

BEFORE THE ZONING HEARING BOARD OF LOWER MERION TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA

APPEAL NOS. 4516, 4517 & 4518

IN THE MATTER OF:	:	Applicant: Lower Merion School District
The Wynnewood Civic Association	:	
(Appellants)	:	
	:	300 E. Montgomery Avenue
	:	Ardmore, PA 19003
	:	(“Arnold Field”)
	:	

FINDINGS OF FACT, CONCLUSIONS OF LAW, MEMORANDUM AND ORDER

INTRODUCTION

The Wynnewood Civic Association (“WCA”) filed three appeals, (Nos.4516, 4517 and 4518) to determinations issued by the Township’s Zoning Officer, Mr. Michael Wylie (the “Appeals” or each, an “Appeal”) related to the Tentative Sketch Land Development Application submitted by Lower Merion School District (“LMSD”) for the construction of improvements on the parcel located at 300 E. Montgomery Avenue, Ardmore, PA, 19003, commonly known as “Arnold Field.” (“Arnold Field”)

There were six days of testimony and the WCA and LMSD provided written submissions and presented oral argument supporting their positions to the Lower Merion Township Zoning Hearing Board (“ZHB” or “Board”). Based on its factual determinations and interpretations of the Lower Merion Township Zoning Code (the “Code” or “Zoning Code”), the ZHB **GRANTS** each of the WCA’s three appeals for the reasons set forth herein.

FINDINGS OF FACT

1. On April 24, 2020, LMSD filed a Tentative Sketch Land Development Application Tentative Sketch Plan to install light improvements at Arnold Field. [Exhibit A-1] (“Application”)
2. The Application was submitted by LMSD for the construction of improvements, primarily lighting, on the parcel located at 300 E. Montgomery Avenue, Arnold Field. (Sometimes hereafter also referred to as the “Property”) [Exhibit A-1]
3. Arnold Field contains recreational and competitive sports facilities and is used for recreational and competitive sports by the LMSD. This is the principal use of Arnold Field. [N.T. 5/20/21 at 69; N.T. 6/14/21 at 53-54, 5761, 183, 200-201, 222, 281, 282-285; N.T. 6/15/21 at 207-210]
4. The Lower Merion High School’s (“LMHS”) *academic* buildings (and other facilities) are located on a separate parcel on the north side of Montgomery Avenue across the street from Arnold Field. [Exhibit A-87]
5. In 2006, the LMSD obtained a waiver of land development approval for the installation of artificial turf on one of the playing fields at Arnold Field to be used for football and other sports (“Turf Field”). A condition of that approval required separate land development approval for any future lighting proposed at Arnold Field. [Exhibit A-87; N.T. 3/31/2021 at 29; N.T. 6/15/21 at 163]
6. As depicted in the Application, the LMSD proposes to install four separate 80-foot high Light Towers at Arnold Field to light the Turf Field (“Light Towers”) as well as twelve (12) 15-foot-high lighting poles along an existing pedestrian walkway between Montgomery Avenue and the Turf Field (“Walkway Lighting”). [Exhibit A-87, Exhibit SD-4]

7. Installation of the Light Towers will allow the LMSD to implement later start times and accommodate the evening usage of the Turf Field for activities such as football, field hockey, soccer, and lacrosse that will result from later start times. [Exhibit A-87, pg. 7]

8. On June 15, 2020, WCA requested determinations from the Zoning Officer that 1) the existing field house is a principal building as defined in the Zoning Code and 2) that each of the Light Towers is an “accessory structure” governed by the “accessory structure” height limitation of the Code. [Exhibit A-1]

9. On June 30, 2020, the Zoning Officer issued a determination that the field house is the “principal building” on the Property *but* that the Light Towers were not “accessory structures” regulated by the “accessory structure” provisions of the Zoning Code, but rather, the Light Towers were regulated by Zoning Code § 155-3.11, the “ambience standards.” [Exhibit A-3]

10. On July 23, 2020, WCA filed a timely Notice of Appeal from the Zoning Officer’s June 30, 2020 determination. (Appeal No. 4516) [Exhibit A-4]

11. On July 30, 2020, WCA requested a determination from the Zoning Officer that the uses of Arnold Field upon installation of the Light Towers and field lighting would constitute an “expanded use” as defined in the Zoning Code and that use would be contrary to the regulations set forth in Table 5.3, “Use Regulations” for cultural and recreational institutional accessory use. [Exhibit A-5]

12. On August 11, 2020, the Zoning Officer issued a determination that increased usage of the facilities located at Arnold Field attendant to LMSD’s proposed installation of the Light Towers did not constitute an “expanded use” as defined in the Zoning Code and would not violate the relevant use regulations. [Exhibit A-7]

14. On August 25, 2020, WCA filed a timely Notice of Appeal from the Zoning Officer's August 11, 2020 determination. (Appeal No. 4517) [Exhibit A-8]

15. On August 11, 2020, LMSD requested a preliminary opinion from the Zoning Officer that the pending Tentative Sketch Plan complied with all of the applicable provisions of the Zoning Code. This request for a preliminary opinion was amended on August 20, 2020 and October 9, 2020. [Exhibit A-9; Exhibit A-10; Exhibit A-13]

16. On November 6, 2020, the Zoning Officer issued a preliminary opinion that the proposed improvements shown on the pending Tentative Sketch Plan was compliant with the Zoning Code and could be constructed, provided the improvements were also in compliance with the other provisions of the applicable Township codes and LMSD obtains all required permits. [Exhibit A-15]

17. On December 8, 2020, WCA filed a timely Notice of Appeal from the Zoning Officer's November 6, 2020 preliminary opinion. (Appeal No. 4518) [Exhibit A16]

18. Arnold Field is improved with multiple playing fields, including the Turf Field with bleacher seating on either side, an athletic track, tennis courts, and a field house located directly beneath the bleachers on the south side of the Turf Field. [Exhibit A-87; Exhibit A-22]

19. The bleachers on both the north side and south side of the Turf Field were constructed by the LMSD in the fall of 1950, pursuant to a building permit issued on September 27, 1950. Final inspection of the bleachers was conducted by the Township on or about November 2, 1950. [N.T. 7/14/21 at 161-164].

20. The Field House, which contains locker rooms, bathrooms and storage areas ("Field House") was constructed by the School District pursuant to a building permit issued by the

Township on May 27, 1968, approximately 18 years after the bleachers were constructed. [N.T. 7/14/21 at 161]

26. The Field House, as the only building on the lot, and hence the main building, is the “principal building” on the Arnold Field as defined by the Zoning Code. [Code § 155-2.1; N.T. 6/14/21 at 38, 288]

27. The proposed Light Towers are primarily designed to provide light to the Turf Field and the immediate air space above the Turf Field to allow for use of the Turf Field for athletic practices and games when the ambient natural lighting is insufficient to facilitate safe play on the Turf Field. As depicted in the Application, two of the Light Towers are located to either side of the bleachers on the north side of the Turf Field and two of the Light Towers are located to either side of the bleachers on the south side of the Turf Field. [N.T. 6/23/21 at 110; 271]

28. Each of the four Light Towers is contained on an 80-foot light pole. [N.T. 6/23/21 at 111-112; 267]

29. Each of the two proposed Light Towers on the north side of the Turf Field consist of one (1) 1200-watt LED luminaire and eight (8) 1500-watt LED fixtures at the top of the pole that illuminate the Turf Field. Each of these two proposed Light Towers also contains one (1) 400-watt LED fixture at a mounting height of 70 feet that is used to illuminate the north side bleachers. Each of these two proposed Light Towers also contains two (2) 575-watt luminaires aimed upwards that are mounted at 16 feet in height that are utilized as ball tracker lighting to illuminate the air space immediately above the Turf Field for ball sports such as football, soccer and lacrosse. [N.T. 6/23/21 at 267]

30. Each of the Light Towers is a “structure” as defined in the Zoning Code. [Code § 155-2.1; N.T. 6/14/21 at 36; N.T. 6/15/21 at 167-168]

31. There were twelve (12) proposed pedestrian sight lights utilized to light the pathway from Montgomery Avenue through Arnold Field and continuing down to the Turf Field. [N.T. 7/14/21 at 78] (“Pathway Lighting”)

32. The proposed Pathway Lighting has a height of 15 feet above grade. [N.T. 7/14/21 at 83]

CONCLUSIONS OF LAW

1. The Zoning Hearing Board has exclusive jurisdiction to hear and render final adjudications on appeals from the determination of the zoning officer and appeals from a preliminary opinion of the zoning officer. 53 Pa. C.S. § 10909.1. As such, the ZHB has jurisdiction to hear and render final adjudications on WCA’s appeals.

2. Whether a proposed use falls within a given category of permitted or prohibited uses in a zoning ordinance is a question of law. *Galzerno v. Zoning Hearing Board of Tullytown Borough*, 92 A.3d 891, 894 (Pa. Commw. 2014). *Sabatini v. Zoning Hearing Bd. of Fayette Cty.*, 230 A.3d 514, 519 (Pa. Commw. 2020).

3. Arnold Field is located within the IE2 District under the Zoning Code. [Exhibit A-87; N.T. 3/31/21 at 29, 136]

4. The Zoning Code defines institutional primary use as: “A use that inhabits the structures and facilities of the property; customarily consumes the greater part of the institution's resources of time and funds in its management; and conforms to institutional district regulations. This includes related services that support the primary use, such as residential facilities for faculty, students, and staff; exhibition, worship, performance, recreational and competitive sports facilities;

food preparation and dining facilities; continuing care and assisted living for the elderly; day -care; and parking.” [Code § 155-2.1]

5. The principal use of Arnold Field is as recreational and competitive sports facilities for LMHS, which are permitted by right in the IE2 District as an Institutional Primary Use.

6. The Zoning Code does not contain specific standards limiting the height of athletic field lighting. Rather, the Code regulates lighting of “open spaces” which may include athletic field lighting. [N.T. 6/14/21 at 73; N.T. 6/15/21 at 42; N.T. 6/15/21 at 181]

7. The Turf Field is an open space as defined in Code §155-2.1 (“an area of land unimproved by permanent building”) and therefore is subject to the applicable ambience standards in Zoning Code §155-3.11. [Code § 155-3.11.B; N.T. 3/31/21 at 105]

8. A township’s zoning officer is charged with the administration and execution of the ordinance’ the zoning officer’s interpretation of the ordinance and is entitled to some deference and should not be disregarded unless shown to be clearly erroneous. *McIntyre v. Board of Supervisors of Shohola Township*, 614 A.2d 335, 337 (Pa. Commw. 1992); *Kohl v. New Sewickley Twp. Zoning Hearing Bd.*, 108 A.3d 961, 968–69 (Pa. Commw. 2015).

9. The ZHB lacks the authority to modify or amend the terms of the Zoning Code. *Greth Development Group, Inc. v. Zoning Hearing Board of Lower Heidelberg Township*, 918 A.2d 181, 187 (Pa. Commw. 2007). *Sabatini v. Zoning Hearing Bd. of Fayette Cty.*, 230 A.3d 514, 521 (Pa. Commw. 2020).

10. Where undefined terms are utilized in the Zoning Code, the Board may consult definitions in statutes, regulations or other sources for guidance, although such definitions are not controlling. *H.E. Rohrer, Inc. v. Zoning Hearing Bd. of Jackson Twp.*, 808 A.2d 1014 (Pa.

Commw. 2002). *Adams Outdoor Advert., LP v. Zoning Hearing Bd. of Smithfield Twp.*, 909 A.2d 469, 483 (Pa. Commw. 2006).

11. The Zoning Code defines a “structure” as: “Any form or arrangement of building materials involving the necessity of providing proper support, bracing, tying and anchoring to the ground.” [Code §155-2.1]

12. The Zoning Code defines “building” as: “Any structure having a solid roof intended for shelter or enclosing of persons, animals, personal property, vehicles or equipment, excluding freestanding tents and awnings.” [Code § 155-2.1]

13. The Zoning Code defines “principal building” as: “A structure used to enclose or house the primary use(s) located on a lot; the main building on a lot, usually oriented toward the street.” [Code § 155-2.1]

14. The Field House is the “principal building” on Arnold Field under the Zoning Code. [Code § 155-2.1; N.T. 6/14/21 at 38, 288]

15. The Field House’s “primary use” as that term is used in Code § 155-2.1 (defining “principal building”) on Arnold Field is to facilitate and accommodate the usage of the Turf Field for activities such as football, field hockey, soccer, and lacrosse.

16. The proposed Light Towers are structures.¹

17. The Zoning Code defines “accessory structure” as: “A nonhabitable structure separate from and subordinate to the principal building on a lot and used for purposes incidental to those of the principal building.” [Code § 155-2.1]

¹ See, LMSD “Proposed Conclusion of Law” related to Appeal 4516: “9. Each of the Lighting Assemblies [i.e., Light Towers] constitutes a “structure” under the terms of the Zoning Code.”

18. The proposed Light Towers are “nonhabitable structures”, separate from the Field House, the principal building.

19. The proposed Light Towers “accessory structures” to the Field House because they are to be used for purposes incidental to those of the principal building accessory, the Field House, in that the Light Towers will facilitate increased usage of the Field House during those occasions when the ambient, natural lighting is insufficient for the safe play of football, field hockey, soccer and lacrosse at Arnold Field and the lighting from the Light Towers is utilized.

20. The proposed Light Towers are “accessory structures” and “subordinate” to the Field House, in that the Light Towers will not be used at all times when the Field House is being used, but rather, (presumptively) only during those occasions when the ambient, natural lighting is insufficient for the safe play of football, field hockey, soccer and lacrosse. The Field House, on the other hand, can be/will be used during those times when ambient, natural lighting is *sufficient* as it has been since its construction and additionally, when the Light Towers would provide supplemental lighting for these activities.

21. The fact that the proposed Light Towers would be used for purposes incidental to those of the Turf Field does not alter the fact that the Light Towers are subordinate to the principal building, the Field House; the Zoning Code *does not* require *exclusivity* with respect to uses and purposes incidental to those of the “principal building” in order to meet the definition of “accessory structure.”

22. The proposed Light Towers are regulated by the provisions of the Zoning Code governing “accessory structures”, including maximum height.

23. The proposed Light Towers depicted in the Application exceed the maximum height for accessory structures and therefore are not permitted *by right*.

24. The June 30, 2020 determination of the Zoning Officer was in error in that he *did not* conclude the Light Towers were “accessory structures” and subject to the height limitation in the Zoning Code which were exceeded by the proposed Light Towers.

25. The Application integrated the Walkway Lighting and Light Towers on its Sketch Plan such that the Walkway Lighting was not independent of the Light Towers; therefore, the determination of the issues related to the Light Towers practically affects the Walkway Lighting depicted on the Sketch Plan.

26. Since the Sketch Plan integrated all proposed lighting and the Light Towers are noncompliant with the Zoning Code, no *final* determinations respecting the Walkway Lighting is possible since it is reflected on a noncompliant Sketch Plan/Application and may therefore be modified.

27. The WCA’s Appeal No. 4516 is “Granted.”

28. The Zoning Code defines “Expanded use” in Code § 155-2.1.

29. The Zoning Code does not specifically distinguish between “expanded use” and “extended durations of existing uses.”

30. The Turf Field is an open space as defined in Code §155-2.1 (“an area of land unimproved by permanent building”) and therefore is subject to the applicable Ambience Standards in Zoning Code §155-3.11. (“Ambience Standards”) [Code § 155-3.11.B; N.T. 3/31/21 at 105]

31. The Ambience Standards set forth in Code §155-3.11 contain standards applicable to the lighting of Arnold Field and specifically the lighting of the Turf Field. [Code § 155-3.11; N.T. 6/14/21 at 70]

32. The proposed Walkway Lighting would be regulated by the Ambience Standards contained in §155-3.11 of the Zoning Code.

33. The Ambience Standards of the Zoning Code require compliance with Township Code Chapter 105, Noise and Exterior Lighting (the “Lighting Code”). [Code § 155-3.11 A]

34. Because the Zoning Officer’s initial determination that the Light Towers *were not* “accessory structures” was in error, all collateral determinations related to the Application, including those at issue in Appeal No. 4517 and Appeal No. 4518, were derivatively in error in that they were grounded on the erroneous presumption that the Light Towers as depicted were permitted, by right, at Arnold Field.

35. The ZHB concludes that Appeal No. 4517 and Appeal No. 4518 are Granted based on the Zoning Officer’s erroneous determination that the Light Towers were not “accessory structures” in Appeal No. 4516.

36. The ZHB will not substantively address any other issues raised in Appeal No. 4517 and Appeal No. 4518 and will not issue advisory opinions related to the specific issues raised in those appeals because the decision in Appeal No. 4516 renders many issues “moot” because the Sketch Plan/Application reflects the erroneous determination that the Light Towers *were not* “accessory structures.”

MEMORANDUM

The dispositive issue for all three appeals is whether the proposed, four 80-foot Light Towers at Arnold Field are “accessory structures” as defined in the Zoning Code. Both parties suggested that this issue was one of “first impression” and called upon the ZHB to interpret the “recently enacted” Zoning Code.

As discussed below, both parties proffered their respective expert and legal opinions of the Zoning Code and advocated interpretations, but, ultimately, the Board must interpret the Zoning Code, apply them to its *factual findings* and reach its own legal conclusions. The opinions of experts and parties' arguments, while helpful, must ultimately give way to this Board's expertise in interpreting the Zoning Code.²

For the reasons explained below, the Board concludes that the Light Towers are "accessory structures" as defined by the Zoning Code and therefore prohibited by the Zoning Code at Arnold Field at the heights proposed by the LMSD. The Board has further concluded that this "threshold determination" is substantively dispositive of all remaining issues in the three WCA appeals, rendering substantially all other issues presented in the appeals "moot."³ The Board declines to offer what would amount to advisory opinions on other matters or provide interpretations of other provisions of the Zoning Code affecting the noncompliant Sketch Plan.

² As a preliminary matter, we note the now well-settled principle that a zoning hearing board's interpretation of its own zoning ordinance is entitled to great weight and deference. *Smith v. Zoning Hearing Bd.*, 734 A.2d 55, 57 (Pa. Commw. 1999), *pet. for allowance of appeal denied*, 747 A.2d 904 (1999). Such deference is appropriate because a zoning hearing board, as the entity charged with administering a zoning ordinance, possesses knowledge and expertise in interpreting that ordinance. *Id.* at 58. While it is undeniable that we are to interpret ambiguous language in an ordinance in favor of the property owner and against any implied extension of the restriction, such a restrictive reading of an ordinance is unwarranted where "the words of the zoning ordinance are clear and free from any ambiguity." *Isaacs v. Wilkes-Barre City Zoning Hearing Bd.*, 612 A.2d 559, 561 (Pa. Commw. 1992)(citing Section 603.1 of the Municipalities Planning Code (MPC)). "When interpreting zoning ordinances, this Court relies on the common usage of words and phrases and construes language in a sensible manner. *Steeley v. Richland Twp.*, 875 A.2d 409, 414 (Pa. Commw. 2005).

³ The Board does address the "Walkway Lighting", *infra*, but notes preliminarily that the Application integrated the Walkway Lighting and Light Towers in its Plan such that the Walkway Lighting was not independent of the Light Towers, so that the disposition of the issues related to the Light Towers the Sketch Plan practically and legally affected the proposed Walkway Lighting.

Procedural posture:⁴

The issues were framed in the three timely appeals from decisions by the Zoning Officer.

Appeal Nos. 4516

The WCA appealed the Zoning Officer's June 30, 2020 determination that four 80-foot-high Light Towers reflected on LMSD's tentative sketch plan land development application (LD#3852) for proposed improvements to Arnold Field *were not* "accessory structures" as defined in Zoning Code §155-2.1 and that the proposed Light Towers must be compatible with the lighting on abutting streets per Zoning Code §155-3.11B. The WCA's appeal contended that (1) the proposed light poles/towers were "accessory structures" to the existing field house and exceed the allowable height limit per §155-3.4F(a)&(b). The WCA also asserted that the proposed 12 Walkway Lights depicted on LMSD's tentative sketch plan exceeded the allowable height limit per §155-3.11C and that the proposed Walkway Lighting would not be compatible with surrounding street lighting per Zoning Code §155-3.11B.

WCA further asserted that the LMSD would need to obtain variances from the requirements of the Zoning Code to permit the proposed lighting reflected in the Application.⁵

⁴ The hearings on Appeal No. 4516, Appeal No. 4517 and Appeal No. 4518 began during the COVID-19 Emergency Declaration and all hearings were conducted in accordance with Pennsylvania Act 15 of 2020, 35 P.S. §5741(a). Although the Emergency Declaration related to COVID-19 officially ended before the completion of all hearings, the ZHB, with the concurrence of the parties to the Appeals, concluded that for continuity, and to allow all interested citizens to continue to "virtually attend" the hearings and in recognition of continuing public health concerns, that the public portion of all hearings would be conducted via the video communication technology provider ZOOM.

⁵ The ZHB will not comment on or discuss any issues related to whether or not the LMSD would succeed on any variance requests.

Appeal No. 4517

The WCA appealed the Zoning Officer's determination that the four 80-foot Light Towers and 12 walkway lights *did not* constitute an "expanded use" as defined in the Zoning Code §155-2.1 and therefore, the LMSD was not required to obtain a use variance. The Zoning Officer's conclusions were grounded in his threshold determination the Light Towers *were not* accessory structures and he therefore opined that public school use is permitted, by right in IE2, districts; that the fields at Arnold Field are part of the "public school use"; and, the field use is the principal use on Arnold Field. The Zoning Officer further concluded that Table 5.3 does not list any additional regulations for public schools and the cultural and recreational institutional accessory use noted in Table 5.3.

The WCA contended that (1) the increase in usage of the facilities due to the installation of the proposed 4 Light Towers and 12 Walkway Lights constituted an expanded use of a use specifically regulated in IE2 zoned districts thereby requiring a use variance, or alternatively, a dimensional variance; (2) public school use is an institutional use and the use of the fields is an institutional accessory use that must comply with the underlying institutional regulations; (3) the proposed use of the fields exceeded the hour limitations imposed for cultural and recreational institutional accessory uses; and, (4) the expanded use requires a use variance.

Appeal No. 4518

The WCA appealed the Zoning Officer's November 6, 2020, Preliminary Opinion that the referenced Tentative Sketch Plan was compliant with the applicable provisions of the Zoning Code, and that the proposed improvements, including four 80-foot-high Light Towers were compliant with the Zoning Code and could be constructed *provided* the Light Towers complied with all other Township Code requirements and the LMSD obtained all required permits. Similar

to the issues addressed in his decision at issue in Appeal No. 4516, the Zoning Officer's determination in Appeal No. 4518 was predicated on his determination that the Light Towers *were not* "accessory structures."

The WCA contended that the Tentative Sketch Plan was noncompliant because: (1) LMSD requested a waiver of §135-28 rendering the plan noncompliant per §155-4 requiring compliance with Chapter 135; (2) the existing nonconforming 50 ft. rear setback and 20 ft. buffer requirements per Table 4.4.3B cannot continue where the use to which they relate is materially changed and increased, and the Zoning Code prohibits expansion of nonconformities per 155-10.12(F)(1)(a) where additional improvements within the 50 ft. setback or 20 ft. buffer would constitute an improper expansion of the existing nonconforming improvements. WCA further contended that the proposed lighting is not compatible with the existing street lighting abutting Arnold Field as required by §155-3.11, citing that the proposed lights, when in use, will cause intrusive light invasion and glare, altering the character of the neighborhood. WCA requested that the ZHB reverse the Preliminary Opinion and issue a Preliminary Opinion that the plan proposed by LMSD for Arnold Field is not compliant with the applicable provisions of the Zoning Code.

Principal Building; "Structures"

The determination of whether the Light Towers are "accessory structures", and therefore subject to the height limitations of the Zoning Code, requires "preliminary determinations." The first is to properly "identify" the Field House and Light Towers in light of the Zoning Code.⁶

⁶ As indicated in the Board's findings of fact and conclusions of law, the Zoning Code defines "building" as: "Any structure having a solid roof intended for shelter or enclosing of persons, animals, personal property, vehicles or equipment, excluding freestanding tents and awnings." [Code § 155-2.1] The Code defines "principal building" as: "A structure used to enclose or house the primary use(s) located on a lot; the main building on a lot, usually oriented toward the street." [Code § 155-2.1] The Zoning Code defines a "structure" as: "Any form or arrangement

The parties agree that the “principal building” at Arnold Field is the Field House. Indeed, as stated by the LMSD: “There is only one building on Arnold Field, the field house, which therefore is the principal building for purposes of an accessory structure analysis.” (LMSD Brief, p. 24) The WCA agreed that the Field House constituted the “principal building” on Arnold Field as defined by Zoning Code. (WCA Brief, *passim*) The Board concludes that consistent with the concurrence of the parties, the principal building on Arnold Field *is* the Field House.

There is also agreement between the parties that each of the proposed four Light Towers are “nonhabitable structures” under the Zoning Code; the ZHB agrees with the parties that the Light Towers meets the Zoning Code definition of “structure”⁷ and that they are “nonhabitable.”⁸

With these terms being defined and the Field House and Light Towers being identified as the “principal building” and “structures”, the ZHB turned to the question of the use(s) of the Field House because of the relational requirements between a “principal building” and “accessory structure”, i.e., that the “accessory structure” “be used for purposes incidental to those of the principal building.”

Uses of Arnold Field, the Field House, Light Towers

Arnold Field is an athletic facility and the Field House has supported this use for decades.⁹ The record confirmed that the Field House was constructed under the south side bleachers in 1968. The LMSD has stated in its brief that “The primary purpose of the field house is to provide locker

of building materials involving the necessity of providing proper support, bracing, tying and anchoring to the ground.” [Code §155-2.1]

⁷ Structure is defined as: “[a]ny form or arrangement of building materials involving the necessity of providing proper support, bracing, tying and anchoring to a fixed location on or below the surface of the ground.” §155-2.1.

⁸ N.T. 3/31/2195:3-5 (Q. Okay. So, the light – the 80-foot light pole/tower is not habitable; correct?” A. Correct.”)

⁹ The LMSD stated that “The principal use of Arnold Field is that of recreational and competitive sports facilities for the Lower Merion High School and the School District.” (LMSD Brief, p. 26)

rooms, bathrooms and storage areas for the Arnold Field complex”, i.e., to facilitate the use of Arnold Field. The Field House has no discernable use, other than to facilitate the use of Arnold Field.

The proposed Light Towers have a discrete, singular purpose; to increase the level of lighting necessary for athletic events on Arnold Field (primarily the Turf Field) to be conducted safely when the ambient, natural lighting would be insufficient. The Light Towers have no purpose other than to facilitate occasional extended hours of use of Arnold Field, the principal structure.

Definitions of “subordinate”, “incidental” and “accessory”

As it specifically relates to “accessory structures”, three questions that must be answered: Are the Light Towers “subordinate” *and* “accessory” and is the purpose of the Light Towers “*incidental* to those of the principal building.” The Zoning Code does not define any of these terms; therefore, the ZHB will provide contextual definitions and apply them to the facts, while taking guidance from the decisions of the courts.

The most recent decision was *Marshall v. E. Bradford Twp. Bd. of Supervisors*, 250 A.3d 481 (Pa. Commw. 2021) In *Marshall*, landowners appealed the trial court’s affirmance of the decision of the Board of Supervisors’ which denied the Landowners’ conditional use application for the use of a barn as the “common area” for a proposed bed-and-breakfast facility. The Supervisors and trial court had concluded that the zoning district permitted only one principal structure, a dwelling. Trial court found that the barn was an “accessory structure” that could be used only for purposes incidental to the “residential use” of the residence and not for the B&B. Although the facts in *Marshall* are not specifically applicable, we find that the Commonwealth Court’s methodologies used in its analysis of the term “accessory structure” helpful.

The Zoning Code in *Marshall* defined “accessory structure” as “[a] building *subordinate* to the principal building on a lot and used for purposes *customarily incidental* to those of the principal building.”¹⁰ The term “customarily incidental” is materially different to simply “incidental” in that in the Zoning Code. The Zoning Code’s use of the term “incidental” specifically references the use of principal building. Since there is no limiting modification to the word “incidental” in the Zoning Code, it is relationally broader than *Marshall’s* “customarily incidental.”

When the Board investigated synonyms for “incidental”, words and phrases such as related to, supplementary or accompanying were identified.¹¹ The ZHB adopts those words as the synonyms for the undefined “incidental.”¹²

In order to be an “accessory structure” under the Zoning Code, the structure must be related to the use of the “principal building.” The LMSD has stated that “The principal use of Arnold Field is that of recreational and competitive sports facilities for the Lower Merion High School and the School District.”⁴” (LMSD Brief, p. 26) The Board agrees and further concludes that the use of the Field House is the same, *viz.*, to facilitate recreational and competitive sports for the Lower Merion High School and the School District.

¹⁰ Section 115-6.A of the Zoning Ordinance; *Marshall* at 490. There is substantial similarity to the definition in the Zoning Code of “accessory structure, although certainly the “legislative intent” of the municipality in *Marshall* is not wholly transferrable to Lower Merion.)

¹¹ *See, e.g.*, Roget’s Thesaurus.

¹² We are constrained in our interpretation by the MPC, 53 P.S. § 10603.1 “Interpretation of ordinance provisions.” In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.”

The Light Towers' purposes are plainly related to the Field House use; the Light Tower will facilitate recreational and competitive sports for the Lower Merion High School and the School District and the concomitant use of the Field House and Arnold Field for longer durations than are presently possible. This use is precisely what the Zoning Code describes in the phrase "and used for purposes incidental to those of the principal building."

Using the contextual definition of "incidental", as applicable to the Light Towers, and "substituting" the terms, the Zoning Code means the Light Towers are "use for purposes [related to, supplementary or accompanying] the [use] of the principal building." The Board has concluded that the Light Towers are related to the use of the Field House and the Field House's use during the extended hours. Indeed, the Light Towers have no other discernable uses but to facilitate the "extended" and "related" use of both the Field House and Arnold Field.

Simply because the Light Towers facilitate the use of other physical areas of Arnold Field does not extinguish their roles as "accessory structures" to the Field House. The language of the Zoning Code *does not* require exclusivity as it relates to "incidental", but broadly defines "incidental" to mean related to, supplementary or accompanying the principal building. Therefore, the Board concludes that the Light Towers are "incidental" and inseparably related to the use of the principal building, the Field House.

Subordinate: The next question is whether the Light Towers are "subordinate to the principal building." "Subordinate" is undefined in the Zoning Code. The Board will follow the methodology of the Commonwealth Court in *Marshall* at 490 and *Riskier v. Smith Twp. Zoning Hearing Bd.*, 886 A.2d 727, 732 (2005 Pa. Commw.) in defining subordinate: "Pursuant to its dictionary definition, *subordinate* means, 'placed in or occupying a lower class, rank, or position.'"

Our analysis of “subordinate” necessarily requires our determination of the “hierarchical” relationship between the Light Towers and the Field House. Plainly, they perform different functions; the Light Towers are intended to illuminate areas of Arnold Field to allow for recreational uses, while the Field House facilitates the same use. But where the Light Towers are “subordinate” are *the times* when they will be functioning. The Light Towers will function *only* when the ambient natural lighting is insufficient to permit safe play, whereas the Field House will function *both*, when the ambient natural lighting is sufficient, and also when the lighting is augmented by the use of the Light Towers.

The Board again looked to the Thesaurus for guidance; subordinate and “lesser” are equivalents and plainly the Light Towers will function for a lesser time than Field House.¹³ Therefore, at a minimum “durationally”, from a use perspective, while both the Light Towers and Field House facilitate recreational play, the Light Towers are plainly subordinate in duration to the use of the Field House.

We therefore conclude that the Light Towers are “accessory structures” under the Zoning Code and are, therefore, height restricted by §155-3.4(F)(2) of the Zoning Code. The Light Towers may not be taller than the Field House as they must be subordinate in height to the “principal building” to which they relate and, as proposed, the Light Towers exceed the permitted heights. Therefore, the WCA’s appeal of the decision of the Zoning Officer at No.

¹³ The LMSD did not suggest that the Light Towers would alter the use of the Field House during times when the ambient, natural lighting will be adequate.

4516 is Granted.¹⁴ The ZHB concludes, that absent a variance, the 80 foot tall Light Towers may not be constructed on Arnold Field.¹⁵

The LMSD's arguments.

The Board acknowledges the many arguments of the LMSD and desires to specifically address several of them. For example, the LMSD has argued:

Assuming *arguendo* that the Lighting Assemblies were found to be subordinate to the field house, the analysis would shift to whether they are used for purposes incidental to the field house. Here, the Lighting Assemblies and field house are used for separate and distinct purposes in the context of the Arnold Field campus. Neither is dependent upon the existence of the other. The primary purpose of the field house is to provide locker rooms, bathrooms and storage areas for the Arnold Field complex. The essential purpose of the Lighting Assemblies is to light the Turf Field and the immediate air space above the Turf Field with the minimum amount of light necessary to play sports activities on the Turf Field in the evening. (LMSD Brief, p. 24)

The LMSD has also argued:

In order to meet the definition of “accessory structure” under the Code, which is crystal clear, they must be both “accessory structure” under the Code, which is crystal clear, they must be both “separate from and subordinate to the principal building on a lot” and “used for purposes incidental to those of the principal building.” An essential element of the accessory

¹⁴ The Board notes that during examination by the WCA, the Zoning Officer altered his initial determination that the Light Towers were not accessory structures related to them being “subordinate.” N.T. 3/31/21, 95:9-16. While the Zoning Officer’s testimony was instructive, it was not conclusive or binding on the ZHB and the Board reached its own conclusions based on the facts and experience with the Zoning Code.

¹⁵ The ZHB offers no opinion related to the LMSD’s entitlement to a variance.

structure analysis is determining the principal building on the lot. There is only one building on Arnold Field, the field house, which therefore is the principal building for purposes of an accessory structure analysis. Each of the Lighting Assemblies is separate from the field house as they are not physically attached in any manner. The Lighting Assemblies, however, are not subordinate to the field house, especially in terms of their importance to the use of the Turf Field by the School District and LMHS in the evening. The fact that the Lighting Assemblies are not subordinate to the field house is sufficient to overcome a classification as an “accessory structure” under the Code. (Brief, pp. 23-24)

The Board disagrees with the LMSD’s analysis and suggested conclusions. The Board again points to the Zoning Code’s definition of an accessory structure: “A nonhabitable structure separate from and subordinate to the principal building on a lot *and used for purposes incidental to those of the principal building.*” (Emphasis furnished) The LMSD claims that the Light Towers “are not subordinate¹ to the field house, especially in terms of their importance to the use of the Turf Field by the School District and LMHS in the evening.” But therein lies the LMSD’s error, the LMSD’s argument does not address the Zoning Code’s stated relational test between the use of accessory structure *to the use of the principal building.*

The School District has stated that the “essential purpose of the Lighting Assemblies [Light Towers] is to light the Turf Field.” (Brief, p. 23) In actuality, the essential purpose of the Light Towers is to facilitate extended durations of the use of “Arnold Field” *through* lighting the Turf Field so that the fields can be uses at times which are currently unavailable. The LMSD conflates “use” with *the means* of accomplishing the “use.”

The essential purpose of the Field House is to facilitate the use of “Arnold Field” through providing essential services *whenever* the Turf Field at Arnold Field is in use. The Light Towers’

purpose is similar; they would facilitate extended durations when the Field House would be in use from those hours when it is currently used.

The relationship between the “principal building” and the Light Towers meets the definition of “accessory structure.” They have common purposes, but the Light Towers have a subordinate relationship since the use of the Light Towers is less than the Field House. This conclusion by the Board necessarily means that the Application and related Sketch Plan are based on the presumed use of unauthorized Light Towers. This affects all other issues in the appeals.

Appeal No. 4516, Walkway Lighting:

As reflected on the Sketch Plan, the LMSD proposes twelve 15-foot-high lighting poles along an existing pedestrian walkway between Montgomery Avenue and the Turf Field (collectively, the “Walkway Lighting”). [Exhibit A-87, Exhibit SD-4] The Zoning Code § 155-3.11 establishes a conditional height limit of 12 feet for walkway lighting sources, but it has been argued by the LMSD that this section of the Zoning Code does not establish any height limit for athletic field lighting or lighting of open spaces. [N.T. 3/31/21 at 68-69] The parties have proffered expert opinions and other evidence related to the regulation of the Walkway Lighting and how the Walkway Lighting will affect the surrounding community.

For their parts, the WCA and LMSD agree that the proposed Walkway Lighting is regulated by the “Ambience Standards” contained in §155-3.11 of the Code (the “Ambience Standards”). Their agreement is consistent with Mr. Wylie’s determination that lighting in IE districts, such as the Walkway Lighting proposed by the Application, is governed by §155-3.11, Ambience Standards, of the Zoning Code as §155-4.4(K)(1) specifically provides that §155-3.11 applies to lighting applications in IE districts. (WCA Ex. 3, Mr. Wylie’s First Determination

(discussing the applicability of §155-4.4(K)(1) and §155-3.11, providing that “IE District lighting is regulated by §155-4.4K(1) *Ambience Standards* according to §155-3.11.)

The ZHB concludes that the ambient standards under the Zoning Code 155-3.11 apply to the Walkway Lighting reflected on the LMSD’s Tentative Sketch Application.¹⁶ However, since the Sketch Plan is an “integrated plan”, reflecting *both* the Walkway Lighting and the Light Towers, and because the Light Towers are not permitted, the Board cannot, at this time, and from this record, factually determine if the Walkway Lighting will be altered in height, location, number or intensity should the LMSD proceed with a different plan.

Therefore, the Board declines to issue any further conclusions respecting the proposed Walkway Lighting, but rather, limits its conclusion to that the Walkway Lighting, as proposed, would be subject to the Ambience Standards.¹⁷ But, because the Walkway Lighting, as proposed, was reflected on plans declared to be invalid, the Board will not offer any further findings or conclusions respecting this particular Walkway Lighting.

Appeal No. 4517

The WCA also appealed the Zoning Officer’s determination that the four 80-foot Light Towers and Walkway Lighting did not constitute an “expanded use” as defined in the Zoning Code per §155-2.1. Because we have concluded in Appeal No. 4516 that the four 80-foot Light Towers

¹⁶ For their parts, the WCA and LMSD generally agrees that §155-3.11 *Ambience Standards* regulates height of lighting for walkways, driveways and surface parking areas. Athletic field lighting [...] would be considered as lighting for open spaces and as such must be compatible with the streetlighting of abutting streets and be designed, installed and operated to prevent glare and excessive brightness from view on abutting and nearby properties[.]” The WCA correctly observed that the LMSD did not appeal Mr. Wylie’s determination to that effect and specifically referenced and applied §155-3.11 to its Application in its opposition to the First Request. *See* WCA Ex. 2 (“Lighting in IE Districts is regulated by Code §155-4.4.K(1) which states that “lighting regulations shall be according to § 155-3.11.”

¹⁷ The ambience standards of the Code require compliance with Township Code Chapter 105, Noise and Exterior Lighting (the “Lighting Code”). [Code § 155-3.11 A]

are noncompliant with the Zoning Code, and the LMSD’s Tentative Sketch application is reflected as noncompliant, the ZHB declines to offer any advisory opinions on the issues raised in Appeal No. 4517, including that of “expanded use.” The appeal will be “granted”, but limited to the determination that because the Light Towers are not permitted, as proposed, and Walkway Lighting was related to the Light Towers, the issue is moot since there can be no determination as to what, if any, future LMSD submission would include.

Appeal No. 4518

The WCA appealed the Zoning Officer’s November 6, 2020 Preliminary Opinion that the referenced Tentative Sketch Plan was compliant with the applicable provisions of the Zoning Code. Because the Tentative Sketch Plan included the proposed four 80-foot-high Light Towers, which we have concluded in Appeal No. 4516 are noncompliant with the Zoning Code, the Tentative Sketch Plan is similarly noncompliant. Therefore, the WCA’s appeal is granted for the limited reasons set forth in the Board’s decision in Appeal No. 4516, which are incorporated herein by reference.

The ZHB declines to offer any advisory opinions on any other issues raised in Appeal No. 4518, including the LMSD’s requested waiver of §135-28, the buffer requirements per Table 4.4.3B and alleged nonconformities. The ZHB also declines to offer opinions of whether or not the proposed lighting is or is not compatible with the existing street lighting abutting Arnold Field, if such compatibility is required. The ZHB declines comment on the WCA’s arguments.

CONCLUSION

Based on the foregoing, the Zoning Hearing Board of Lower Merion Township issues the following Order for the reasons set forth above.

ORDER

AND NOW, this 14th day of September, 2021, it is hereby ORDERED:


That Wynnewood Civic Association Appeal No. 4516 is GRANTED.

That Wynnewood Civic Association Appeal No. 4517 is GRANTED.

That Wynnewood Civic Association Appeal No. 4518 is GRANTED.

Chairman Brier and Members Davidson and Alternate Member Vale, all voting "aye."

Alternate Member Ritterband participated in the hearings but not in the decision.

Attest: 

Michael Wylie
Secretary