

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA  
CIVIL ACTION

PENNSYLVANIA REAL ESTATE  
INVESTMENT TRUST

: NO. 2021-23520

V.

:

PLYMOUTH TOWNSHIP ZONING  
HEARING BOARD

: LAND USE APPEAL

**ORDER**

AND NOW, this 21<sup>st</sup> day of December, 2022, upon consideration of the Land Use Appeal of Pennsylvania Real Estate Investment Trust, all answers thereto, and after argument held, the Decision of the Board is **AFFIRMED** and the instant appeal is **DENIED** in accordance with the attached Memorandum.

BY THE COURT:

  
STEVEN C. TOLLIVER, SR., J.


This Order has been E-Filed on 12/21/2022

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All Parties of Record

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IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA  
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PENNSYLVANIA REAL ESTATE INVESTMENT TRUST : NO. 2021-23520

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PLYMOUTH TOWNSHIP ZONING HEARING BOARD : LAND USE APPEAL

**MEMORANDUM**

Appellant, Pennsylvania Real EQ state Investment Trust ("PREIT" or "Appellant") appeals the November 3, 2021 Decision of the Zoning Hearing Board of Plymouth Township ("Board") 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").

Upon review of the record adduced throughout several hearings held before the Board, this Court determines that the Board's findings of fact are supported by substantial evidence and the conclusions of law made by the Board do not reflect that the Board committed any error of law. Accordingly, this Court affirms the decision of the Board and denies the appeal of Appellant. In support thereof the following discussion is provided.

**Appellant's Land Use Appeal**

On October 15, 2020, Appellant submitted an application for special exception under Section 1100.R of the Township Zoning Ordinance of 1960, as amended, ("Ordinance") to the Zoning Hearing Board. Appellant sought a special exception with the goal of constructing a high-rise apartment building containing 503 dwelling units in the SC District.

The issues are presented in the instant appeal and they are:

A. Whether Appellant's proposed use is "of the same general character" as any of the permitted uses enumerated in Appendix A, Section 1100, as required by the Zoning Code; and

B. Whether Appellant's proposed use meets the criteria for a special exception under the Zoning Code.

The use regulations governing the SC District are set forth in Section 1100 of the Zoning Ordinance, and in pertinent part, provides:

**Section 1100 Use regulations.**

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

K. Motel or motor court;

L. 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;

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;

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 automatic parking or storage space serving such rooms or apartments, which

building or group of buildings is designed, intended or use principally for the providing of sleeping accommodations for automobile travelers and is suitable for occupancy at all seasons of the year.

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.

Section 200 of the Zoning Ordinance defines and "**apartment house**" as "a **multiple dwelling with common outside access**".

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."

### **Standard of Review**

This Court, in examining a decision of a zoning hearing board, is limited to determining whether the Board committed an abuse of discretion or erred as a matter of law. *Lamar Advantage GP Company, LLC v. City of Pittsburgh Zoning Board of Adjustment*, 244 A.3d 348 (Pa. 2021). An abuse of discretion occurs when the Board's "factual findings are unsupported by substantial evidence." *Hill Dist. Project Area Comm., Inc. v. City of Pittsburgh Zoning Board of Adjustment*, 638 A.2d 278 (Pa. Cmwlth. 1994). Substantial evidence is understood to mean relevant evidence of which "a reasonable mind might accept as adequate to support a conclusion." *Valley View Civic Assoc. v. Zoning Board of Adjustment*, 461 A.2d 637, 640 (Pa. 1983). A reviewing court must understand its role in that the "zoning board is the sole judge of

credibility of witnesses and the weight afforded to evidence." *In Re Garcia*, 276 A.3d 340 (Pa. Cmwlth. 2022). If there is found to be substantial evidence, the reviewing court is bound by the zoning hearing board's findings which are the result of its resolutions of credibility and conflicting testimony." *Id.* In reviewing evidence before a zoning hearing board, the trial court may not substitute its judgment or interpretation of the evidence for that of the zoning hearing board. *425 Property Association of Alpha Chi Rho, Inc. v. State College Borough Zoning Hearing Board*, 223 A.3d 300 (Pa. Cmwlth. Ct 2019). Furthermore, an administrative agency's interpretation of the statute (in this case an ordinance) it is charged to administer is entitled to deference on appellate review absent fraud, bad faith, abuse of discretion, or clearly arbitrary action. *Markwest Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board*, 102 A.3d 549 (Pa. Cmwlth. 2014).

**The Record before the Board Contained Substantial Evidence Demonstrating that  
Appellant's Proposed Use is not "of the Same General Character" as Any of the  
Permitted Uses Enumerated in Appendix A, Section 1100, as Required by the Zoning  
Code**

Section 1100.R of the Plymouth Township Zoning Ordinance allows for uses that are of "the same general character as any of the [enumerated] permitted uses, when authorized as a special exception by the zoning hearing board." Appendix A, Section 1100.R. A special exception is a use which is expressly permitted by a zoning ordinance if certain standards are met. *Tower Access Group, LLC v. S. Union Twp. Zoning Hearing Board*, 192 A.3d 291 (Pa. Cmwlth. 2018). The determination of whether a use is "of the same general character" is a

question of law. *Cook v. Zoning Hearing Bd. of Twp. of Ridley*, 408 A.2d 1157, 1158-59 (Pa. Cmwlth. 1979). In deciding if a use is of the same general character is not required for the proposed use to “have the same character, but rather a similarity to other uses permitted by right in the zoning district.” *Zippy’s Car Wash v. Zoning Hearing Bd. of Twp. of Ridley*, 2020 WL 57661 (Pa. Cmwlth. 2020).

Here, the Appellant is correct that if it can show that its proposed use is of “the same general character” as a permitted use, then it would be entitled to a special exception under Section 1100.R of the Zoning Ordinance assuming certain special exception criteria are met. The Appellant argues that its proposed use of a high-rise apartment building containing 503-units is of “the same general character” as the permitted uses of: (1) a “motel or motor court” under Section 1100(K); or (2) an “elderly housing/assisted living facility” under Section 1100(L). However, the record before the Board contains substantial evidence supporting the factual findings that the proposed use is not of “the same general character” as either.

The Board was presented with evidence from multiple expert witnesses who testified that a “motel or motor court” was significantly different from the proposed use because of its transient nature of lodging, the requirement for direct outside access, and connections for the automobile. Stated more succinctly, motels and motor courts are focused on temporary accommodations, rather than an apartment building, which primary purpose is to provide permanent housing. Additionally, evidence was presented to the Board that ultimately supported its findings that the proposed use was not of “the same general character” as an “elderly housing/assisted living facility.”

In pertinent part, in its November 3, 2021 29 page Decision the Board found the following facts:

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.

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 Application, 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.

With regard to the issue of whether Appellant's proposed apartment building use is "of the same general character" as any other permitted use under the ordinance allowed in the SC, Thomas J. Comitta ("Comitta"), a zoning and planning expert was offered by Appellant, and

Kenneth Amey ("Amey"), a land planning, zoning and engineering expert was offered by the Board.

The Board made the following findings of fact as to these two witnesses:

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.

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.

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.

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.

Pointedly, Mr. Amey's testimony that there is a significant difference in what occurs inside elderly housing/assisted living facilities and apartment buildings, undoubtedly impressed the Board; but this is outside the purview of the Court's review. The Board determined that the Appellant did not satisfy its burden of establishing that the proposed use was of "the same general character" as either a "motel or motor court" or an "elderly housing/assisted living facility." This Court finds no error of law in this determination, in view of the above cited testimony and findings of fact.



## **Appellant's Proposed Use does not meet the Criteria for a Special Exception under the Zoning Code**

In the alternative, assuming the proposed use was of "the same general character" as either a "motel or motor court" under Section 1100(K) or an "elderly housing/assisted living facility" under Section 1100(L), the Board found that the proposed use failed to meet the required conditions for a special exception under the respective sections. Section 2101.D of the Zoning Ordinance sets forth the standard for whether a special exception will be granted by the Township. Section 2101.D.1 additionally establishes the burden of proof that the Applicant must meet to have its special exception granted. It must show that the proposed use falls within the provisions of the Zoning Ordinance providing it a right to seek a special exception and that the allowance of the special exception will not be contrary to the public interest. The Boards primary function in this analysis is determining if the special exception is contrary to the public interest by looking at several factors, including, but not limited to: (1) increase of traffic congestion, (2) public safety, (3) overcrowding of land or undue concentration of population, (4) consistency with the surrounding zoning and uses, (5) burden on public facilities, and (6) adverse effects on the public health, safety moral or general welfare as a whole.

Here, the Board was presented with substantial and credible evidence from the Township that the proposed high-rise apartment building containing 503-units will substantially increase traffic congestion, unduly burden the Township's sewer system, and endanger the safety of persons or property by improper location of design of facilities for ingress or egress. Because of this, the Applicant had the burden of providing credible evidence sufficient to persuade the Board that allowance of the special exception will not be contrary to the public interest with respect to those three specific criteria, as required by Section 2101.D.4. The Board ultimately

determined that the Applicant failed to do so because: (1) the Township's sewer system, in its current design, cannot properly accommodate the density of a 503-unit apartment building, (2) there would be significant increase in traffic volume to an already-overloaded area, adding to existing queue lengths, and (3) the proposed use will likely create a dangerous condition at the existing "slip" entrance from Germantown Pike near Lukoil Gas and Whole Foods.

Appellant's own expert witness, all but conceded, that the special exception criteria could not be satisfied. In pertinent part, the Board found the following with respect to Comitta's testimony:

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.

Consideration must also be given to the fact that in 1980, Plymouth Township expressly removed the "high-rise apartment" use from the SC District pursuant to Ordinance No. 840. In essence, this shows the Township's belief that such a use was incompatible with the other uses permitted within the SC District. Based on this, the Board determined the Appellant did not meet its burden and this Court will not overturn its decision absent an abuse of discretion.

Appellant directs the Court's attention to The Plymouth 2040 Comprehensive Plan and argues that zoning ordinances adopted by municipalities shall be generally consistent with the

Municipal or Multi-Municipal Comprehensive Plan. The Court is impressed with this argument; however, the Court is also guided by the principles of administrative law set forth in *Markwest, supra*. that the Board's interpretation of the Zoning Ordinance it is charged to administer is entitled to deference on appellate review absent fraud, bad faith, abuse of discretion or clearly arbitrary action.

### **Conclusion:**

After reviewing the record before the Zoning Hearing Board of Plymouth Township, and in consideration of the arguments made, this Court finds that the findings of fact set forth in the November 3, 2021, decision are supported by sufficient, competent, and credible evidence. Further, the Board's interpretation of the Zoning Ordinances and its conclusions were effectively laid out in its Discussion and Order without committing an error of law.