

**BOROUGH OF JENKINTOWN
BOROUGH COUNCIL
MONTGOMERY COUNTY, PENNSYLVANIA**

IN RE: Application of Midgard Properties LP

PREMISES: 821 Homestead Road, Jenkintown, Pennsylvania
tax parcel numbers:
10-00-01896-00-2

Council Members Present at the hearings:

Deborra Sines-Pancoe, President
Jay Connors, Vice President
David Ballard
Kiernan Farrell
Jennifer Lugar
Anne MacHaffie
Kimberly McGlonn¹
Joanne Bruno²
Alexandria Khalil
Maxine Marlowe³
Chelsea Sperger⁴
Christian Soltysiak⁵

DECISION AND ORDER

I. FINDINGS OF FACT

A. The Subject Property

1. The property that is the subject of the Conditional Use application is 821 Homestead Road, Jenkintown, PA 19046 and is located in Jenkintown Borough (hereafter "Subject Property"). See B-4, B-6, and A-1.

¹ Council member McGlonn was not present for the hearing on July 28, 2021; however, she was provided and had an opportunity to read the transcript of the proceeding that she missed prior to voting.

² Council member Joanne Bruno was not present for the hearing on May 26, 2021, at which time the hearing was continued by the Applicant through a letter request. Ms. Bruno was provided and had an opportunity to read the transcript of the proceeding that she missed prior to voting.

³ Council member Marlowe was not present for the hearing on July 28, 2021; however, she was provided and had an opportunity to read the transcript of the proceeding that she missed prior to voting.

⁴ Council member Sperger was not present for the hearings on April 28, 2021, and July 28, 2021. The hearing on April 28th was continued by the Applicant through a letter request. Council member Sperger was provided and had an opportunity to read the transcript of the proceedings that she missed prior to voting.

⁵ As stated in the Findings of Fact Below, Council member Soltysiak was absent from the public meeting on August 25, 2021, when the vote was taken and therefore, she did not participate in the vote.

2. The Subject Property contains existing improvements including two buildings listed on the Borough's historic building inventory list, namely Homestead Hall and the Church of Our Savior building. See B-11 and A-11; see also Notes of Testimony ("NT") 3/24/21 p52.

3. Both Homestead Hall and the Church of Our Savior building are constructed with stone with wood trim and the homes surrounding the Subject Property are a mix of stone and stucco. See NT 3/24/21 p109.

4. The Subject Property along the northern property line abuts a commercial property (440 Old York Road), referred to as the "Chelsea," that is owned by David Mermelstein and the Subject Property abuts residential properties along the eastern property line. See A-11 and B-10.

5. Across Homestead Road from the Subject Property is another commercial property owned and operated by Paul Feldman that is also constructed with a fair amount of stone. See NT 3/24/21 p110.

6. The Subject Property is a corner lot with street frontage along both Old York Road and Homestead Road, and it is located in the NCR Neighborhood Commercial Residential District. See A-11.

7. The existing sidewalk width along Old York Road is a little over 9 feet wide. See NT. 3/24/21, p113.

8. The existing sidewalk along Homestead Road has two widths, with the section from the side entryway of the Church of Our Savior building to the corner as about 4 feet and the section in the opposite direction as about 7 feet. See NT. 3/24/21 p113

9. The Subject Property also has two existing exterior staircases leading from Old York Road up to the interior of the Subject Property. See A-11, see also NT. 3/24/21 pp144-145.

B. The Parties

10. The applicant is Midgard Properties LP (hereafter "Applicant"), who is the record owner of the Subject Property. See B-4, B-6, and A-1, see also Notes of Testimony ("NT") NT 3/24/21 pp37-38.

11. Applicant was at all times represented by Alyson Fritzges, Esq.

12. A group of residents referred to collectively as the "Homestead Protestants" appeared and requested party status and were represented by Michael Yanoff, Esq. See NT 3/24/21, p9.

13. The residents comprising the “Homestead Protestants” changed from the first hearing held on March 24, 2021, to the last hearing held on July 28, 2021.

14. As of July 28, 2021, the “Homestead Protestants,” who continued to be represented by Attorney Yanoff, consisted of the following individuals:

- a. Bob and Carol Hawthorne of 409 Newbold Road;
- b. Heather Alicia of 225 Cottman Avenue;
- c. Renato Amorim and Sabine Oberbach of 429 Clement Road;
- d. Kacy and Dylan Cicocca of 811 Homestead Road;
- e. Margarite Del Giudice and Doran Twer of 414 Vernon Road;
- f. Paul Feldman of 820-824 Homestead Road;
- g. Jaimee and Andrew Fitzpatrick of 416 Vernon Road;
- h. Loisa and Mauricio Garrido of 410 Vernon Road;
- i. Emmanuel and Jennifer Kostacos of 405 Newbold Road;
- j. Patrick and Danielle Morrin of 413 Vernon Road;
- k. Brian and Hilary Sperling of 413 Newbold Road;
- l. Steve and Sandi Spinder of 429 Vernon Road;
- m. Will and Dajia Steuber of 411 Vernon Road;
- n. Anthony and Jeta Traino of 901 Homestead Road;
- o. Will and Laura Igoe of 407 Newbold Road;
- p. Alyson and Wayne Gifford of 902 West Avenue;
- q. Nicole Wolset of 419 Cottman Avenue;
- r. Tom and Mary Ellen Leifsen of 412 Vernon Road;
- s. Clair and Sean Ryan of 424 Newbold Road and 425 Cottman Avenue⁶;
- t. Anne and Bob Zielinski⁷; and
- u. Anne Lovitt⁸.

Compare NT 3/24/21 pp10-11, 26-27 and 30-31 to NT 7/28/21 pp8, 13-15.

15. Nina Russakoff of 900 Homestead Road was identified as having previously been represented by Attorney Yanoff but was no longer represented by him as of the July 28th hearing and she was granted party status⁹. NT 7/28/21 pp14-15.

⁶ Clair and Sean Ryan were granted party status at the March 24th hearing but were not represented by Attorney Yanoff at that time. NT 3/24/21 pp29-30. At the July 28th hearing, Attorney Yanoff identified Clair and Sean Ryan as his clients. NT 7/28/21 p8.

⁷ At the July 28th hearing Attorney Yanoff listed the names of his then current clients which included Anne and Bob Zielinski. NT 7/28/21 p8. Anne and Bob Zielinski were not previously identified among the list of individuals represented by Attorney Yanoff at the March 24th hearing. See NT 3/24/21 pp10-11, 26-27, 30-31. Therefore, no address was ever provided for these individuals.

⁸ At the July 28th hearing Attorney Yanoff listed the names of his then current clients which included Anne Lovitt. NT 7/28/21 p8. Anne Lovitt was not previously identified among the list of individuals represented by Attorney Yanoff at the March 24th hearing. See NT 3/24/21 pp10-11, 26-27, 30-31. Therefore, no address was ever provided for this individual.

⁹ Because party status was granted to the “Homestead Protestants” at the March 24th hearing, such individuals continued to have party status when they decided to no longer be represented by Attorney Yanoff and proceed pro se. Additionally, and while the address of Anne and Bob Zielinski, and Anne Lovitt were not provided and they were only added as part of the “Homestead Protestants” at the July 28th hearing, no specific objection was raised with regard to their status or inclusion as a party.

16. The following individuals were identified as having previously been represented by Attorney Yanoff, but were no longer represented by him as of the July 28th hearing and no longer desired party status, but did provide public comment:

- a. Anne and Tom Peff of 407 Vernon Road, NT 7/28/21 pp14, 80-81; and
- b. Andrea Okagawa of 2 Rydal Road, NT 7/28/21 pp13, 88-89.

17. The following individuals were identified as having previously been represented by Attorney Yanoff, but no longer represented by him as of the July 28th hearing and they did not appear or identify themselves at the July 28th hearing as desiring continued party status:

- a. Joseph and Lydia Imperiale of 418 Vernon Road; and
- b. Howard Anthony of 300 Clement Road.

18. Applicant objected to party status of all of the “Homestead Protestants” except for the following individuals: Kacy and Dylan Cicocca of 811 Homestead Road; Paul Feldman of 820-824 Homestead Road; Patrick and Danielle Morrin of 413 Vernon Road; Anne and Tom Peff of 407 Vernon Road; and Will and Dajia Steuber of 411 Vernon Road. NT 03/24/21 p12.

19. After hearing argument, Borough Council granted party status to all of the “Homestead Protestants” at the March 24th hearing. NT 3/24/21 pp13-14.

20. David Mermelstein, who is the owner of 440 Old York Road known as the “Chelsea” (a former nursing home) that is adjacent to the Property along the northern property line, was granted party status. NT 3/24/21 p19.

21. Jennifer and Kyle Southerling, who are owners of 420 and 422 Cottman Avenue, were granted party status. NT 3/24/21 pp32-33.

C. Exhibits

22. Over the course of the hearings, the following documents were marked and admitted as Borough exhibits:

- B-1 – Legal advertisement;
- B-2 – Posting;
- B-3 – Mailed notice of hearing;
- B-4 – Applicant’s Conditional Use Application;
- B-5 – Applicant’s Plot Plan as submitted with Application dated February 26, 2021;
- B-6 – Deed;
- B-7 – Applicant’s Traffic Study as submitted with Application;
- B-8 – Pennoni Conditional Use Review Letter dated March 8, 2021;
- B-9 – Pennoni Traffic Study Review Letter dated March 23, 2021;
- B-10 – Written Public Comments received as of March 22, 2021;
- B-11 – Jenkintown Planning Commission Memo dated March 16, 2021;
- B-12 – Zoning Review Letter dated January 9, 2021;

- B-13 – Applicant Response Letter to Zoning Review dated March 15, 2021;
- B-14 – Applicant hearing continuance request letters dated April 27, 2021, and May 24, 2021;
- B-15 – Applicant hearing continuance request letter dated June 23, 2021;
- B-16 – List prepared by Attorney Yanoff listing all represented clients as of July 28, 2021; and
- B-17 – Agreement between Homestead Protestants and Applicant.

23. Over the course of the several hearings, the following documents were marked and admitted as Applicant exhibits:

- A-1 - Deed – 821 Homestead Road
- A-2 - Curriculum Vitae of Steven Kline, AIA
- A-3 - Site Plan prepared by Regan, Kline, Cross, LLC dated March 24, 2021
- A-4 - Landscaping Plan prepared by Regan, Kline, Cross, LLC dated March 24, 2021
- A-5 - Elevations prepared by Regan, Kline, Cross, LLC dated March 24, 2021
- A-6 - Rendering View 1 prepared by Regan, Kline, Cross, LLC dated March 24, 2021
- A-7 - Rendering View 2 prepared by Regan, Kline, Cross, LLC dated March 24, 2021
- A-8 - Rendering View 3 prepared by Regan, Kline, Cross, LLC dated March 24, 2021
- A-9 - Rendering View 4 prepared by Regan, Kline, Cross, LLC dated March 24, 2021
- A-10 - Rendering View 5 prepared by Regan, Kline, Cross, LLC dated March 24, 2021
- A-11 - Site plan prepared by Regan, Kline, Cross, LLC dated July 28, 2021
- A-12 - Floor plan prepared by Regan, Kline, Cross LLC dated July 28, 2021
- A-13 - Landscaping Plan prepared by Regan, Kline, Cross, LLC dated July 28, 2021
- A-14 - Rendering prepared by Regan, Kline, Cross, LLC dated July 28, 2021
- A-15 - CV of Greg Richardson, P.E.
- A-16 - Traffic Impact Study prepared by Traffic Planning and Design, Inc. dated April 13, 2021
- A-17 - Trip Generation Comparison Memo prepared by Traffic Planning and Design, Inc. dated July 28, 2021

24. The Homestead Protestants did not submit or introduce any exhibits; however, their Agreement with the Applicant was marked by the Borough as B-17 and some of the individuals may have provided written comment that was marked and contained in B-10.

25. Mr. Mermelstein did not submit or introduce any exhibits; however, he did submit written comment (both in letter and email form) that was included with B-10.

26. No other parties submitted or introduced any exhibits and any written comment that was submitted by such parties was marked and collectively contained in B-10.

D. Application and Hearings

27. Applicant's conditional use application sought conditional use approval under Section 181-49.B.1 of the Borough Zoning Code to construct an apartment building at the Subject Property. B-4.

28. Section 181-49.B.1 of the Borough Zoning Code states, in relevant part, as follows:

B. Conditional uses.

(1) Apartment buildings, provided that the following is included:

(a) Twenty percent of the first floor of the building located along the street frontage shall be walk-in office or retail uses, not associated with the operation of the residential portion (e.g., sales office, gym, etc.).

(b) Apartment buildings should follow the building design standards in § 181-54B.

29. Applicant's Application initially sought approval for a three-story, 32-unit apartment building consisting of a mixture of one-bedroom, two-bedroom, and three-bedroom units with commercial space on the first floor ("32-Unit Plan"). B-4, A-3, A-5, see also NT 3/24/21 pp38, 53, and 130.

30. During the course of the hearings and based, in part, on communications with the other parties and neighbors, the Applicant modified its proposed apartment building to make the following changes: reduce the number of units to 26 from 32; reduce the overall footprint of the building from about 13,000 sq ft to about 7,400 sq ft; limit the building to one-bedroom and two-bedroom units only; re-orient the building to be parallel to Old York Road; and such other modifications and changes as shown on the revised site plan, floor plan, and landscaping plan all dated July 28, 2021 ("26-Unit Plan"). Compare A-3, A-4 and A-5 to A11, A-12, A-13, see also NT 7/28/21 pp22-23, 27-29.

31. There were five hearings with the first hearing commencing on March 24, 2021, and the last hearing ending on July 28, 2021.¹⁰

32. At the March 24th hearing, Applicant presented Stephen Kline, who is a partner with the firm Regan Kline Cross Architects located at 7670 Queen Street, Suite 200, Wyndmoor, PA 19038, as an expert witness.

¹⁰ Applicant submitted three continuance request letters thereby limiting the April 28, 2021 hearing, the May 26, 2021 hearing and the June 23, 2021 hearing for the purpose of admitting the continuance request letter and announcing the continuance to the next regular public meeting date.

33. With regard to his qualifications and experience, Mr. Kline testified that:
- (a) He is a licensed architect in Pennsylvania, New Jersey and Delaware. NT 3/24/21 pp44-45;
 - (b) He has experience in designing apartment and mixed use buildings, including site planning, feasibility and schematic planning, and zoning analysis for such buildings. NT 3/24/21 pp45-47;
 - (c) He has worked on projects involving historic preservation. NT. 3/24/21 p49; and
 - (d) He has designed apartment buildings with similar site challenges in Mount Airy off of Talon Road, which roadway he believes to be similar to Homestead Road, and in Cheltenham for an apartment building of similar size on Glenside Avenue. NT 3/24/21 p143.
34. Mr. Kline was offered and accepted as an expert in architecture and site plan design at the March 24th hearing. NT 3/24/21 p52.
35. Mr. Kline also testified at the July 28th hearing in his continued capacity as an expert witness.
36. At the July 28th hearing, Mr. Kline testified with regard to the 26-Unit Plan as follows:
- (a) The 26-Unit Plan was revised based on comments from the neighbors. NT 7/28/21 p22.
 - (b) The 26-Unit Plan (shown at Exhibit A-11) is a 26-unit apartment building with 20% commercial space on the first floor. NT 7/28/21 p23.
 - (c) The Applicant changed the location of the proposed apartment building so that it is facing (and parallel to) Old York Road as opposed to facing Homestead Road (and perpendicular to Old York Road). NT 7/28/21 p23.
 - (d) While the 26-Unit Plan shows a parking field with 73 parking spaces, the Applicant proposes to reduce the number of parking spaces to 66 spaces. NT 7/28/21 p23.
 - (e) Per his parking calculation as shown on the 26-Unit Plan at Exhibit A-11, Kline concluded that the Subject Property as proposed to be developed would require only a minimum of 53 spaces total based on the following: (a) 36 spaces for the new 26 apartment units, (b) 2 spaces for the first floor office/ retail use, (c)

3 spaces for the 2 apartments in Homestead Hall, (d) 7 spaces for the Little Gym based on a one space per 800 sq ft calculation, and (e) 5 spaces for the church based on an anticipated conversion of that building into three apartments. NT 7/28/21 pp45-46.

(f) The proposed 26-unit apartment building will have a setback of 10 feet from the northern property line with Mr. Mermelstein's property. NT 7/28/21 p24, see also A-11.

(g) The proposed 26-unit apartment building will have a setback of more than 200 feet from the eastern property line with the residentially zoned properties. NT 7/28/21 pp53-54.

(h) In response to questioning about the applicable residential setback requirements, Mr. Kline testified that while the side between the proposed 26-unit apartment building and the residentially zoned properties along the eastern property line would likely be considered a side yard due to the unique condition of the Subject Property as a corner lot, even if such area would be determined to be a rear yard, the proposed location of the new 26-unit apartment building would more than meet the 40 feet setback requirement as it shown in the Plan as more than 200 feet away. NT 7/28/21 pp84-85.

(i) The parking area for the 26-Unit Plan will be setback 10 feet from the northern property line where Mr. Mermelstein's property is located and also setback 30 feet from the eastern property line where the residential neighbors are located. NT 7/28/21 pp25, 51.

(j) In response to questioning, Mr. Kline explained that the 40 ft rear yard setback requirement from properties zoned A-Residential applies only to buildings and not to parking lots, and that the Jenkintown Zoning Code only requires parking lots be set back 10 feet from any property line. NT. 7/28/21 pp85-86.

(k) Mr. Kline testified that the 26-Unit Plan is compliant with all the setback requirements of the NCR zoning districts. NT. 7/28/21 p29.

(l) The new building height will increase from three (3) stories to four (4) stories. NT 7/28/21 pp25, 27.

(m) With regard to the interior, due to the reduced footprint of the building, the proposed commercial space on the first floor will total 1,500 square feet which is 20% of the proposed 7,400 sq ft footprint. NT 7/28/21 p27.

(n) In addition to the commercial space, there will be four (4) one-bedroom units on the first floor and the second through fourth floors will each consist of four (4) two-bedroom units and three (3) one-bedroom units per floor. NT 7/28/21 p27.

(o) There will be a total of 14 one-bedroom units and 12 two-bedroom units in the 26-Unit Plan. NT 7/28/21 p28.

(p) As for the commercial space, Mr. Kline testified (and the Exhibits for the 26-Unit Plan showed) that such space would be located on the first-floor closet to the existing Church of Our Savior building and fronting Old York Road so that they would be accessible from the front via the existing exterior staircase along Old York Road. NT 7/28/21 pp37-39, A-11.

(q) In terms of massing and size and design, Mr. Kline testified that Exhibit A-14 is intended to be a massing study or massing model, that the Applicant will be required to go through Design Review Board as part of land development, and that the massing model shows the proposed different uses and architectural design including the potential building materials such as brick and stone. NT 7/28/21 pp30-31.

(r) Mr. Kline testified that the 26-Unit Plan meets the design criteria required by the Jenkintown Zoning Ordinance and is consistent with the Jenkintown Comprehensive Plan. NT 7/28/21 p31.

(s) With regard to exterior space and intra-site connectivity, Mr. Kline testified (and Applicant's exhibits showed) that while areas around Homestead Hall and the Church of Our Savior building will remain unchanged, some of the interior walkways and sidewalks are proposed to be altered or created to address interior pedestrian circulation. NT. 7/28/21 pp23-24.

(t) Mr. Kline confirmed that the existing rectory building on the Subject Property will need to be torn down to construct the new apartment building but that neither Homestead Hall nor the Church of Our Savior building will be demolished. NT. 7/28/21 p49, see also A-11.

(u) In response to questioning from a party about additional green space along Old York Road and potentially pushing the proposed 26-unit building further back, Mr. Kline suggested that the only impediment to move the new apartment building further into the site may be whether the Applicant would need to obtain zoning relief due to the build-to line requirement under the Zoning Ordinance given that parking spaces will be eliminated as shown on the 26-Unit Plan and that such a move would not impact the setback requirement with the eastern property line as it is currently 200+ feet. NT 7/28/21 p48.

37. Mr. Kline also previously testified at the March 24th hearing that:

(a) With regard to stormwater created due to the proposed development, the Applicant would meet the requirements of the Borough's Stormwater Management Ordinance and SALDO during land development as well as any DEP requirements as applicable. NT 3/24/21 p.123;

(b) With regard to landscaping requirements, the Applicant will comply with the requirements of SALDO as it relates to any replacement tree and planting requirements. NT 3/24/21 p119; and

(c) With regard to the Planning Commission, the Applicant received feedback from the Planning Commission suggesting that the Planning Commission desired additional buffer area along Old York Road in order to create additional greenspace and to preserve existing mature trees and historical character of that portion of Old York Road with existing buildings set farther back from the sidewalk and roadway. NT 3/24/21 pp149-150.

38. At the July 28th hearing, Applicant presented Greg Richardson, who is a principal and executive vice president for Traffic Planning and Design (TPD) where he runs the municipal services unit. NT 7/28/21 p57.

39. Mr. Richardson was offered and accepted as an expert in traffic engineering and design. NT 7/28/21 p57.

39. Mr. Richardson testified at the July 28th hearing as follows:

(a) He prepared a traffic study for the 26-Unit Plan that was admitted and marked as A-16, which is a revision to the original traffic study that he prepared and to reflect the reduced size of the proposed apartment building. NT 7/28/21 p75.

(b) Richardson's traffic report looked at the following four intersections near the Subject Property to determine what impact may occur: (1) Old York Road and Homestead, (2) Cottman and Homestead, (3) Vernon and Homestead, and (4) West Avenue and Old York Road. NT 7/28/21 pp58-59.

(c) TPD performed traffic counts at each of these intersections during the morning commuting hour, usually between 7am and 9am, and during the peak hour for the afternoon, usually between 4pm and 6pm. NT 7/28/21 pp59-60.

(d) Due to the pandemic, TPD compared its traffic counts to pre-pandemic volumes and made adjustments as needed to account for the potential temporary change in commuter behavior. NT 7/28/21 p61.

(e) TPD then determined the proposed land uses to estimate the number of vehicles entering or existing the Property during the peak morning and afternoon times. NT 7/28/21 p60.

(f) TPD combined the traffic count numbers with the proposed use estimates to do a capacity analysis for each intersection to determine the potential level of service with “A” as most desirable and “F” as failing. NT. 7/28/21 pp61-62.

(g) TPD then compares the preconstruction to the post-construction levels of service to determine what impact the proposed use may have on an intersection. NT 7/28/21 p62.

(h) TPD determined that the proposed new uses consisting of apartments and small office use will result in 32 new trips during peak morning and 40 new trips during peak evening. NT 7/28/21 p62.

(i) Richardson testified that “adding 32 new vehicles and 40 vehicles, that’s roughly about one new vehicle every two minutes or turning movement, which isn’t, in my opinion, based on some of the studies I do for other commercial uses and other residential uses – it’s adding traffic, but I don’t believe it’s a significant number of vehicles being added.” NT 7/28/21 p63.

(j) Richardson opined that, “while there are some minor delaying increases – and it’s like by tenths of a second, not by seconds or minutes – we show that our site will not have a significant impact based on the traffic perspective.” NT 7/28/21 pp63-64.

(k) Richardson testified that the Applicant agrees with the Borough’s Engineer’s recommendation based on its review that one driveway be ingress-only allowing both left-ins and right-ins, and that the other driveway be egress only allowing rights-out and prohibiting lefts-out with appropriate markings and signage. NT 7/28/21 pp64-65

(l) Richardson stated that the Applicant agrees that it would improve the stop bar for turning into the driveway or turning onto Homestead by painting it with a double yellow line to better designate what lanes vehicles need to turn into, so that those vehicles do not go off track and cause a conflict. NT 7/28/21 pp65-66.

(m) Richardson stated that the Applicant agrees to improve the pedestrian signage and crosswalks at the intersection of Cottman and Vernon. NT 7/28/21 p66.

(n) Richardson also stated that the Applicant is willing to do painted crossings across both the entering and exiting driveways to further alert drivers to the possibility of pedestrian traffic. NT 7/28/21 pp66-67.

(o) Richardson believes that the proposed improvements will make the Subject Property and immediate area safer for pedestrian traffic. NT 7/28/21 pp67-68.

(p) Richardson explained that Exhibit A-17 was the memorandum that he prepared to show the difference in the reduced number of residential units per the revised apartment building plan as well as the corresponding reduced commercial space. NT 7/28/21 p69.

(q) Per Richardson and Exhibit A-17, the number of trips would be reduced due to the reduction in the number of apartment units and commercial space, and therefore the 26-Unit Plan would be less impactful than the 32-Unit Plan. NT 7/28/21 p70.

(r) Richardson opined that the proposed development would not result in or significantly add to any serious traffic hazard or serious traffic congestion. NT 7/28/21 pp70-71.

41. The Applicant also presented Jeff Lustig as a witness at the March 24th hearing.

42. Mr. Lustig testified that he is a member of Midgard Properties LP and that Midgard has proactively tried to preserve the historic integrity and character of the Subject Property by renovating Homestead Hall for adaptive reuse and also intending to renovate the Church of Our Savior building for adaptive reuse. NT 3/24/21 p41.

43. Mr. Lustig confirmed that the proposed apartment building will have commercial units on the first floor but he does not know at this time what business will lease the space. NT 3/24/21 p42.

44. Based on his experience as a developer, including other properties within the Borough, Mr. Lustig testified that his proposed apartment development would not produce an impact that would be unusual than what would be typical expected of any other apartment building of the same size and number of units. NT 3/24/21 p38-39.

45. The Homestead Protestants did not produce or offer any witnesses.

46. The Homestead Protestants submitted and the Borough marked into evidence as B-17 an Agreement entered into between the Homestead Protestants and the Applicant. N.T. 7/28/21 pp7, 16-17.

47. The Agreement requested the following accommodations from the Applicant:

(a) the site plan be situated in accordance with and occupy the footprint as shown in a new site plan marked as A-11;

- (b) the apartment building be limited to 26 apartments;
- (c) the apartment building will not have any three-bedroom apartment units;
- (d) the Applicant will provide a minimum of 66 parking spaces;
- (e) the Applicant will share design plans with and consider input from residents on final architectural design;
- (f) the Applicant will provide increased buffering on the east side of the Property that will include mature trees and a setback of at least 30 feet from the property line for the parking lot;
- (g) The Applicant shall be responsible for the costs of the following traffic mitigation measures if required by the Borough Engineer and approved by Council: (i) raised crosswalk across Homestead Road near Cottman Street; (ii) two speed humps on Homestead Road, one west of the ingress driveway and one east of the ingress driveway with associated pavement markings and signage; (iii) a larger radius on the west side of the proposed access for vehicles exiting the site onto Homestead Road and a smaller radius on the east side of the proposed access for vehicles exiting the site also onto Homestead Road; and (iv) speed bumps on Homestead Road and Vernon Road to reduce speed.

See B-17, see also NT 7/28/21 pp17-20.

48. Mr. Mermelstein did not present or offer any witnesses other than his own comments and personal opinions with regard to the proposed apartment development and impact to his property.

49. No other party presented or offered any witnesses either for or against the Application.

50. Borough Council admitted as Exhibit B-11, with no objection by any party, the review memorandum issued by the Jenkintown Borough Planning Commission ("JPC"). NT 3/24/21 p34.

51. In its review letter, the JPC stated "the project seems to be very much in line with the 2035 (Comprehensive) plan." B-11

52. The JPC noted in its review that the property is part of the Borough's historical building inventory list. B-11.

53. The JPC also recommended that consideration be given to maintaining the number of existing mature trees along Old York Road and to consider pushing the development and parking back. B-11.

54. The JPC also recommended that the proposed building's design be engaged with Old York Road and consider orientation options for entrances. B-11.

55. The JPC further recommended that consideration be given to the number of units to allow for greater flexibility with regard to the proposed apartment buildings design and how it interacts with the surrounding properties. B-11

56. As referenced by the JPC, the Borough recognizes that it maintains a historic building inventory that includes Homestead Hall and the Church of Savior building located on the Subject Property as well as the buildings on nearby properties along Old York Road including Grace Presbyterian Church and the Jenkintown Lyceum/ Library that are important to the character and appearance of that portion of Old York Road.

57. As part of the hearings, Borough Council also received public comment on the Application.

58. Borough Council marked and admitted into evidence as B-10, with no objection by any parties, written public comment that was submitted to both the Borough and individual Council members, which written comments were reviewed and considered by Borough Council as appropriate.

59. At the July 28th hearing and following the close of Applicant's case in chief and any case present by anyone with party status, Borough Council also received oral public.

60. During oral public comment on July 28th, Andrea Okagawa spoke and expressed concerns with the existing conditions at the Subject Property as it relates to traffic and parking resulting from the current uses. NT. 7/28/21 pp80-81.

61. During oral public comment on July 28th, Tom Peff spoke and expressed opposition to the Application, and he stated that he did not believe that additional signage at the Subject Property would address existing concerns with pedestrian safety and vehicular traffic. NT 7/28/21 pp88-89.

62. Following public comment, the hearing was closed on July 28, 2021, and Borough Council announced that it would deliberate in executive session and take a vote on the application at its regular business meeting on August 25, 2021. NT. 7/28/21 p94-96.

63. At its regular business meeting on August 25, 2021, Borough Council approved the Conditional Use Application with conditions as set forth in the Order below by a vote of 10 to 1.¹¹

¹¹ Council member Alexandra Khalil voted against approval. Council member Christian Soltysiak was absent and therefore did not participate in the vote.

II. CONCLUSIONS OF LAW

1. Applicant, as the record owner of the Property, possesses standing to apply for the conditional use. *See* 53 P.S. § 10107; *Collier Stone Co. v. Township of Collier Bd. of Commissioners*, 735 A.2d 768 (Pa. Commw. Ct.1999).

2. The hearing was properly advertised, posted and held in accordance with the requirements of the Jenkintown Borough Zoning Ordinance and the Pennsylvania Municipalities Planning Code (“MPC”).

3. The Property is located in the NCR Zoning District which District permits, by conditional use, apartment use under § 181-49(B)(1).

4. “The fact that a use is permitted as a conditional use evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community.” *In re Cutler Group, Inc.*, 880 A.2d 39, 42 (Pa. Commw. Ct. 2005).

5. Applicant presented sufficient evidence to establish a prima facia case that it satisfied the criteria and that it will conform to the applicable regulations of the district in which it is located for a conditional use approval under § 181-49(B)(1) for a 26-unit apartment building as proposed in the 26-Unit Plan based on the evidence and testimony provided.

6. Objectors failed to produce sufficient evidence to establish that a high degree of probability exists that the proposed apartment building use will cause substantial threat to the community, or that such use will pose a degree of harm greater than that which normally flows from any apartment use.

7. Applicant’s 26-Unit Plan containing a mix of commercial use and apartments is consistent with the Borough’s comprehensive plan and the health, safety and welfare of the community.

9. Applicant’s redevelopment of the Subject Property, including the 26-Unit Plan and the adaptive reuse and preservation of two existing historical structures at the Subject Property is consistent with the Borough’s comprehensive plan and the health, safety and welfare of the community

10. The Subject Property presents unique physical circumstances and conditions in that it is a corner lot along a portion of Old York Road that contains important, historical structures as well as mature trees and whose current appearance and condition demonstrates an intention to be consistent with the deep setbacks for the placement of other recognized Jenkintown historical structures so as to create visual greenspace and harmony among such buildings.

11. In order to maintain this visual greenspace and harmony with the neighboring historical structures along this portion of Old York Road, a condition requiring that the proposed 26-unit apartment building remain parallel to but set back further from Old York Road is

reasonable and consistent with the recommendations of the Planning Commission and of at least one party to the proceedings.

12. The need to maintain the visual greenspace and harmony with the neighboring historical structures along this portion of Old York Road by setting the proposed 26-unit apartment building further back is a hardship that is not created by the Applicant and that is not created by the proposed development, but rather exists as a result of the existing conditions of the Subject Property and the surrounding properties and historical structures along Old York Road.

13. Based on the 26-Unit Plan, including the reduction in the number of parking spaces and the 200+ feet distance from the eastern property line with the residential neighbors, a further set back of the proposed apartment building would cause minimal impact that would not prevent the reasonable uses on neighboring properties and that would not alter the essential character of the neighborhood, but would rather maintain or enhance the existing historical and greenspace character.

14. Based on the exhibits and testimony presented as well as the conditions as imposed herein by this Decision and Order, the 26-Unit Plan and Application does not present a serious conflict with other Borough ordinances, does not result in or significantly add to a serious traffic hazard or serious traffic congestion, does not create a significant public safety hazard, including fire, toxic or explosive hazards.

15. Based on the exhibits and testimony presented as well as the conditions as imposed herein by this Decision and Order, the 26-Unit Plan and Application is generally consistent with the Borough Comprehensive Plan and will involve adequate site design methods, including evergreen screening, setbacks, and traffic control, to avoid serious negative influences on adjacent uses.

16. Based on the exhibits and testimony presented as well as the conditions as imposed herein by this Decision and Order, the 26-Unit Plan and Application sufficiently meets at this stage the design standards as contained in §181-54.B.

17. Borough Council neither abused its discretion nor committed an error of law in granting Applicant's conditional use request for relief with conditions as set forth in this Decision and Order.

III. DISCUSSION

It is well accepted under Pennsylvania law that,

A conditional use is one to which the applicant is entitled provided that the specific standards of the zoning ordinance are met. An applicant seeking a conditional use must show compliance with the express standards of the zoning ordinance that relate to the specific conditional use. If the applicant demonstrates compliance with the

zoning ordinance, the governing body must grant the application unless objectors introduce sufficient evidence that the proposed use will have a detrimental effect on the public health, safety, and welfare.

Feldman v. Bd. of Sup'rs of E. Caln Twp., 48 A.3d 543, 548 (Pa.Cmwlt. 2012)(citing *In re Thompson*, 896 A.2d 659, 670 (Pa. Cmwlt. 2006). “The fact that a use is permitted as a conditional use evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community.” *In re Cutler Group, Inc.*, 880 A.2d 39, 42 (Pa. Cmwlt. 2005).

Section 909.1(b)(3) of the Pennsylvania Municipalities Planning Code (MPC) grants the governing body, i.e. Borough Council, the jurisdiction to hear and render final decisions on conditional use applications under the provisions of a borough’s zoning ordinance.

The Commonwealth Court in *Williams Holding Group, LLC v. Bd. Of Supervisors of West Hanover Twp.*, 101 A.3d 1202 (Pa. Cmwlt. 2014) aptly summarized the respective burdens of proof in a contested conditional use hearing as follows:

The applicable standard of proof [for a conditional use] requires an applicant to demonstrate that the use proposed in an application complies with the specific criteria of the particular ordinance. **An applicant who satisfies this prima facie burden is entitled to approval, unless objectors in the proceeding offer credible and sufficient evidence indicating that the proposed use would have a detrimental impact on public health, safety, and welfare.**

101 A.3d at 1212 (bold added).

Additionally, and in explaining the role that a conditional use approval process plays in the **overall** development process, the Commonwealth Court has usefully explained as follows:

Generally, satisfying the criteria for conditional use is just one step of the subdivision approval process. In fact, subdivision approval cannot be granted until the conditional use approval is first obtained. **Special exception or conditional use proceedings involve only the proposed use of the land, and do not involve the particular details of the design of the proposed development.** What must be demonstrated in order to obtain conditional use approval must be determined on a case by case basis and will vary among municipalities based upon the use requested and the language in the ordinance.

In [*Schatz v. New Britain Township Zoning Hearing Board of Adjustment*, 596 A.2d 294 (Pa Cmwlt. 1991)], we held that a zoning board could not reject an application for a special exception as not being in the best interest of the community because the

application did not address the issues of adequate sewage capacity, storm water management or water supply requirements. We held that “such issues are to be addressed further along the permitting and approval process. Zoning only regulates the use of land and not the particulars of development and construction.”

Similarly, in [*In Re Brickstone Realty*, 789 A.2d 333 (Pa Cmwlth 2001)] we held that detailed design information such as floor plans, even if required by the ordinance, is not relevant to the consideration of a special exception or conditional application. All the ordinance required for approval of the use was information indicating the nature, size, and location of the proposed use.

In re Thompson, 896 A.2d at 670–71 (bold added) (internal citations omitted).

With regard to an objector’s burden of proof, the Commonwealth Court has stated that an objector must,

present sufficient evidence to establish that there is a high degree of probability that the use will cause substantial threat to the community. The evidence of the protestants cannot consist of mere bald assertions or personal opinions and perceptions of the effect of the use on the community. Moreover, the degree of harm required to justify denial of the conditional use must be greater than that which normally flows from the proposed use.

In re Cutler Grp., Inc., 880 A.2d 39, 43 (Pa.Cmwlth. 2005) (citing Robert S. Ryan, 1 Pennsylvania Zoning Law and Practice 5.2.6 (2003) and *Visionquest National, Ltd. v. Board of Supervisors*, 524 Pa. 107, 569 A.2d 915 (1990)).

In the instant case, Applicant seeks conditional use approval for an apartment building under §181-49(B)(1) (relating to apartment use in the NCR zoning district). With regard to Applicant’s request for conditional use approval for an apartment building under §181-49(B)(1), the Borough Zoning Code states the criteria for conditional use approval as follows¹²:

(a) Twenty percent of the first floor of the building located along the street frontage shall be walk-in office or retail uses, not associated with the operation of the residential portion (e.g. sales office, gym, etc.).

¹² It should be noted that the Borough Zoning Code also contains under §187-99 conditional use standards that are applicable to all conditional use requests. These standards include: (1) compliance with all local, state and federal laws and regulations; (2) consistent with the Borough Comprehensive Plan; (3) not result in significant traffic hazards or serious traffic congestion; (4) not create a significant public safety hazard such as fire, toxic or explosive hazards; and (5) involve adequate site design methods to avoid serious negative influences on adjacent uses, including screening, setbacks, traffic control. To the extent that Applicant was required to meet these standards, Applicant presented sufficient testimony from witnesses that the proposed development of a 26-unit apartment building would meet these five general standards.

(b) Apartment buildings should follow the building design standards in §181-54B.

Based on the above criteria and the legal standards for conditional uses as recited above, Applicant has met its prima facie burden of proof to be entitled to conditional use approval under §181-49(B)(1) as set forth in the findings of fact and conclusion of law sections above. Applicant presented testimony from witnesses explaining that the ground floor would contain small office or retail spaces equaling 20% of the building footprint and, that while such future commercial tenants are currently unknown, such commercial use would not be associated with the operation of the residential portion of the building (i.e. leasing office).

As for the building design standards in §181-54(B), Applicant presented the testimony of Mr. Kline who provided testimony as to how the building design standards were met, including testimony about materials and design, massing and proportion, and use of large windows. Applicant also produced concept plans/renderings for the 26-Unit Plan marked as A-14 that similarly showed that the proposed building would include design features that would meet the standards as set forth in §181-54(B).

To the extent that any other party to the conditional use hearing was continuing to seek to object, such party had the burden to prove that there is a high degree of probability that the proposed apartment use will cause substantial threat to the community and that the degree of harm is greater than that which normally flows from the proposed apartment use. Given that some parties to the proceedings entered into an Agreement with the Applicant, it is unknown whether such parties continue to object to the proceedings. While Borough Council admitted the Agreement into evidence in order to consider it as part of its review and decision making, Pennsylvania law does not require that Borough Council be bound by any of its terms or conditions. Therefore, to the extent that any party desired to oppose the Application, no protesting party presented sufficient, credible evidence to meet their burden of proof. As such, Applicant is entitled to the conditional use with those conditions as set forth in this Decision and Order.

IV. ORDER

AND NOW this _____ day of September 2021, the Conditional Use Application of Midgard Properties, LP for conditional use approval under §181-49(B)(1) to permit a 26-unit apartment building with no three-bedroom units and with ground level commercial space as reflected in the hearing testimony and exhibits is hereby **GRANTED** with the following conditions:

- (1) Wayfinding signage shall be provided by the Applicant for Borough public parking options to the satisfaction of the Borough Engineer;
- (2) Access shall be provided from the proposed parking lot to the first floor commercial space facing Old York Road in addition to the access along Old York Road as presented in the 26-Unit Plan;
- (3) Applicant shall provide PennDOT approved traffic calming measures at appropriate intersections such as a raised crosswalk at Cottman Avenue and Homestead Road to the satisfaction of the Borough Engineer;
- (4) Applicant shall comply with all representations made by the Applicant and its witnesses at the July 28, 2021, hearing that was stenographically recorded and which representations shall be binding. Additionally, this approval shall be subject to the Applicant meeting all applicable Borough, Commonwealth, and Federal permitting/Ordinance/legal requirements.
- (5) The 26-unit building as proposed shall be set back further from Old York Road than as shown in Exhibits A-11 through A-14 and as testified to at the July 28, 2021 hearing in order to be closer in character with the existing setbacks of the buildings that surround it, and to preserve greenspace and mature trees, and to comply with the eastern setbacks from the residential properties.
- (6) The 26-unit building shall be constructed with a priority being placed on greenspace and tree preservation to the satisfaction of the Borough Engineer.
- (7) Consistent with Condition 6 above, the 26-unit building shall be constructed to protect and preserve to the satisfaction of the Borough Engineer the existing deep setback from Old York Road relative to surrounding buildings on the Property and on nearby properties (i.e. Grace Presbyterian Church, the Jenkintown Lyceum/Library, and the Church of Our Savior building) which is a part of the original landscaping and architectural feature of the existing Property and is an essential characteristic of the Borough's appearance and ambience for those passing Old York Road as recommended by the Jenkintown Planning Commission review regarding Greenspace preservation.

- (8) The 26-unit building shall be constructed to preserve the historical charm and significance of the Church of Our Savior building and Homestead Hall to the satisfaction of the Borough Engineer.
- (9) The parking plan layout, while still being compliant with Jenkintown Code, shall work to include more greenspace and less impervious surface and shall include a reduction in parking spaces from 72 to 66 to the satisfaction of the Borough Engineer.

**BOROUGH OF JENKINTOWN
BOROUGH COUNCIL**


DEBORRA SINES-PANCOE, PRESIDENT

**This Decision and Order was mailed
to the Applicant on September 10, 2021.**