its burden to show that the proposed apartment building use will not be contrary to the public interest with respect to the 3 criteria noted above.

1. Undue Burden on the Sewer System

The ZHB, in its discretion, determined that the Township's sewer engineer, Allen B. Mason, who is intimately familiar with the Township's sewer system, presented the more credible testimony regarding the impact of the proposed apartment building use on the Township's sewer system. Mason testified that in his professional opinion, the peak sewage flow capacity as calculated by the Applicant's sewer engineer on behalf of the Applicant is exaggerated. N.T. 2/15/21 at p. 12. Mason reviewed the Applicant's sewer expert's November 2, 2020 report (Exhibit A-13) and determined that the flow capacity of the sewer is actually 1.6 million gallons per day, and not 2.6 million gallons per day as calculated by the Applicant's expert. N.T. 2/15/21 at p. 13. Further, Mason testified that the engineering capacity standard to be used for the design of sewer pipes that are 15" in diameter or more, based on both the Water Environment Federation and the American Society of Civil Engineers, is 50% (to allow for infiltration and inflow during rainfall events) and not 75% as was used by the Applicant's sewer expert. N.T. 2/15/21 at pp. 14-16. Accordingly, the capacity of the existing sewer segment identified by the Applicant's sewer expert would be 0.78 million gallons per day, and not 1.95 million gallons per day. N.T. 2/15/21 at p. 16.

Using flow metering data from 2019, Mason testified that the current peak flows are 0.7 million gallons per day, and that using the standard 50% capacity calculation, which results in a peak flow pipe capacity of 0.78 million gallons per day, would only allow for an additional 0.08 million gallons of peak flow per day in the subject sewer pipe, or an additional 80,000 gallons per day of peak flow. N.T. 2/15/21 at pp. 16-17. Converting peak flow capacity of a sewer pipe to an average daily flow requires dividing the peak flow by 4, resulting in an average daily flow capacity remaining in the pipe of 20,000 gallons per day. N.T. 2/15/21 at p. 18. Considering that Plymouth Township uses a figure of 230 gallons per day per EDU (equivalent dwelling unit), resulting in the proposed apartment building use of 503 units producing in the order of 115,000 gallons per day, the added flow from the proposed apartment

building use would result in the design capacity of the sewer being exceeded by 95,000 gallons per day. N.T. 2/15/21 at pp. 18-19.

With the strong likelihood of the capacity of the sewer being exceeded, an overflow event might manifest itself in sewers backing up into homes or overflowing out of manholes, thus creating an environmental problem. N.T. 2/15/21 at pp. 19-20. The concern with exceeding the design capacity of the sewer by adding the flows anticipated to be generated by the proposed 503-unit apartment building use occurs along the stretch of sewer pipe from manhole 970 through manhole 978, located downstream of Arthur's Court, in the open space of a residential development. N.T. 2/15/21 at p. 20, 40. Even using the Applicant's number of gallons per day per EDU generated by each proposed apartment unit (129 gallons per day), rather than the Township's 230 gallons per day per EDU, the capacity in the sewer segment between manholes 970 and 978 would be overburdened and could only handle the daily flows from approximately 87 apartment units. N.T. 2/15/21 at pp. 21-22. The proposed 503-unit apartment building use has the potential to have a detrimental impact on the community due to the increased probability that a sewer backup or overflow could occur in the 12" sewer pipe at or just downstream of Arthur's Court. N.T. 2/15/21 at pp. 25-26, 34; N.T. 4/26/21 at p. 120.

The ZHB determined that the Township's sewer system, as designed to serve the Plymouth Meeting Mall and the surrounding area, is not designed to accommodate the density of a 503-unit apartment building use. The sewer infrastructure is not designed to accommodate the large scale of the proposed project. The introduction of sewage flows from the proposed apartment building use poses a direct health, safety, and welfare threat to the existing residents and businesses in the area. Granting a special exception would be contrary to the public welfare based on the undue burden on the Township's sewer system. These conclusions are based on substantial evidence to which the ZHB gave full credence. Therefore, the ZHB neither abused its discretion nor committed an error of law in denying the Application.

2. Substantial Increase in Traffic Congestion

The ZHB heard expert testimony from both the Applicant and the Township regarding traffic generation and congestion in and around the Plymouth Meeting Mall as a result of the proposed apartment building use.

The Township presented the credible evidence of its traffic engineer, James Graham, III. Graham has been practicing traffic engineering for 20 years. N.T. 2/15/21 at pp. 46, 51. Graham testified that a 503-unit mid-rise apartment building use (up to 10 stories) will generate a total of 2,740 vehicle trips per weekday. In support of his conclusions, Graham prepared an analysis of the “levels of service” or delay time for traffic at 4 intersections around the Plymouth Meeting Mall using 2006 traffic counts performed by the Applicant’s traffic engineer and adding PennDOT growth factors for an urban non-interstate road in Montgomery County to bring the numbers to current day traffic volumes. N.T. 2/15/21 at pp. 67-72; Exhibit T-7. This method is acceptable to PennDOT as a methodology of calculating current levels of service.

The intersection of Germantown Pike and Launfall Road is the main intersection associated with the Plymouth Meeting Mall. N.T. 2/15/21 at p. 71. Based on Graham’s data, there is currently a 58.7 second delay at the intersection of Germantown Pike and Launfall Road, which is a level of service E. N.T. 2/14/21 at p. 73; Exhibit T-7. Graham added the traffic that would be generated by the 503-unit apartment building to his calculations and used the Applicant’s traffic engineer’s proposed improvements to the ring road around the Mall and concluded that the delay for traffic at the intersection of Germantown Pike and Launfall Road would increase 14 seconds from its current delay. N.T. 2/15/21 at p. 75; Exhibit T-7.

Graham further testified that the traffic improvements proposed by the Applicant to the ring road around the Mall are substandard and that more improvements would be required based on the addition of traffic from the proposed apartment building use. N.T. 2/15/21 at p. 77. Graham testified

that in his professional opinion, the proposed 503-unit apartment building use would have a detrimental impact on the community because it would be adding traffic to an already-overloaded intersection and adding to existing queue lengths. N.T. 2/15/21 at p. 77.

Finally, Graham testified that the traffic volume in the area does not include services such as Door Dash and Amazon Prime and other trips that would be generated to serve the proposed apartment building use, thus he concluded that traffic queues and delay could get even worse. N.T. 2/15/21 at p. 78. Graham testified that in his professional opinion, the development of a 503-unit apartment building use would significantly increase traffic and affect traffic on the streets and at the intersections surrounding the Mall. N.T. 4/26/21 at p. 33.

While the Applicant's traffic engineer presented contrary testimony regarding the impact of the traffic generated by the proposed apartment building use on the surrounding streets and intersections, the ZHB gave credence to the testimony of the Township's traffic engineer, Mr. Graham. "It is irrelevant whether the record contains evidence to support findings other than those made by the fact-finder"; rather, "the critical inquiry is whether there is evidence to support the findings actually made." *Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Rev.*, 949 A.2d 338, (Pa. Cmwlth. 2008). In this case, there is substantial evidence in the record to support the ZHB's findings of fact and conclusion that the Applicant failed to meet its burden of proving that its proposed apartment building use will not cause a substantial increase in traffic congestion.

3. Improper Location or Design of Facilities for Ingress or Egress

The ZHB determines, based on the testimony proffered by the traffic engineering witnesses, that the proposed apartment building use would worsen the existing poor traffic conditions entering and exiting the Mall, and finds that the proposed improvements to the internal ring road around the Mall are unlikely to address the increase in traffic on the ring road generated by the 503-unit apartment building use. Currently, there are significant queuing and traffic congestion issues leaving the Mall at

the main Launfall Road access point. In the Applicant's traffic engineer's opinion, it is unclear whether the proposed improvements to the ring road will actually improve the currently difficult congestion and queuing conditions that will be exacerbated by the addition of 503 market-rate apartment units. N.T. 6/30/21 at pp. 11-12.

The proposed 503-unit apartment building use will also create a dangerous condition at the existing "slip" entrance from Germantown Pike near the Lukoil gas and the Whole Foods market. Currently, the "slip" entrance requires a 90-degree right turn into the access point. The existing condition is dangerous, as it causes motorists to brake at the crest of a hill in the through-lane of Germantown Pike to utilize the access point. The Applicant has forecasted that most of the residents of the proposed apartment building use traveling west on Germantown Pike, will utilize this access point as their primary point of ingress. In response to the notably difficult ingress point, the Applicant has proposed to soften the right turn at the "slip" entrance. However, the design change does not solve the problem. While the proposed softening may aid in a slightly swifter turn from Germantown Pike, it is unclear if it will be significant with existing traffic counts without considering the increased traffic from the proposed use of this access point by apartment traffic using the access as its primary point of ingress.

Further, the Applicant's only solution to lessen the burden on the current "slip" entrance and Germantown/Launfall access points is to install signs to encourage motorists to utilize the Hickory Road access points on the far side of the Mall from the proposed apartment building. The Applicant admitted, however, that apartment residents would not be required to take the route leading to egress onto Hickory Road. N.T. 6/30/21 at pp. 8-10.

In sum, the Applicant failed to meet the requirements for a special exception under Sections 2101.D.3.(a), (g), and (i). Notably, the Applicant's failure to meet any one of the three requirements is proper grounds for denial of the special exception. The ZHB neither abused its discretion nor committed

an error of law in determining that the Applicant failed to meet its burden of proving that it has met all Ordinance requirements for a special exception.

III. CONCLUSIONS OF LAW

1. The Applicant has standing to file and prosecute the Application.
2. Notice of the hearing was properly advertised in a newspaper of general circulation in the Township and properly posted on the Property as required by law.
3. The Property is located in the SC – Shopping Center Zoning District in Plymouth Township.
4. The proposed use of the Property as a 503-unit apartment building is not a “use of the same general character” as any of the uses permitted in the SC – Shopping Center Zoning District, including, but not limited to, a “Motel or Motor Court” use and an “Elderly Housing/Assisted Living Facility” use, and is thus not permitted by special exception in the SC – Shopping Center District.
5. If it is determined that the proposed use is permitted by special exception in the SC – Shopping Center District, the Applicant has failed to meet its burden of proving that the use will not substantially increase traffic congestion in the streets, not unduly burden the sewer system, and not endanger the safety of persons or property by improper location or design of facilities for ingress or egress.
6. The ZHB neither abused its discretion nor committed an error of law by denying the Application.
7. The ZHB’s decision is supported by substantial evidence.

IV. ORDER

AND NOW, this 3rd day of November, 2021, the Application of Pennsylvania Real Estate Investment Trust is hereby **DENIED**.

PLYMOUTH TOWNSHIP ZONING HEARING BOARD

/s/David Raimondo

David Raimondo, Acting-Chairman

/s/Dominic Aprile

Dominic Aprile, Acting-Vice-Chairman

/s/Brian Daly

Brian Daly, Member

/s/Denise Pygatt

Denise Pygatt, Member

/s/Amy Lettich

Amy Lettich, Alternate Member

**A copy of this Decision and Order
was mailed to the parties on:**

11/3/21

THIS DECISION AND ORDER OF THE PLYMOUTH TOWNSHIP ZONING HEARING BOARD IS FINAL, AND ANY APPEAL OF IT MUST BE FILED WITH THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY WITHIN THIRTY (30) DAYS FOLLOWING THE ABOVE-STATED MAILING DATE.

KAPLIN STEWART MELOFF REITER & STEIN, P.C.

BY: Marc B. Kaplin, Esquire
Robert M. Tucker, Esquire
I.D. Nos: 4465, 318586

Union Meeting Corporate Center
910 Harvest Drive
P.O. Box 3037
Blue Bell, PA 19422-3037
(610) 260-6000
mkaplin@kaplaw.com
rtucker@kaplaw.com

Attorneys for Appellant,
Pennsylvania Real Estate Investment Trust

IN RE: APPEAL OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS OF
REAL ESTATE INVESTMENT : MONTGOMERY COUNTY, PENNSYLVANIA
TRUST FROM THE DECISION :
DATED NOVEMBER 3, 2021 : No. 2021 -
OF THE ZONING HEARING BOARD OF :
PLYMOUTH TOWNSHIP : LAND USE APPEAL

CERTIFICATE OF SERVICE

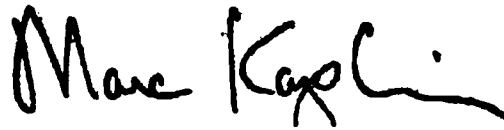
I, Marc B. Kaplin, Esquire, hereby certify that on November 24, 2021, I caused a true and correct copy of the foregoing Notice of Appeal to be sent via First Class U.S. Mail, postage prepaid, to the addressees stated below, at the addresses stated below:

Plymouth Township Zoning Hearing Board
c/o David Conroy, Zoning Officer
700 Belvoir Road
Plymouth Meeting, PA 19462

David J. Sander, Esquire
Kilkenny Law
519 Swede Street
Norristown, PA 19401
Zoning Hearing Board Solicitor

Plymouth Meeting KPG III, LLC
c/o Robert W. Gundlach, Jr., Esquire
Fox Rothschild, LLP
Stone Manor Corporate Center
2700 Kelly Road, Suite 300
Warrington, PA 18976

**KAPLIN STEWART MELOFF REITER
& STEIN, P.C.**



By:

Marc B. Kaplin, Esquire
Robert M. Tucker, Esquire
Attorneys for Appellant, PREIT

Dated: November 24, 2021