

**PROVING HARDSHIP,  
AND OTHER STEPS ON THE WAY TO A VARIANCE**

**by**

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I. Variance Basics

- A. A variance is permission to violate the zoning ordinance, granted by the zoning hearing board.
- B. The definition of a variance in the Pennsylvania Municipalities Planning Code, 53 P.S. 10101 et seq. (“MPC”) is “relief granted pursuant to the provisions of Articles VI and IX [of the MPC]”. MPC, §107.
  - 1. Article VI of the MPC deals with zoning
  - 2. Article IX of the MPC deals with the zoning hearing board and other administrative proceedings.
  - 3. Section 910.2 of the MPC specifically addresses the Zoning Hearing Board’s functions with respect to variances.
- C. Under Section 910.2 of the MPC, the zoning hearing board may grant a variance “where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant,” when the following findings have been made:
  - 1. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.
  - 2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that

the authorization of a variance is therefore necessary to enable the reasonable use of the property.

3. That such unnecessary hardship has not been created by the appellant.
4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impaired the appropriate use or development of adjacent property, nor be detrimental to the public welfare.
5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

D. A municipality may include requirements for the grant of a variance in its zoning ordinance, which are to be considered in addition to the requirements of the MPC when the Zoning Hearing Board renders a decision on a variance application. *Wilson v. Plumstead Township Zoning Hearing Board*, 936 A.2d 1061 (Pa. Commw. Ct., 2007). Failure of a Zoning Hearing Board to consider each requirement of the zoning ordinance prior to granting a variance is an error of law. *Larsen v. Zoning Board of Adjustment of the City of Pittsburgh*, 672 A.2d 286 (Pa. 1996). See also *In Re: Appeal of Chestnut Hill Community Association*, 155 A.3d 658 (Pa. Commw. Ct., 2017).

## II. Selected Case Law Holdings on Unnecessary Hardship Requirement

A. The Recognition of a Different Standard for Dimensional Variances than for Use Variances – the Pennsylvania Supreme Court Decision in the *Hertzberg Case*.

1. *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 721 A.3d 43 (Pa. 1998).

A non-profit corporation sought variances from the area and parking requirements for a lodging house use. The Zoning Board of Adjustment granted the variances, and the approval was appealed by a neighbor who asserted that the necessity for the variances had not been demonstrated. The Court of Common Pleas affirmed; the Commonwealth Court reversed.

The Pennsylvania Supreme Court reversed the Commonwealth Court decision, finding that the Commonwealth Court improperly applied variance standards applicable to a use variance, when the applicant sought only a dimensional variance, and that the Commonwealth Court's standards were too strict even under use variance standards.

The Commonwealth Court reversed the grant of the variance on the basis that the applicant failed to prove that the property could not be used for a permitted use under the ordinance, without the need for a variance or special exception (the ordinance provided for 65 permitted uses in the district). The Commonwealth Court found that in the absence of a showing that the property could not be used in conformity with the zoning ordinance, there is no unnecessary hardship.

In evaluating whether the applicant had met the unnecessary hardship requirement, the Pennsylvania Supreme Court for the first time formally recognized the distinction between a use variance and a dimensional variance in that evaluation, stating:

“The issue here involves a dimensional variance and not a use variance-an important distinction ignored by the Commonwealth Court. When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations. Thus, the grant of a dimensional variance is of lesser moment in the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation.”

The decision in *Hertzberg* establishes the standards to be met for dimensional variances:

“To justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict

compliance with the zoning requirements and characteristics of the surrounding neighborhood.”

The Supreme Court noted that the Commonwealth Court had rendered its decision based upon a determination that the Zoning Board of Adjustment had not found that the property had no value or only distress value, which was contrary to the Pennsylvania Supreme Court’s rejection of the “practically valueless” standard as a requirement for a variance in earlier cases. Further, the Commonwealth Court, again contrary to existing law, had held that the owner was required to show that the property could not be used for any other permitted use.

B. Surrounding uses

1. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 501 Pa. 550 (Pa. 1983).

Commercial and industrial uses in the vicinity of the property, and its location on a major thoroughfare containing many commercial uses, supported a finding of hardship for a variance to convert a residentially zoned property containing a single family detached dwelling to a takeout steak and sandwich shop and two family dwelling.

2. *S. Broad Street Neighborhood Association v. Zoning Board of Adjustment*, 208 A.3d 539 (Pa. Commw. Ct., 2019).

Property owner had obtained a variance to permit a three unit multi-family use in a zoning district in which multi-family uses were not permitted. A subsequent owner applied for relief to allow five units at the property, to be achieved by creating four units from two of the units. Evidence was presented that the block surrounding the property consisted mainly of multifamily properties and commercial uses, and that the size of the units in the three unit multifamily use was not appropriate given the demographics and affordability in the area, and that smaller units would make more sense.

The Commonwealth Court found that the evidence did not establish the existence of unnecessary hardship. Although the Court noted that surrounding uses can be grounds for finding unnecessary hardship, there must also be a determination that the property is uniquely burdened by circumstances peculiar to the property. The Court found that this requirement had not been met.

Further, the evidence about the size and affordability of units related to mere economic hardship which does not meet the unnecessary hardship requirement.

C. Physical Conditions Asserted as Basis for Hardship.

1. *Society Hill Civic Association v. Philadelphia Zoning Board of Adjustment*, 42 A.3d 1178 (Pa. Commw. Ct., 2012).

Owners sought variances in connection with the proposed renovation and development of a historically designated building, including a variance from a requirement that a loading dock be provided for buildings larger than 50,000 square feet. The Board granted the variances, finding hardship due to the narrowness of the streets preventing trucks from accessing the loading area in the rear of the property. Objectors appealed the decision, which was affirmed by the Court of Common Pleas. The Commonwealth Court reversed, noting that the variance was not needed because of the narrow streets, but because the owners elected to construct a structure that exceeded 50,000 square feet.

2. *Marshall v. City of Philadelphia*, 97 A.3d 323 (Pa. 2014).

The Archdiocese of Philadelphia applied for variances to permit it to convert a school to an apartment complex for low income senior citizens, both nonconforming uses. In support of the variances, the Archdiocese presented evidence that the school had been closed, and details about the physical conditions of the property and the buildings. The Archdiocese asserted hardship based upon the prohibitive cost of conforming the property to a permitted use. The Zoning Board of Adjustment granted the variances, which were affirmed by the Court of Common Pleas. The Commonwealth Court reversed, holding that the owner was required to demonstrate that the entire building was functionally obsolete for any purpose other than a use not permitted under the zoning ordinance, and that the property could not be used for any permitted use. The Pennsylvania Supreme Court reversed the Commonwealth Court, finding that the standards applied by the Commonwealth Court did not conform to the law, and that the approval of the variances was within the discretion of the Zoning Board of Adjustment.

3. *Tidd v. Lower Saucon Township Zoning Hearing Board*, 118 A.3d 1 (Pa. Commw. Ct., 2015).

Owner sought setback variances to permit horse corrals to be located closer than 100 feet from property lines. There were a large number of mature

trees on the property, and a utility easement, all of which restricted the amount of usable land. The setback variances were requested so that trees would not have to be removed to recover usable land. Court upheld the grant of variances and noted that the Board did not abuse its discretion in finding that mature trees and the utility easement were unique physical characteristics of the property causing hardship, and also noted the testimony concerning the significant cost of tree removal if the variances were denied. The Court also noted the requirement to give deference to the finding of the Board.

4. *Pham v. Upper Merion Township Zoning Hearing Board*, 113 A.3d 879 (Pa. Commw. Ct., 2015).

The owners of a large single family detached residence in a residential district requested a use variance to permit a bed and breakfast use. In support of the claim of hardship, the owners presented evidence about the home's age, size and physical condition, and the financial burden of the property, and asserted that it was functionally obsolete as a single family residence. The variance was denied by the Board, and the Board's decision was affirmed by the Court of Common Pleas. The Commonwealth Court affirmed, stating that there was no evidence presented that the property could not be improved as a single family residence, or that those improvements would be economically prohibited.

5. *McCarry v. Haverford Township Zoning Hearing Board*, 113 A.3d 381 (Pa. Commw. Ct., 2015).

Owner had two adjoining lots: Lot 1, which was nonconforming as to front yard setback, and Lot 2, which was vacant and landlocked. The zoning ordinance prohibited the subdivision of a lot with a nonconforming structure. The owner sought a variance to permit him to subdivide Lot 1 to provide Lot 2 with the minimum street frontage required to build a house, asserting hardship based upon Lot 2 being landlocked. The Zoning Hearing Board denied the variance and the Court of Common Pleas affirmed. The Commonwealth Court affirmed, holding that the evaluation of hardship must relate to the property for which the variance is sought; in this case, the owner was seeking a variance for Lot 1, but asserting hardship relating to Lot 2.

6. *Demko v. City of Pittsburgh Zoning Board of Adjustment*, 155 A.3d 1163 (Pa. Commw. Ct., 2017).

A redeveloper of a deteriorating property owned by a redevelopment Authority sought variances from height and floor area ratio requirements. The

testimony in support of the variances asserted hardship based upon redevelopment requirements which included the costly retention and renovation of existing buildings, and the need for the variances in order for the proposed development to be financially viable. The Commonwealth Court found that the cost of meeting the redevelopment Authority's requirements for the project did not support a hardship finding, contrasting this situation to other cases in which the costs were related to satisfying zoning ordinance requirements. The Court noted that the existing buildings were not required to be preserved under any municipal ordinance or law. The Commonwealth Court further stated that although Zoning Board findings are to be given deference, the Board did not have the authority to make a finding that the existing buildings should be preserved because of their historic façades, since no such protections were provided under the zoning ordinance.

7. *In Re: Appeal of Chestnut Hill Community Association*, 155 A.3d 658 (Pa. Commw. Ct., 2017).

Owner requested a variance to permit a parking space in the front yard of their home. The Zoning Board of Adjustment granted the variance, finding that hardship existed because parking at the rear of the property was not possible due to the configuration of the property and the location of the structure. The Community Association appealed on the basis that the hardship requirement had not been met, and the Court of Common Pleas denied the appeal. The Commonwealth Court reversed. The Commonwealth Court evaluated the ordinance provisions regarding parking and determined that the property did not meet the requirements for rear parking, since it was not bordered by a rear alley and did not have a common driveway. Since the owners were prohibited under the ordinance from having a rear parking space, the Zoning Board of Adjustment could not find that hardship existed due to the owner's inability to access a parking space to the rear.

8. *Liberties Lofts LLC v. Zoning Board of Adjustment*, 182 A.3d 513 (Pa. Commw. Ct., 2018).

Owner sought a use variance to permit the construction of a multifamily residence with commercial space in a district in which that use was not permitted. Evidence was presented concerning the nature of the neighborhood, the dilapidated existing warehouse on the site, and the inability to utilize the property with a permitted use and not lose money. The Zoning Board of Adjustment granted the variances, and the decision was affirmed by the Court of Common Pleas. Objectors appealed, and the Commonwealth Court affirmed.

The Commonwealth Court stated that the evidence supported the Zoning Board of Adjustment's finding of hardship, noting that evidence of vacancy and unmarketability can be part of a finding of unique hardship.

D. Financial Hardship

1. *Isaacs v. Wilkes-Barre City Zoning Hearing Board*, 612 A.2d 559 (Pa. Commw. Ct., 1992).

Testimony concerning low commercial rents, difficulty obtaining tenants, and the need for residential units for income to maintain commercial uses in a commercial district was economic hardship, which was not the unnecessary hardship required for the grant of a variance. The Commonwealth Court noted that the applicant had not provided evidence of any unique physical conditions that resulted in the economic hardship.

2. *Dunbar v. Zoning Hearing Board of the City of Bethlehem*, 144 A.3d 219 (Pa. Commw. Ct., 2016).

Owner of a delicatessen, a legal nonconforming use, sought a special exception to change the use to a restaurant, and a variance to expand the restaurant from 540 square feet to 1,080 square feet, a 100% increase. The owner presented evidence that the deli had been operating at a financial loss, and that the expansion is necessary for the survival of the business, and is necessary to enable him to make reasonable use of the property. The Zoning Hearing Board found that the existing structure was inadequate to operate a restaurant, and granted the variance. The Court of Common Pleas and the Commonwealth Court affirmed. The Commonwealth Court discussed the right of the owner to a natural expansion of the deli nonconforming use, and stated: "This court must consider whether the variance is necessary for the property owner's business to remain financially viable and whether it is "the minimum necessary to support the business."

E. Value of the Property as Zoned.

1. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 501 Pa. 550 (Pa. 1983).

The Commonwealth Court found that the applicant had not demonstrated the existence of an unnecessary hardship because the applicant had not shown that the property was "rendered practically valueless as zoned." Pennsylvania

Supreme Court reversed, holding that an owner is not required to try to sell his property as a prerequisite to obtaining a variance.

2. *Allegheny West Civic Council, Inc. v. Zoning Board of Adjustment of City of Pittsburgh*, 689 A.2d 225 (Pa. 1997).

At the zoning hearing, an objector presented the property owner with an Agreement of Sale that proposed a sales price of less than half of the original value of the subject property, which the owner rejected. The Commonwealth Court reversed the Board's grant of variances, finding that the applicant had failed to demonstrate that the property is practically valueless as zoned when it did not pursue an offer to purchase the property. The Pennsylvania Supreme Court reversed, citing to its holding in *Valley View*, stating that it is "unreasonable under these facts to force a property owner to pursue and offer that is less than half of the property's initial value in lieu of a variance." The Court also noted that refusal to sell a property is not a basis for denying a variance.

F. Hardship asserted based upon owner's use of the property.

1. *Jefferson Borough v. Zoning Hearing Board of Jefferson Borough*, 1697 C.D. 2017 (Pa. Commw. Ct., 2018) (Opinion Not Reported).

Owner paved his driveway to a width of 38 feet, which exceeded the permitted width of 20 feet under the Zoning Ordinance. After being cited, he filed an application with the Zoning Hearing Board seeking dimensional variances for the driveway. The evidence presented related to the Owner's need for a wider driveway to access a pole barn constructed by the Owner, and the use of the driveway by the Owner's four vehicles. The Owner testified that due to the space limitations, he had to back out onto the adjoining street which was a safety issue, and also as to drainage issues along the adjoining roadway. The Commonwealth Court found that no unnecessary hardship is present, since unnecessary hardship must relate to the physical characteristics of the property, not the owner's use. Further, the size of the lot and the drainage situation is similar to the other properties along the same street, and therefore the circumstances are not unique.

G. Telecommunications Tower Cases

1. *Township of East Caln v. Zoning Hearing Board of East Caln Township*, 915 A.2d 1249 (Pa. Commw. Ct., 2007).

Applicant, as lessee, had a 103 foot monopole telecommunications tower on a property that also contained a self storage facility. The tower was constructed pursuant to a conditional use previously granted. Applicant filed for variances to permit a 123 foot tower and accessory equipment, in a zoning district with a maximum height restriction of 35 feet. The stated purpose for the higher tower was to eliminate a coverage gap. The Applicant also presented testimony concerning the requirement to provide reliable wireless service under its FCC licenses, and the impacts of the coverage gap. The Zoning Hearing Board granted the variances, finding that unnecessary hardship existed, and the decision was affirmed by the trial court, which held that the taller tower was needed to better serve the citizens of the Township, and noted the topography of the land that made a taller tower necessary. The Commonwealth Court reversed the lower court's decision, finding that the Applicant had not met its burden to show unnecessary hardship. The Court stated: "The ZHB based its finding of unnecessary hardship solely upon the life-safety issue posed by the coverage gap... The ZHB found that the coverage gap interfered with the proper functioning of the enhanced 911 emergency service. Such health and safety issues are important concerns, and the Township may wish to amend its ordinance in order to address them. However, the well-established law does not permit the grant of a variance on the basis that it is in the public interest."

2. *Vineyard Oil & Gas Co. v. North East Township Zoning Hearing Board*, (Pa. Commw. Ct., 2019).

Applicant, as lessee, applied for a variance to permit a wireless communications facility on a property that was not large enough to meet the requirement that the setback between the base and each adjoining property must be equal to the maximum height of the antenna and antenna support structure. Under this requirement, the setback for the proposed facility was 195 feet. The setbacks proposed were 54'4", 132'4", 113'5", and 114'3". The testimony showed that the property was irregularly shaped, there was a stream bisecting the property, and the property also contained floodplains. The property was being used as a repair shop and salvage yard. The Zoning Hearing Board granted the requested variances, and the Board's decision was affirmed by the trial court. The Commonwealth Court reversed. Although the property contained unique physical conditions, the zoning hearing Board failed to consider the repair shop and the salvage yard, stating: "... because Jones is already making reasonable use

of the Property, this Court holds that Applicant has not established an unnecessary hardship that entitles it to the variances it requested.”

H. Effect of prior zoning decisions as res judicata or collateral estoppel

1. *Fowler v. City of Bethlehem Zoning Hearing Board*, 187 A.3d 287 (Pa. Commw. Ct., 2018).

Owner sought a special exception or in the alternative a use variance to allow the use of a residentially-zoned property to be used for a financial services office and convert a retail building into offices and an apartment. The Owner had previously sought zoning relief to use the residence as an office. The Court held that res judicata and collateral estoppel theories did not preclude this application. The objectors asserted that because there was no change in circumstance that related to the land, the application should be barred. However, the Court rejected that analysis, stating that changes to the physical characteristics of the land are not required; the relevant change is the scope of the project. Res judicata and/or collateral estoppel apply when the requests for relief are identical. Here, the court found that the earlier request sought three commercial spaces into apartments, the current application requested one commercial office space and one apartment. Because the Owner proceeded under different theories and sought different relief, the application was not barred by res judicata or collateral estoppel.

I. The *De Minimis* Variance

1. *Dunn v. Middletown Township Zoning Hearing Board*, 144 A.3d 219 (Pa. Commw. Ct., 2016).

Owner sought variances in order to subdivide a single lot containing a dilapidated residence to create two lots which did not meet the lot width requirement for the district, upon which two homes would be constructed, and a third lot to be merged with an adjoining property. The minimum lot width in the district was 125 feet; the owner proposed Lot 1 with a width of 106.73 feet and Lot 2 with a width of 107.24 feet, each being an approximate 15% deviation from the requirement. There was no finding of hardship, but the Zoning Hearing Board granted the variances, which were affirmed by the Court of Common Pleas which characterized the lot width variances as *de minimis*. The Commonwealth Court reversed, stating that while there is no specific percentage that makes a variance *de minimis*, it would not find that two lots with deviations

of approximately 15% from the minimum lot width constituted *de minimis* variances.

2. *Pequea Township v. Zoning Hearing Board of Pequea Township*, 180 A.3d 500 (Pa. Commw. Ct., 2018).

Property contained a residence and a garage, which was an accessory structure. The Owner testified that he contacted the zoning officer and was told that no permit was required to add a second floor addition to the detached garage. The Owner proceeded to construct a second floor addition, and received a notice of violation for failure to obtain a building permit. The Owner submitted an application for a variance to allow a height of 28 feet for the accessory structure, which exceeded the maximum height of 20 feet, a 40% deviation from the requirement. The Zoning Hearing Board granted the variance, concluding that it was *de minimis* because it did not increase the burden on the land or the use of the property, and would not detract from the character or nature of the neighborhood. The Board further found that there were other structures in the vicinity that exceeded the height of the proposed structure. The Township appealed the decision, which was affirmed by the trial court. The Commonwealth Court distinguished the line of cases relied upon by the trial court in finding the existence of a *de minimis* variance. However, the Commonwealth Court noted that the height of other buildings in the vicinity could support a finding of entitlement to a *de minimis* variance. The Commonwealth Court found that since the Board's findings did not include details about the presence of other structures in the vicinity that exceeded the height of the proposed structure – whether they are accessory structures, whether they were legal nonconforming structures, etc. – it was unclear whether those other structures could support the *de minimis* variance. As result, the Commonwealth Court remanded the matter to the Board for specific findings.

3. *Huston v. Borough of Edinboro*, No. 1813 C.D. 2017 (Pa. Commw. Ct., 2018) (Opinion Not Reported).

Owner's residence was nonconforming as to the minimum front yard setback of 30 feet, but the home, with a front stoop of 4'10" x 8', qualified as a pre-existing nonconforming structure. The owner removed the front stoop and replaced it with a new covered porch of 6' x 20'. The Owner did not obtain a building permit a subsequently was cited for a violation, following which he applied to the Zoning Hearing Board for a dimensional variance. At the hearing, the Owner submitted photos of other homes in the district with encroachments in the front yard setback, along with letters of support from neighbors, but no

substantive testimony or evidence. The Zoning Hearing Board denied the application, finding no hardship, and that the request was not *de minimis* in nature. The trial court, after conducting a site visit, reversed the Zoning Hearing Board decision, finding that the Owner met the requirements for the variance or, alternatively, that the variance was *de minimis*. The Commonwealth Court rejected the position that the location of the house created an unnecessary hardship since a variance would be necessary to construct anything in the front yard, and that steps and a landing are needed to access the front entrance of the house. The Commonwealth Court noted that under the zoning ordinance, the Owner could have replaced the front stoop with a stoop of the same size or smaller, without violating the zoning ordinance.

However, the Commonwealth Court did not disturb the trial court's determination that the variance met the requirements for a *de minimis* variance. The Commonwealth Court noted that the *de minimis* doctrine is a narrow exception to the normal heavy burden of proof required to obtain a variance, and applies where the variation from the requirements is minor and "rigid compliance" is not needed to protect public policy concerns. Further, the Court noted that the application of the *de minimis* doctrine is dependent upon the specific circumstances of the case, and is left to the discretion of the fact finder. The trial court found that the residence, without a stoop or porch, was located only 15'2" from the road. The house with the original stoop, which was legally nonconforming, was located 10'4" from the road, and the current porch is 1'2" closer than the original stoop. The new porch decreased the setback by only 3.8%, which the trial court ruled was *de minimis*.

J. When an ordinance's effect on a particular property is so strict as to be confiscatory

1. *Nowicki v. Zoning Hearing Board of the Borough of Monaca*, 91 A.3d 287 (Pa. Commw. Ct., 2014).

Owners purchased 0.176 acre property. Two days before the Agreement of Sale was signed, the Borough amended the Zoning Ordinance to change the zoning district of the property from R-2, permitting single-family detached dwellings, to Plan River-Oriented Development District (PROD), which did not permit a single-family detached dwelling on the property.

Owners applied for a variance to permit a single-family detached dwelling; the Zoning Hearing Board denied the application on the basis that the ordinance was not confiscatory as the property could be used for both

noncommercial and public recreation. The definitions of these uses included privately owned facilities such as golf courses, sportsmen’s clubs, country clubs, swimming pools and tennis clubs, and public recreation facilities such as parks, playgrounds, golf courses, ice rinks, tennis courts and swimming pools. The trial court reversed the decision, finding that the ordinance created an unnecessary hardship.

The Commonwealth Court affirmed the lower court decision, finding that the ordinance places a burden on the property that rises to the level of an unnecessary hardship. The Court stated: “although the Ordinance sets the square footage necessary for public and recreation uses just below the square footage of the Property, each of the recreation uses... necessitates more land than is contained within the bounds of the Property. The exception, of course, is for the land to be turned over to a public entity for use as a park; however, this clearly would deprive the Nowickis of use of their Property and would constitute a confiscation or taking of the Property for public use without payment of just compensation.” The Court found that the impact of the ordinance upon this property was unique, because the other properties formerly in the residential district which had been rezoned to PROD either already contained a single-family residence, or were large enough to develop with high density dwellings as permitted under PROD.

- K. Categorizing a variance request as a use variance or dimensional variance.
  - 1. *Society Created to Reduce Urban Blight v. Zoning Board of Adjustment*, 787 A.2d 1123, (Pa. Commw. Ct., 2001).

Amtrak sought variances from maximum height, number and location requirements to allow the erection of an outdoor advertising sign on its building. The Zoning Board of Adjustment granted the variances, finding that strict enforcement of the zoning code would result in unnecessary hardship due to a federal mandate that Amtrak raise revenue. The trial court reversed, finding that Amtrak had not demonstrated unnecessary hardship.

The Commonwealth Court found that the variances requested were not dimensional “because a dimensional variance contemplates only a reasonable adjustment from area and space requirements in order to develop a *permitted* use.” (Emphasis in original). The Court noted that the ordinance prohibited the use of property for outdoor advertising unless the requirements of number and location were met. As result, the variances requested must be evaluated as use variances and not dimensional variances.

2. *St. John the Baptist Ukrainian Greek Catholic Church v. City of Pittsburgh Zoning Board of Adjustment*, 88 A.3d 1046 (Pa. Commw. Ct., 2014).

Owner sought to develop a service station on an industrially zoned property and requested several variances, one of which was characterized as a dimensional variance and sought relief from the requirement that a service station be located 150 feet from any residential zoning district. The variances were granted, but reversed on appeal to the Court of Common Pleas, which held that the distance variance request was a use variance, not a dimensional variance. The Commonwealth Court found that the owner needed a use variance, stating that the “attempt to erect a service station where it is prohibited requires a use variance.” The Commonwealth Court differentiated between a variance related to the distance of structures from the property line of the lot on which the structures will be located, and the distance between the subject property and a residential zoning district.

3. *Deangelo v. North Strabane Township Zoning Hearing Board*, 208 A.3d 156 (Pa. Commw. Ct., 2019).

Owners sought to build a medical clinic in a residential zoning district. The zoning district permitted a medical clinic as a residential use if the clinic was part of an assisted living facility, independent living facility, life care community or nursing home. The Owners requested a variance from the condition that the clinic be associated with one of the listed uses, so that a stand-alone clinic could be operated. The Zoning Hearing Board denied the variance, and the Zoning Hearing Board decision was affirmed by the trial court. The Owners appealed, claiming that the variance request was improperly evaluated as a use variance, rather than a dimensional variance, which carries different standards under *Hertzberg*. The Owners asserted that because a medical clinic was permitted as a conditional use, it was not “wholly outside the zoning regulation”.

The Commonwealth Court vacated the trial court’s decision denying the variance and remanded based on the Owners’ claim that they did not have the opportunity to present evidence on their variance application. The Commonwealth Court did reject the Owner’s position that the variance being requested was a dimensional variance, not a use variance. The Commonwealth Court found that “Landowners do not seek a “reasonable adjustment from area and space requirements” but, rather, to use the property for a stand-alone medical clinic, which is prohibited by the Zoning Ordinance unless the requirements in Section 1303.34(B) are met.” “The conditional language in

Section 1303.34(B) has nothing to do with “lot width, building area, setbacks and impervious surface limitations.” As a result, the Commonwealth Court found that the Owners required a use variance from the ordinance requirements.

L. Temporary Variances.

1. *Coyle v. City of Lebanon Zoning Hearing Board*, 135 A.3d 240 (Pa. Commw. Ct., 2016).

The zoning hearing board granted a request for a temporary use variance to operate a professional business office in a residential district, and the Court of Common Pleas affirmed the decision. The objector appealed, asserting that the unnecessary hardship requirement had not been met; the applicant took the position that unnecessary hardship was not a requirement for a temporary variance. The Commonwealth Court reversed, finding that even though temporary variances (also referred to as “time-limited variances”) are allowable, they must meet the same requirements as permanent variances.

III. Key Takeaways in Evaluating a Variance Case, based on the Case Law.

- A. Always look for unique physical conditions or circumstances associated with the property to support the hardship claim. This can be the size, shape or topography of the property; its location; surrounding uses; easements that affect the use; trees on the property; building obsolescence, etc.
- B. Conversely, do not base a variance request on the needs of the applicant only. This can be tricky, but remember that the application should be focused on the property circumstances, not the owner’s circumstances – the variance request should be possible even if a different owner was the applicant.
- C. When a claim for hardship is based upon the expenses associated with changes to the property, those expenses should relate to conformity with zoning ordinance requirements.
- D. Evaluate the request and determine whether it is a dimensional variance or a use variance. Dimensional variances have a less difficult burden of proof under the *Hertzberg* case. However, if the dimension at issue relates to something outside the property (such as the distance of a use from a

residential zoning district), the courts have considered it to be a use variance.

- E. *De minimis* variances are desirable because the need to prove hardship is lessened non-existent. However, for that very reason the courts are reluctant to find that a variance is *de minimis*, and have held that a *de minimis* theory was not applicable with a deviation of only 6.25%. A *de minimis* claim should be able to be supported with relevant case law.
- F. Review the Zoning Ordinance for variance requirements in addition to the standards laid out in the Municipalities Planning Code; the courts have found that both sets of standards must be satisfied.
- G. Of course, always present evidence of each element required for the grant of a variance.