

NORTH CAROLINA
MECKLENBURG COUNTY

CITY OF CHARLOTTE
ZONING BOARD OF ADJUSTMENT
2019-085 (APPEAL)

ROBERT EDWARD LESNICK

Petitioner

v.

CITY OF CHARLOTTE HISTORIC DISTRICT
COMMISSION

Respondent.

**RESPONDENT
CITY OF CHARLOTTE
HISTORIC DISTRICT
COMMISSION'S
BRIEF**

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STATEMENT OF THE CASE

DAS Architecture Inc./Westwood Stevens Grove LLC (“HDC Applicants”) filed an application with the City of Charlotte’s Historic District Commission (“HDC”) for property located at 1101 Myrtle Avenue, Charlotte, North Carolina (“Subject Property”).¹ The Subject Property is located at the corner of Myrtle Avenue and Lexington Avenue in the Dilworth Historic District and is zoned R-22MF (HD).² The HDC staff labeled the application as HDC Case #2019-085.³ The HDC Applicants sought to construct three new townhomes with detached garages on the Subject Property (“Project”).⁴

On May 8, 2019, the HDC conducted a hearing (“May HDC Hearing”) on HDC Case #2019-085.⁵ A representative of HDC Applicants, Kevin Pfahl of DAS Architecture Inc., attended the May HDC Hearing to present HDC Case #2019-085 and answer any questions from the HDC.⁶ Petitioner also attended the May HDC Hearing and presented three points of concern to the HDC: one, “the proximity of the last residence to the property line, specifically with relation to the trees;” two, the front yard patios; and three, a discrepancy in measuring the distance between the Subject Property and 1121 Myrtle Avenue, Charlotte, North Carolina.⁷ The HDC unanimously voted to continue its review of HDC Case #2019-085.⁸

On June 12, 2019, the HDC conducted a hearing (“June HDC Hearing”) on HDC Case #2019-085.⁹ Representatives of HDC Applicants, Kevin Pfahl of DAS Architecture Inc. and Myles Gordon of Westwood Stevens Grove LLC, attended the June HDC Hearing to present HDC Case #2019-085 and answer any questions from the HDC.¹⁰ Petitioner did not speak at the July HDC Hearing.¹¹ The HDC unanimously voted to continue its review of HDC Case #2019-085.¹²

On July 10, 2019, the HDC conducted a hearing (“July HDC Hearing”) on HDC Case #2019-085.¹³ Representatives of HDC Applicants, Kevin Pfahl of DAS Architecture Inc. and Myles Gordon of Westwood Stevens Grove LLC, attended the July HDC Hearing to present HDC Case #2019-085 and answer any questions from the HDC.¹⁴ Petitioner did not speak at the July HDC Hearing.¹⁵ The HDC voted 7-1 to approve with conditions HDC Case #2019-085.¹⁶

On December 13, 2019, a Certificate of Appropriateness (“COA”) was issued to Westwood Stevens Grove LLC; one-half of the HDC Applicants.¹⁷ A party challenging the issuance of the COA must file an appeal to the City of Charlotte’s Zoning Board of Adjustment (“ZBA”) within thirty (30) days of the issuance pursuant to Section 10.213(1) of the City of Charlotte’s Zoning Ordinance. In this case, any appeal to the ZBA had to be filed no later than January 13, 2020.

On January 9, 2020, Petitioner filed an appeal challenging the issuance of the COA (“ZBA Appeal”).¹⁸ Petitioner asserts five arguments in the ZBA Appeal: first, an incomplete application was submitted for HDC Case #2019-085; second, the height of the townhomes was taller than the tallest historic single-family building on the block within three hundred sixty degrees (360°) of the Subject Property; third, the finished grade of the Subject Property was lowered; fourth, the Subject Property used more than fifty percent (50%) of the rear yard with impermeable material; and fifth, the Subject Property failed to retain existing trees.¹⁹

On March 10, 2020, the Governor of North Carolina issued Executive Order No. 116 declaring a state of emergency related to COVID-19.

On May 4, 2020, Session Law 2020-3 was adopted by the North Carolina General Assembly. Session Law 2020-3 authorized remote meetings and required that all parties must consent to conducting a quasi-judicial hearing, such as the ZBA, via a remote meeting. Upon

information and belief, the HDC Applicants did not provide their consent to the ZBA Appeal being conducted as a remote meeting.

Around January 2022, the ZBA resumed in-person meetings.

On March 7, 2022, the HDC Record on Appeal (“Original HDC Record”) was served on Petitioner by mail and email.²⁰ Petitioner subsequently requested the inclusion of documents that were not included in the Original HDC Record. On April 19, 2022, the amended HDC Record on Appeal was served on Petitioner by mail and email (“Amended HDC Record”).²¹ The Original HDC Record and Amended HDC Record (collectively “HDC Record”) comprised all materials that were presented to the HDC during its public hearings on the COA.

On April 26, 2022, the ZBA is scheduled to hear Petitioner’s ZBA Appeal. The questions before the ZBA are (i) whether Petitioner has alleged special damages as a prerequisite to appeal the issuance of the COA and (ii) whether the HDC properly granted the COA.

STANDARD OF REVIEW

I. Special Damages Standard

A party must allege and demonstrate special damages in order to challenge the HDC’s decision to issue a COA.²² If a party does not meet all of the requirements, then it has not alleged or demonstrated special damages.

For the first element, a party must own, lease, or have a contract to buy the nearby or adjoining lands.²³ North Carolina courts do not specify a minimum or maximum distance for fulfilling the nearby or adjoining component. However, a party’s mere statement that the party owns, leases, or has a contract to buy property, absent any allegation of special damages distinct from the rest of the historic district in the party’s appeal, is insufficient to demonstrate special damages.”²⁴

For the second element, Petitioner must show how the COA was unlawful or illegal.

For the third element, Petitioner must show an injury distinct from the rest of the historic district as a result of the unlawful or illegal COA. An appealing party's injury could be a reduction in the appealing party's land value as a result of the unlawful or illegal COA²⁵ or increased traffic, increased water runoff, parking, and safety concerns, as well as the secondary adverse effects resulting from the COA.²⁶ The aforementioned examples require an expert's opinion and cannot be proffered without an expert's opinion.

II. Review in the Nature of Certiorari

In reviewing the HDC's decision to issue the COA, the ZBA sits in the posture of an appellate court, not a trier of fact.²⁷ As such, it only reviews the HDC Record but does not compile new evidence or testimony regarding the COA. The proper standard of review by the ZBA depends on the particular nature of the issues presented on appeal.

If Petitioner alleges that the HDC's decision was based on error of law, *de novo* review is required.²⁸ *De novo* means "anew."²⁹ Thus, the ZBA would be reviewing and applying the applicable law without any deference to the HDC or its prior determination of the law.

However, if Petitioner contends that the HDC's decision was either unsupported by the evidence or arbitrary and capricious, the appropriate standard of review is the "whole record" test.³⁰ In applying the whole record test, the ZBA may not substitute its own judgment for that of the HDC when the HDC Record contains competent and substantial evidence supporting the HDC decision, even though conflicting evidence in the record would have allowed the ZBA to reach a contrary finding if proceeding *de novo*.³¹ Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion.³²

Based upon Petitioner's five arguments, this brief addresses the *de novo* standard and the application of the "whole record" standard of review.

ARGUMENT

I. PETITIONER, ROBERT EDWARD LESNICK, FAILED TO ALLEGE “SPECIAL DAMAGES” AS A PREREQUISITE TO CHALLENGING THE ISSUANCE OF THE CERTIFICATE OF APPROPRIATENESS.

Special damages must be demonstrated by Petitioner in order to challenge the HDC’s decision to issue the COA.³³ At a minimum, Petitioner must demonstrate all of the following: (i) owns, leases, or has a contract to buy the nearby or adjoining land affected by the issuance of the COA; (ii) an unlawful or illegal COA; and (iii) an injury distinct from the rest of the historic district as a result of the unlawful or illegal COA.

Upon information and belief, Petitioner meets the first element because Petitioner owns, leases, or has a contract to buy the nearby or adjoining lands. It is the HDC’s standard procedure to notify nearby and adjoining properties that are within three hundred (300) feet of the Subject Property. In this instance, Petitioner lives at 1121 Myrtle Avenue, Apartment 68, in the Dilworth Historic District and within three hundred (300) feet of the Subject Property at 1101 Myrtle Avenue.³⁴

Petitioner attempts to fulfill the second element via its ZBA appeal. The HDC disagrees with Petitioner’s allegations and has set forth its responses in Section II below.

It is the third element that Petitioner has failed to state and/or proffer evidence needed to demonstrate special damages – i.e. an injury distinct from the rest of the historic district as a result of the unlawful or illegal COA. Petitioner’s ZBA Appeal lacks any evidence of special damages. Moreover, it has been over twenty-eight (28) months since the issuance of the COA and Petitioner has not provided any evidence that Petitioner has sustained any special damages to undersigned counsel as of 4:00 p.m. on April 19, 2022.³⁵ This glaring omission strongly demonstrates that Petitioner has not suffered an injury from the HDC’s decision to issue the COA.

Accordingly, Petitioner's ZBA Appeal must be dismissed for the failure to allege or demonstrate special damages required by state law.

II. THE CHARLOTTE HISTORIC DISTRICT COMMISSION COMMITTED NO ERROR OF LAW WHEN IT APPLIED ITS POLICY & DESIGN GUIDELINES TO GRANT THE CERTIFICATE OF APPROPRIATENESS.

A. Incomplete Application Argument

Petitioner initially alleges that the HDC Applicants submitted an incomplete application for HDC Case #2019-085 and references Paragraphs 7.3.2.1, 7.3.2.2, 7.3.2.5 of the HDC's Rules for Procedure.³⁶

The relevant language of these Paragraphs state:

- 7.3.2.1. Site Survey – Applications for significant additions and all new construction must include a registered survey with the following information: Lot dimensions, existing structures, existing setback and yard lines, topography lines, mature trees, unique site features, fences, walls, easements, public rights of way, utilities, driveways, and other relevant information.
- 7.3.2.2. Site Plan – The site plan must include: All structures (existing and proposed), setback dimensions (porch and thermal wall), yard dimensions, driveways and alleys, tree protection and/or tree removal, HVAC location(s) and percentage of lot coverage. Provide a grading plan where site slopes affect the project significantly and/ or its height.
- 7.3.2.5. Streetscape – Applications for new construction must provide composite streetscape elevations showing the proposed project with existing adjacent buildings and height dimensions. The same applies to building additions that are taller or wider than the existing structure.

The undisputed facts show that the HDC staff deemed HDC Case #2019-085 to be complete by placing it on HDC agenda for the May HDC Hearing.³⁷ Furthermore, HDC staff recommendations outlined its concerns for the May HDC Hearing including: (1) lack of differentiation in building designs; (2) additional information needed about materials (garage doors, front entry doors, trim); (3) building at corner of Lexington and Myrtle does not address Myrtle; (4) developed patios in the front yard; (5) tree protection plan for the existing trees to

remain; and (6) lack of details about the brick retaining wall.³⁸ None of the HDC staff recommendations reflect the belief that an incomplete application was submitted for HDC Case #2019-085.

Similarly, the HDC reviewed HDC Case #2019-085 and discussed it.³⁹ The HDC ultimately decided to request additional information from the HDC Applicants and specified ten (10) items that were necessary to fulfill the request for additional information.⁴⁰ Once again, nothing in the HDC's decision during the May HDC Hearing reflects the notion that an incomplete application was submitted by the HDC Applicants.

Accordingly, the HDC did not error in the application of the law and the HDC record does not lack substantial evidence, which a reasonable mind might accept as adequate to support a conclusion.⁴¹ Petitioner's allegation is meritless.

B. Height Argument

Next, Petitioner alleges that the Project's height was taller than the tallest historic single-family building within three hundred sixty degrees (360°) of the Subject Property and references HDC's Design Standards Section 6.6.2.⁴²

The relevant language of this paragraph states:

6.6.2 For new single-family structures, the height of the proposed building should be no taller than the tallest single-family historic building on the block within a 360-degree range of visibility from the sidewalk in front of the subject parcel. The height of the historic building should be calculated from the original historic ridge line (not any later additions that may be taller). See illustration C on page 6.4, Context.

As evidence, Petitioner cites single-family structures at 825 Lexington Avenue with a height of 25.6 feet and 728 Lexington Avenue with a height of 22.2 feet.⁴³

The HDC determined that 829 Lexington Avenue with a height of 40.0 feet was the tallest multifamily historic structure on the block within a three hundred sixty degree (360°)

range of visibility.⁴⁴ The Subject Property's height is 25.9 feet or less than the height of 829 Lexington Avenue.⁴⁵ The HDC only compared similar multifamily structures and did not take into consideration single-family structures because of the difference.

Accordingly, the HDC did not error in the application of the law and the HDC record does not lack substantial evidence, which a reasonable mind might accept as adequate to support a conclusion.⁴⁶ Petitioner's allegation is meritless.

C. Finished Grade Argument

Third, Petitioner alleges that the Subject Property achieved its height by lowering its grade and building a retaining wall to build the three (3) townhomes and references HDC's Design Standards Section 6.9.1.⁴⁷

The relevant language of this paragraph states:

6.9.1 Relate the height of a new foundation to the height of foundations on historic buildings found within the context of the new building. Avoid lowering the grade to achieve greater overall height to the new building.

In this instance, Petitioner fails to state how the foundation for the Subject Property differs from the height of the foundations on historic buildings within the context of the new building. The absence of evidence proffered by Petitioner demonstrates that this allegation is meritless.

D. Impermeable Material in Rear Argument

Petitioner also contends that the Subject Property used more than fifty percent (50%) of the rear yard with impermeable material and references HDC's Design Standards Section 8.4.7.⁴⁸

The relevant language of this paragraph states:

8.4.7 In a single-family use, no more than 50% of the rear yard (as measured from the back of the original house) shall be of impermeable material including the roofs of additions to original buildings, paving, decks, patios, pools, and accessory buildings. Wood slatted decks are considered permeable.

As evidence Petitioner calculates the rear yard of Lot 1 to be 69% to 74% impermeable, the rear yard of Lot 2 to be 82% impermeable, and the rear yard of Lot 3 to be 81% impermeable.⁴⁹

The HDC noted that HDC's Design Standards Section 8.4.7 did not apply to the Subject Property because it was zoned R-22MF (HD) which is a multifamily zoning designation. Evidence of this discussion is noted below:

19. MR. BARTH: I would assume we're treating
20. these as single-family units. 8.4, number 7 -- you
21. know, I'm sort of overwhelmed by the amount of
22. impervious surface on the site. I don't know that
23. that speaks to --
24. MS. HARPST: That's for single-family zoning
25. and this is multi-family.
01. MR. HADEN: This is actually multifamily
02. zoned.
03. MS. PARATI: It's a single-family unit.
04. MS. HINDMAN: So it's a really tricky
05. situation because it's zone multifamily, but the
06. appearance is single.
07. MS. PARATI: Uh-huh.⁵⁰

Petitioner's allegation is meritless because the HDC's Design Standards Section 8.4.7 only applies to single-family zoned property. In this case, the Subject Property was zoned multifamily.

Accordingly, the HDC did not error in the application of the law and the HDC record does not lack substantial evidence, which a reasonable mind might accept as adequate to support a conclusion.⁵¹ Petitioner's allegation is meritless.

E. Trees Argument

The final argument made by Petitioner is that the Subject Property failed to retain existing trees and references HDC's Design Standards Section 8.5.1.⁵²

The relevant language of the HDC's Design Standards Section 8.5 states:

- 8.5.1. Retain existing trees that define the district's character.

- 8.5.2 When tree removal is needed (due to disease, documented damage to a historic structure, or other reasons) or desired, a Certified Arborist must be consulted and the written recommendation must be provided to the HDC before removal is granted. This guideline includes trees in front, side, and rear yards. Staff may approve removal of diseased, declining trees based on the Certified Arborist letter.
- 8.5.3 Trees less than ten (10) inches in diameter may be removed in front, side, and rear yards with Administrative approval.
- 8.5.4 Identify and take care to protect significant existing trees and other plantings via a Tree Protection Plan when constructing new buildings, additions, or site structures such as garages.
- 8.5.5. New construction that impacts healthy trees must be reviewed by the HDC. Mature trees that are unhealthy or causing significant structural damage to historic structures may reviewed by HDC staff. Replacement trees may be required.
- 8.5.6 The HDC may require the planting of additional trees to replace a mature canopy that is removed.

Although Petitioner focuses its allegation on Section 8.5.1, the entirety of Section 8.5 demonstrates that trees can be removed and/or replaced.

In this case, the HDC received a Certified Arborist Letter dated July 1, 2019, which stated that trees labeled #16, #19, and #21 were “inside the minimum distance” of ten feet for a tree to survive.⁵³ Moreover, the HDC received sworn testimony about the removal of these trees as evidenced by this exchanged:

24. MR. HARPST: No. The only comment that I
 15. would share would be that all of the existing trees
 01. along the retaining wall the arborist believes will
 02. need to be removed, because as he details in his
 03. letter, they’re not outside the critical root zone,
 04. and it will be impossible to protect them given the
 05. location of the buildings and garages. And that
 06. was basically my big takeaway.

10. MR. PFAHL: Most of the trees
 11. along this property line have grown in and around that
 12. wall and have caused it to fail, so going forward, we
 13. feel like it’s a more prudent plan to remove those

14. trees and underbrush and plant a proper tree, a more
15. vertical-type tree.⁵⁴

Petitioner's allegation is meritless because the HDC's Design Standards Sections 8.5.2, 8.5.5., and 8.5.6 allow for the removal of trees and the replanting of new trees based on new construction. Moreover, the HDC Applicants presented a Certified Arborist Letter, which is a requirement of HDC's Design Standards Sections 8.5.2, as evidence in support of the removal of those trees.

Accordingly, the HDC did not error in the application of the law and the HDC record does not lack substantial evidence, which a reasonable mind might accept as adequate to support a conclusion.⁵⁵ Petitioner's allegation is meritless.

CONCLUSION

For the foregoing reasons, Respondent HDC respectfully requests that the ZBA dismiss Petitioner's ZBA Appeal upon concluding that Petitioner failed to allege or demonstrate "special damages."

In the alternative, Respondent HDC respectfully requests that the ZBA affirm the HDC's decision to issue the COA for 1101 Myrtle Avenue.

This the 19th day of April, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he attached Respondent City of Charlotte Historic District Commission's Brief has been duly served on this date, by email and by depositing a copy thereof, postage prepaid, in the United States Mail in Charlotte, North Carolina and addressed to the following:

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This the 19th day of April, 2022.

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FOOTNOTES

¹ HDC Record p. 1-2.

² HDC Record p. 1-2.

³ HDC Record p. 1-2.

⁴ HDC Record p. 1-2.

⁵ HDC Record p. 21-58.

⁶ HDC Record p. 4, lines 1-8

⁷ HDC Record p. 31-35, 75.

⁸ HDC Record p. 54-58, 75-76, 84.

⁹ HDC Record p. 97-168.

¹⁰ HDC Record p. 98

¹¹ HDC Record p. 188.

¹² HDC Record p. 167-168, 187-189.

¹³ HDC Record p. 239-297.

¹⁴ HDC Record p. 241.

¹⁵ HDC Record p. 323.

¹⁶ HDC Record p. 295-297, 323.

¹⁷ HDC Record p. 332-353.

¹⁸ HDC Record p. 354-356.

¹⁹ HDC Record p. 354-356.

²⁰ HDC Record p. 358.

²¹ HDC Record p. 359-370.

²² *Cherry v. Wiesner*, 245 N.C. App. 339, 347, 781 S.E.2d 871, 877 (2016) (“[T]o be considered an ‘aggrieved person’ and thus have standing to seek review, a party must claim special damages, distinct from the rest of the community.”).

²³ *Heery v. Zoning Bd. of Adjust.*, 61 N.C.App. 612, 613, 300 S.E.2d 869, 870 (1983) (“The appealing party must have some interest in the property affected.”).

²⁴ *Sarda v. City/County of Durham Bd. of Adjust.*, 156 N.C.App. 213, 215, 575 S.E.2d 829, 831 (2003) (citing *Lloyd v. Town of Chapel Hill*, 127 N.C.App. 347, 351, 489 S.E.2d 898, 900 (1997) (emphasis added)).

²⁵ *Jackson v. Guilford County Bd. of Adjust.*, 275 N.C. 155, 162, 166 S.E.2d 78, 83 (1969) (“If, however, the proposed use is unlawful, as where it is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain such proceeding.”) (internal citations omitted) (emphasis added).

²⁶ *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008)

²⁷ North Carolina General Statutes Section 160A-400.9(e) and Section 160D-947 (HDC appeals to the ZBA are in the nature of certiorari – based on the record compiled by the HDC.).

²⁸ *Tucker v. The Mecklenburg County Zoning Board of Adjustment*, 148 N.C.App. 52, 55, 557 S.E.2d 631, 634 (2001).

²⁹ Blacks Law Dictionary 500 (9th Ed. 2009).

³⁰ *Tucker v. The Mecklenburg County Zoning Board of Adjustment*, 148 N.C.App. 52, 55, 557 S.E.2d 631, 634 (2001).

³¹ *CG & T v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992).

³² *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218 (1997); *Humble Oil and Refining Co. v. Town of Chapel Hill*, 284 N.C. 458, 470-471, 202 S.E.2d 129, 137 (1974).

³³ *Cherry v. Wiesner*, 245 N.C. App. 339, 347, 781 S.E.2d 871, 877 (2016) (“[T]o be considered an ‘aggrieved person’ and thus have standing to seek review, a party must claim special damages, distinct from the rest of the community.”).

³⁴ HDC Record p. 4-5.

³⁵ The time noted is when counsel for the HDC submitted this memorandum of law to the ZBA staff for distribution to the ZBA.

³⁶ HDC Record p. 354-356.

³⁷ HDC Record p. 1.

³⁸ HDC Record p. 2.

³⁹ HDC Record p. 21-58.

⁴⁰ HDC Record p. 21-58, 75-76.

⁴¹ *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218 (1997); *Humble Oil and Refining Co. v. Town of Chapel Hill*, 284 N.C. 458, 470-471, 202 S.E.2d 129, 137 (1974).

⁴² HDC Record p. 354-356.

⁴³ HDC Record p. 354.

⁴⁴ HDC Record p. 360.

⁴⁵ HDC Record p. 209, 360.

⁴⁶ *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218 (1997); *Humble Oil and Refining Co. v. Town of Chapel Hill*, 284 N.C. 458, 470-471, 202 S.E.2d 129, 137 (1974).

⁴⁷ HDC Record p. 354-356.

⁴⁸ HDC Record p. 354-356.

⁴⁹ HDC Record p. 354-356.

⁵⁰ HDC Record p. 278-279.

⁵¹ *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218 (1997); *Humble Oil and Refining Co. v. Town of Chapel Hill*, 284 N.C. 458, 470-471, 202 S.E.2d 129, 137 (1974).

⁵² HDC Record p. 354-356.

⁵³ HDC Record p. 213-214.

⁵⁴ HDC Record p. 248-249.

⁵⁵ *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218 (1997); *Humble Oil and Refining Co. v. Town of Chapel Hill*, 284 N.C. 458, 470-471, 202 S.E.2d 129, 137 (1974).