[J-57-2021]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

BAER, C.J., SAYLOR, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

METAL GREEN INC. AND NOA PROPERTIES INC.	:	No. 9 EAP 2021
	:	Appeal from the Order of
	:	Commonwealth Court entered on
v.	:	July 28, 2020 at No. 373 CD 2019
	:	reversing the order entered on
	:	February 26, 2019 (dated February
CITY OF PHILADELPHIA AND CITY OF PHILADELPHIA ZONING BOARD OF ADJUSTMENT AND WICKHAM KRAEMER III AND MARY KRAEMER, HUSBAND AND WIFE	:	25, 2019) in the Court of Common Pleas of Philadelphia County, Civil Division, at No. 0180102735.
	:	ARGUED: September 22, 2021
APPEAL OF: METAL GREEN INC.	:	

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

JUSTICE TODD **DECIDED: December 22, 2021**

In this appeal by allowance, we consider the proper legal standard to be applied when considering an application for a "use variance"[1] under the Philadelphia Zoning Code, as well as the appropriate standard of review for such determinations. For the reasons discussed below, we hold that the minimum variance requirement, as set forth in the Philadelphia Zoning Code, applies to use variances. Additionally, in determining the entitlement to a use variance, we conclude considerations of property blight and

[1] A "use variance" is a request to use property in a manner that is wholly outside zoning regulations. This can be compared to a "dimensional variance" which involves a request for a reasonable adjustment of the zoning regulations to use the property in a manner consistent with the applicable regulations. *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh,* 721 A.2d 43, 47 (Pa. 1998).

abandonment are more properly evaluated under the Code's unnecessary hardship requirement, rather than under the minimum variance requirement. Finally, we reaffirm our Court's traditional abuse of discretion or error of law standard of review with respect to a court's review of a variance determination; however, as a component thereof, we allow for review for a capricious disregard of the evidence under certain circumstances. Accordingly, we affirm in part, reverse in part, and remand.

I. Background

This matter involves the proposed redevelopment of a 90-year-old abandoned two-story industrial building, consisting of approximately 14,000 square feet, formerly used as a garage/warehouse facility. The property is located on a "flag lot"[2] at 6800 Quincy Street, within the City of Philadelphia ("City"). In 2013, Appellant Metal Green Inc. ("Metal Green") purchased the property at a sheriff's sale for approximately $90,000. Thereafter, in August 2016, Mt. Airy USA, a local nonprofit organization whose goal is to transform blighted and underutilized areas into property that benefits the community, commenced a legal action against Metal Green pursuant to the 2008 Abandoned and Blighted Property Conservatorship Act ("Act 135").[3] After legal proceedings in the Philadelphia Court of Common Pleas, the court declared the property to be blighted and abandoned and ordered Metal Green to remediate the hazards that the property posed to the community. While the court possessed the authority to order the demolition of the

[2] A "flag lot" is characterized by "a main portion (the 'flag') and a narrow strip (the 'pole') that connects the main portion to a public street." *Bartkowski v. Ramondo*, 219 A.3d 1083, 1085 (Pa. 2019).

[3] 68 P.S. §§ 1101-20. The purpose of Act 135 is to, *inter alia*, provide "a mechanism to transform abandoned and blighted buildings into productive reuse" and to allow for "an opportunity for communities to modernize, revitalize and grow, and to improve the quality of life for neighbors who are already there." 68 P.S. § 1102(5).

building, it held such action in abeyance, allowing Metal Green to not only make necessary repairs, but to pursue redevelopment of the property.[4]

Metal Green, along with NOA Properties, the owners of the property at that time, envisioned revitalizing the building on the property as apartments. Specifically, the plan proposed the conversion of the former interior warehouse space into 19 indoor parking spaces on the first floor, and an 18-unit apartment complex on the second floor. Metal Green ultimately submitted to the City Department of Licenses and Inspections the redevelopment plan and application for the approval of a building permit. The property, however, sits in the City's residential two-family RTA-1 zoning district, which permits, as a matter of right, residential two-family attached dwellings, *i.e.*, duplexes.[5] As the project's use for the property as multi-family residential was not permitted as of right in a RTA-1 district, and thus constituted a non-conforming use, the Department of Licenses and Inspections denied Metal Green's application for a building permit. Metal Green and NOA Properties appealed the denial of the permit application to the Philadelphia Zoning Board of Adjustment ("Zoning Board") seeking a use variance. The Zoning Board conducted a hearing on the matter on September 19, 2017.[6]

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[4] *See* 68 P.S. § 1106(c). Under Act 135, if the owner of a building fails to maintain the property in accordance with applicable municipal codes or standards of public welfare or safety, a court may appoint a conservator, who may present a plan for abatement, for the rehabilitation of the building or, if rehabilitation is not feasible, a proposal for the demolition of the building. 68 P.S. § 1106(c)(3).

[5] In a RTA-1 zoning district, the "minimum lot sizes, setbacks, and heights are identical to the residential single-family attached RSA-3 district, however the RTA-1 district permits two-families, not just one, to reside in the dwelling." Philadelphia Zoning Code, Informational Manual: Quick Guide at 10, *available at* https://www.phila.gov/media/20200213115058/NEW-ZONING-GUIDE_2020.pdf.

[6] NOA Properties no longer has an interest in the property. Metal Green pursued the use variance from the time of the hearing to the present, and is the legal owner of the property.

At the hearing, both Metal Green and Appellees Francis Wickham Kraemer, III and Mary Kraemer (collectively, the "Kraemers"), as intervenors, presented testimony and other evidence. For its part, Metal Green offered various expert witnesses who testified, *inter alia*, about the general nature and character of the dwellings in the building's immediate neighborhood, traffic conditions, and the plan's impact on the community. Specifically, George Ritter, a licensed landscape architect, asserted that the redevelopment would change nothing about the neighborhood except that the building would be improved, and that it would have virtually no impact on neighbors. Ritter testified that the renovation of the building would only improve the value of the neighborhood, and not change its character. Because of the property's limited street frontage, Ritter opined that if the building were demolished, only one home would be allowed under the RTA-1 district – a single or dual family dwelling.

Relevant to the question before us involving the standard to be applied to use variance determinations, Ritter, when asked on cross examination whether 18 units represented the least amount of variance that was required for the plan, responded that "the choice that's being asked is to tear down the existing structure, abandon its use, and rebuild it . . . this is the least that should be considered given the fact that the structure is there . . . that it's being renovated . . . and the hope is to retain it." Zoning Board Determination, 8/31/2018, at 4. Ritter also established the presence of other non-conforming structures, such as seven duplexes that had each been converted after the grant of prior variances into family apartment buildings, each containing 40 units, as well as two adjacent 9-story and 4-story apartment buildings, which contained 155 units and 94 units, respectively. However, the latter two buildings, though in close proximity, were located in a separate zoning district in which such uses were permitted as of right. Finally, Ritter offered unrebutted testimony that the previously converted duplexes had an

average density of 62 units per acre, and the existing multi-story apartment complexes had an average density of 143 units per acre; by contrast, Metal Green's proposed redevelopment would result in a lower density of 55 units per acre.

Frank Montgomery, a traffic operations engineer, also testified. Montgomery described his review of the traffic surrounding the property and opined that Metal Green's proposal would not affect transportation in the area. Further, David Polatnick, a project architect, discussed the current building and plans for redevelopment. The President of Metal Green, Jack Azran, also testified as to the due diligence engaged in before and after the purchase of the property, as well as the steps taken to improve the property.

Finally, John J. Coyle, III, a certified real estate broker, testified regarding the physical dimensions of the building, the manner in which it occupied the rectangular lot on which it was situated, the character of the neighborhood, and his opinion that the proposal would increase the value of neighboring lots. According to Coyle, the RTA-1 district requirements imposed a burden on the property that could not be met without demolishing the building, the building was unsuited to commercial or industrial use, and it would not be commercially feasible to place two semi-detached single-family dwellings or two semi-attached dual family dwellings on the property. As discussed more fully below, Coyle also opined as to the relative square footage of neighboring apartment complexes compared to those proposed by Metal Green.

The Kraemers, along with other neighborhood residents who live in single-family dwellings in the same district, opposed the variance, and offered testimony that the proposed conversion would alter the historical nature and traditional character of their neighborhood, a community consisting mainly of single-family dwellings. Additionally, witnesses objected to the granting of the variance on the basis of predicted noise, traffic, congestion, and difficulties with on-street parking. Furthermore, witnesses expressed

their concern that the proposed redevelopment project would increase the neighborhood's population density, that the 18 units did not satisfy the minimum variance requirement, but that they would be open to a less dense redevelopment.

After reviewing the testimony adduced at the hearing, the Zoning Board denied the variance request. Zoning Board Determination, 8/31/2018, at 1. In issuing its denial, the Zoning Board relied on the criteria set forth in Section 14-303(8)(e)(.1) of the Philadelphia Zoning Code regarding the requirements for a variance. The Zoning Board referenced three specific sections of that Code: the first requires the Zoning Board to consider whether "[t]he denial of the variance would result in an unnecessary hardship," Philadelphia Zoning Code, § 14-303(8)(e)(.1)(a); the second, of particular importance herein, mandates its consideration of whether "[t]he variance, whether use or dimensional, if authorized will represent the minimum variance that will afford relief and will represent the least modification possible of the use or dimensional regulation in issue," *id*. § 14-303(8)(e)(.1)(b);[7] and the third requires it to consider whether the grant of a variance would "endanger the public health, safety, or general welfare," *id*. § 14-303(8)(e)(.1)(d). Zoning Board Determination, 8/31/2018, at 7-9.

The Zoning Board concluded that, "[a]lthough the Property is an irregularly shaped lot improved with an existing structure, [Metal Green] did not establish that the requested variance represents the least minimum variance necessary to afford relief. It specifically did not establish that conversion to a less dense use, with fewer units, was not possible." Zoning Board Determination, 8/31/2018, at ¶ 9. Additionally, the Zoning Board found that

[7] The parties and tribunals below have referred to this provision as the "least minimum variance test." The Code's requirement in this regard has also been referred to as the minimum variance standard, minimum standard, and the minimization requirement. For ease of reference, we shall refer to this provision of the Philadelphia Zoning Code as the "minimum variance requirement."

Metal Green "failed to establish that the proposed use would not negatively impact the public health, safety or welfare." *Id*. at ¶ 10. The Zoning Board, however, did not expressly discuss the unnecessary hardship requirement in its determination.[8] Metal Green appealed this decision to the Court of Common Pleas of Philadelphia County.

The trial court, after allowing for oral argument but taking no additional evidence, reversed the Zoning Board's decision and granted the requested variance. The trial court concluded, *inter alia*, that the Zoning Board committed an error of law by applying the minimum variance requirement in ruling on Metal Green's request for a *use* variance, given that, in its view, decisions of the Commonwealth Court hold that this mandate is applicable only when a zoning hearing board adjudicates requests for a *dimensional* variance. Trial Court Opinion, 8/12/19, at 5-6 (discussing *South of South Street Neighborhood Association v. Philadelphia Zoning Board of Adjustment*, 54 A.3d 115 (Pa. Cmwlth. 2012) (holding that, under prior version of the Philadelphia Zoning Code, the zoning hearing board was not required to apply the minimum variance requirement in evaluating a request for a use variance, as it applied only to dimensional variances), *reversed on other grounds*, *Scott v. Philadelphia Zoning Board of Adjustment*, 126 A.3d 938 (Pa. 2015), and *Liberties Lofts v. Philadelphia Zoning Board of Adjustment*, 182 A.3d 513 (Pa. Cmwlth. 2018) (determining, after failing to acknowledge the 2013 amendments to the Philadelphia Zoning Code, discussed below, that the minimum variance requirement was more appropriate for evaluating dimensional variance requests, but ultimately concluding that, even if minimum variance requirement applied, the developer presented evidence that the requested variance was the least necessary to afford relief)).

[8] While the Zoning Board did not speak to this requirement, for purposes of this appeal, the Kraemers concede that this requirement has been satisfied.

The trial court further determined that, even if the minimum variance requirement was applicable, Metal Green, through testimony and evidence, had met the requirements of that test by demonstrating that construction of the 18-unit apartment complex was the least modification possible from the ordinance's permitted use. The court found that the proposed development would be consistent with the character of the neighborhood and would result in an apartment complex with less density per acre than either of the surrounding duplexes (which had already been converted to apartments), or the adjacent multi-story apartment complexes. According to the trial court, any less dense use of the property would require the demolition of the existing structure and the construction of a new building. Hence, in the trial court's view, Metal Green showed that it was entitled to the variance.

The Kraemers appealed to the Commonwealth Court, which reversed in a published opinion authored by Judge Kevin Brobson. *Metal Green Inc. v. Philadelphia Zoning Board of Adjustment*, 237 A.3d 604 (Pa. Cmwlth. 2020). After recounting the conflicting testimony before the Zoning Board, as well as summarizing the lower tribunals' decisions, the court first observed that the ordinance at issue was amended in 2013 – after the decision in *South of South Street*, *supra* – to include the language "whether use or dimensional" in its requirement that the variance "will represent the minimum variance that will afford relief and will represent the least modification possible of the use or dimensional regulation in issue." Philadelphia Zoning Code, § 14-303(8)(e)(.1)(.b). While the court noted that Metal Green conceded that, under the current version of the Code, the minimum variance requirement applied to a use ordinance, Metal Green nevertheless asserted that the test should apply differently to blighted property.[9]

[9] The Commonwealth Court acknowledged that its prior precedent in *Liberties Lofts* was decided under the present version of the Code, but, in its view, that decision's pronouncement rejecting the application of the minimum variance requirement to

The Commonwealth Court rejected the contention that blighted properties are subject to a different minimum variance requirement. Consequently, the Commonwealth Court applied the minimum variance requirement in assessing whether substantial evidence supported the Zoning Board's determination that Metal Green failed to show that it was not possible to convert the plan to a smaller number of residential units. However, the court recognized that, in coming to its conclusion, the Zoning Board did not expressly indicate whether Metal Green failed in its burden of production – *i.e.*, failed to produce sufficient evidence – or its burden of persuasion – *i.e.*, failed to convince the Zoning Board to credit its evidence and rule in Metal Green's favor. *Metal Green Inc.*, 237 A.3d at 614.

The Commonwealth Court then focused on the testimony of Ritter. Specifically, it examined his testimony that the 18-unit design "is the least that should be considered" given that the structure existed and that Metal Green was attempting to rehabilitate the structure. *Id*. This statement, according to the court, could either mean that it would be a hardship if fewer units were approved (albeit without an explanation for why constructing fewer units in the building was not viable), or merely that it was Metal Green's preference to build 18 units. *Id*. The court further noted that Ritter testified that 18 units would not be an "overuse" of the property, but emphasized that he did not indicate whether 18 units is the minimum viable use of the property, or provide reasons why 18 units was not an "overuse" of the property. Finally, the Commonwealth Court pointed to Coyle's statement that, to take advantage of the building as it exists, the feasible number of apartment units "*approaches* . . . 18," and that he "wouldn't [start] out thinking about . . . 10 or 12 or 14 units." *Id*. (emphasis original). But, the court emphasized that Coyle did not expressly

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requests for use variances was not dispositive given that the court failed to acknowledge the 2013 amendment to the Code, and, in any event, stated that the court would have upheld the variance even if it applied that test.

discuss "whether '10 or 12 or 14' units would be a *viable* (although less profitable) course, and he did not consider a project with a marginally smaller number of units—17, for example, or 16." *Id*. (emphasis original). Ultimately, the Commonwealth Court determined that, while the Zoning Board did not explicitly state that it was making a credibility determination regarding Metal Green's witnesses, it nonetheless interpreted the Zoning Board's final conclusion – that Metal Green failed to meet the requirements of the minimum variance requirement – to be an "implicit" credibility determination. *Id*. Thus, the court found that the Zoning Board did not abuse its discretion in refusing to grant Metal Green's requested variance, and so reversed the trial court.[10]

We granted allowance of appeal on two issues. First, we agreed to consider whether the minimum variance requirement, which in the past has been applied only to dimensional variances, is applicable to a use variance, and if so, the parameters for such a requirement as applied to blighted or abandoned property. Second, we granted allocatur to consider the proper standard of review of a zoning board's decision granting or denying a use variance. *Metal Green Inc. v. Philadelphia Zoning Board of Adjustment,* 249 A.3d 886, 886-87 (Pa. 2021) (order).

II. Minimum Variance Requirement

We first consider the propriety of the minimum variance requirement for granting a use variance under the Philadelphia Zoning Code. Metal Green, both in its brief and at oral argument, acknowledges that, under the Philadelphia Zoning Code as amended in 2013, it is proper to apply the minimum variance requirement to an application for a use variance, even though such inquiry has been historically applicable only to requests for

[10] Having resolved the matter on the minimum variance requirement question, the Commonwealth Court declined to address the Kraemers' second issue on appeal regarding whether Metal Green demonstrated that its requested use variance would not adversely affect the public safety, health, and welfare. *Metal Green Inc.*, 237 A.2d at 615 n.11.

dimensional variances. However, Metal Green asserts that our Court should incorporate into that requirement an adjustment for properties designated as blighted under Act 135, and that, for such properties, an applicant should be entitled to a use variance if the developer establishes merely that there is no other possibility of developing the property other than the use for which the developer seeks approval. Metal Green submits that the present test is excessively "narrow and restrictive" and will inhibit or even preclude the repurposing of abandoned and blighted buildings. Metal Green offers that Act 135, and its policy of placing blighted buildings back into productive and beneficial use, commands a "slight relaxation" of the variance criteria. Appellant's Brief at 29. It maintains that, consistent with prior precedent, the blighted and vacant condition of a building should be a factor in assessing whether a plan constitutes the minimum variance necessary to afford relief. It repeatedly emphasizes the salutary benefits of the rehabilitation of abandoned and blighted buildings into productive use and contends that this overriding public policy should inform variance evaluations. Further, Metal Green warns that to ignore the blighted and abandoned nature of a property with an Act 135 designation would prohibit the rehabilitation of neighborhoods by precluding an applicant who seeks to reuse a building in such an area from obtaining the necessary variances.

With respect to its property, Metal Green also maintains that the Commonwealth Court erred in focusing upon whether a proposal with a marginally smaller number of units would be viable, albeit less profitable. In doing so, it claims that the Commonwealth Court imposed upon it the "unprecedented burden to prove a 'negative' that less than 18 apartment units was 'not possible' in an existing non-conforming structure." *Id*. at 28. That is, according to Metal Green, the Commonwealth Court improperly determined that it did not establish that the variance it sought was the minimum variance that would enable it to develop the property because Metal Green failed to show that it was not possible to

develop the property for other types of housing different than the specific apartment building design it proposed. Rather, Metal Green maintains that the minimum variance necessary to afford relief is not what is "possible even if less viable;" this is especially true, it contends, where the variance concerns an existing non-conforming building, and where the property cannot be used for any permitted uses within the zone without being demolished. *Id*. at 37. According to Metal Green, its experts advanced unrebutted testimony that its 18-unit design was the minimum variance needed to afford it relief. In making this argument, Metal Green stresses that the conversion of the building into residential use is consistent with the character of the neighborhood, and that it is less dense than nearby residential uses.

Instead of the Commonwealth Court's approach, Metal Green suggests that a reviewing court should use the multi-factor test which our Court employed in *Hertzberg*, *supra*, to determine whether a proposed use is the minimum variance for development of blighted property. In that case, our Court indicated that it was appropriate for a court to consider (1) the economic detriment to the applicant if the variance was denied, (2) the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements, and (3) the characteristics of the surrounding neighborhood. *Hertzberg*, 721 A.2d at 50. Ultimately, Metal Green contends that its evidence demonstrated that its proposed use for the property was necessary to convert it to productive use, given that it was presently abandoned and blighted; that it would be more costly to convert the property to residential townhouses given its current condition and the configuration of the lot (the odd dimensions of which made it impracticable to build residential homes); and that its proposed development as an apartment building was consistent with the character of the surrounding neighborhood which featured another apartment building as well as other residential dwellings.

The Kraemers respond by defending the Commonwealth Court's use of the minimum variance requirement for use variances. The Kraemers initially maintain that the test for the granting of a variance as set forth in our decision in *Marshall v. City of Philadelphia*, 97 A.3d 323 (Pa. 2014), applies the minimum variance requirement to all variances, including use variances. The Kraemers contend that, under *Marshall*, there are three requirements: (1) an unnecessary hardship unique to the property; (2) no adverse effect on the public safety, health or general welfare; and (3) the variance is the minimum that will afford relief with the least modification possible. Appellees' Brief at 11. The Kraemers stress that the Philadelphia Zoning Code was amended in 2013 in response to the Commonwealth Court's decision in *South of South Street*, *supra* (calling into question the application of the minimum variance test for use variances). The Kraemers explain that the amended Code now expressly requires the Zoning Board, in considering whether to grant a use variance, to determine whether the use variance represents the minimum variance that will afford relief and will represent the least modification possible of the use regulation at issue. The Kraemers point out that, formerly, the Philadelphia Zoning Code's requirement in this regard had applied, by its terms, only to dimensional variances. They view the amendment as not only a specific repudiation of the *South of South Street* decision, but also as consistent with *Marshall*, which came two years later and which made no distinction between use and dimensional variances in this regard. Thus, according to the Kraemers, the Commonwealth Court correctly determined that the Zoning Board properly applied the minimum variance requirement, and properly deferred to the Zoning Board's findings of fact, credibility determinations, and conclusions of law in denying the use variance.

With respect to Metal Green's primary argument that, because the property has been adjudged as blighted under Act 135, its variance application should be subject to a

relaxed standard, the Kraemers offer that, under *Marshall*, the blighted status of a property is relevant only to the extent it pertains to showing an unnecessary hardship, but it has no relevance in determining whether a proposed use is the minimum variance required. While, here, the Zoning Board implicitly acknowledged, and the Kraemers concede, that Metal Green has established the hardship requirement, the Kraemers submit that we should reject Metal Green's suggestion that the minimum variance requirement should be relaxed. The Kraemers warn that, if the terms of the Philadelphia Zoning Code and the requirements of *Marshall* are set aside and a hardship-only test is employed, there will be no limiting factors with respect to an applicant's use variance request proposal.[11]

By way of background, the right of landowners in this Commonwealth to use their property as they wish, unfettered by governmental interference except as necessary to protect the interests of the public and of neighboring property owners, is of ancient origin, recognized in the Magna Carta, and memorialized in Article I, Section 1 of the Pennsylvania Constitution, which declares as an "inherent rights of mankind . . . acquiring, possessing and protecting property." Pa. Const. art. I, § 1; *In re Real Valley Forge Greenes Associates*, 838 A.2d 718, 727 (Pa. 2003). However, while property owners may have a constitutionally protected right to enjoy their property, that right is not without limits. The Constitution grants the General Assembly broad and flexible police powers to enact laws for the purpose of promoting public health, safety, morals, and the general welfare. *Robinson Township, Washington County v. Commonwealth*, 83 A.3d 901, 946

[11] The Kraemers also note that the Zoning Board concluded that Metal Green failed to demonstrate that the requested use variance would not adversely impact public safety, health, and general welfare, and that, on this basis, we should affirm the Zoning Board's denial of Metal Green's variance request. We did not grant allocatur on this distinct issue, and the Commonwealth Court did not consider this question below, *see supra* note 10; thus, we decline to address it.

(Pa. 2013). In accord with this power, the right to enjoy property may be reasonably restricted by, *inter alia*, zoning ordinances enacted by municipalities pursuant to the police power granted to them by the General Assembly. *Cleaver v. Board of Adjustment of Tredyffrin Township,* 200 A.2d 408, 412 (Pa. 1964). Thus, a local government, through its police power and reflecting the needs of its citizens, may utilize zoning measures that are substantially related to the protection and preservation of the health, safety, morals, or general welfare of the community. *National Land and Investment Co. v. Easttown Township Board of Adjustment*, 215 A.2d 597, 602 (Pa. 1966); *see also C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board,* 820 A.2d 143, 150 (Pa. 2002). The Municipalities Planning Code ("MPC") grants to each municipality the authority to enact and enforce zoning ordinances. 53 P.S. § 10601; *see Wilson v. Plumstead Township Zoning Hearing Board*, 936 A.2d 1061, 1064 (Pa. 2007). Philadelphia has enacted its own Zoning Code, which governs zoning issues in Philadelphia. *Wilson*, 936 A.2d at 1065, 1067.

Zoning "is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities." *National Land and Investment Co.*, 215 A.2d at 610. Zoning ordinances are presumed to be constitutional, and the burden of proving otherwise is upon he who challenges an ordinance. *Whitpain Township v. Bodine*, 94 A.2d 737, 739 (Pa. 1935). Moreover, zoning classifications and the fixing of lines of demarcation are largely within the judgment of the controlling legislative body, and the exercise of that judgment will not be interfered with by the courts except in cases where it is obvious that the classification has no relation to public health, safety, morals, or general welfare. *Di Santo v. Zoning Board of Adjustment of Lower Merion Township*, 189 A.2d 135, 136–37 (Pa. 1963).

Zoning ordinances, however, are not immutable and the public may seek relief from their strictures through variances. An application for a variance seeks permission to do something which is prohibited by the zoning ordinance. In essence, a variance constitutes an exception, or an overriding of legislative judgment concerning the will of the citizens of the community regarding land use.

There are distinct types of variances. At issue in this appeal is an application for a use variance. A use variance can be contrasted with a dimensional variance. As noted above, "[w]hen 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." *Hertzberg*, 721 A.2d at 47. However, the granting of a use variance is of greater significance, as it involves "a proposal to use the property in a manner that is wholly outside the zoning regulation." *Id*. Based on this distinction, the *Hertzberg* Court offered that "a dimensional variance is of lesser moment than the grant of a use variance." *Id*.

The party applying for a variance bears the burden of proof. *Marshall*, 97 A.3d at 329. It is the function of the zoning board to determine whether the evidence satisfies the criteria for granting a variance. *East Torresdale Civic Association v. Zoning Board of Adjustment of Philadelphia County*, 639 A.2d 446, 447 (Pa. 1994). The zoning board, as factfinder, is the sole judge of credibility. *Marshall*, 97 A.3d at 331. More specifically, a zoning board determines the credibility of witnesses and weighs their testimony, resolves conflicts in testimony, and, in doing so, may accept or reject the testimony of any witness in part or *in toto*. In making these determinations, a zoning board is free to reject even uncontradicted testimony, including expert testimony, it finds lacking in credibility. *See Nettleton v. Zoning Board of Adjustment of the City of Pittsburgh,* 828 A.2d 1033, 1041 n.10 (Pa. 2003).

The requirements to obtain a variance are legislative in nature, and subject to the terms of the applicable municipal zoning enactment. Although the Statutory Construction Act, 1 Pa.C.S. §§ 1921-39, is not expressly applicable to the construction of local ordinances, we apply the principles contained therein in interpreting local ordinances. *Francis v. Corleto*, 211 A.2d 503, 507 n.10 (Pa. 1965). Thus, the rules of statutory construction are applied to zoning ordinances with equal force and effect. *Cloverleaf Trailer Sales Co. v. Borough of Pleasant Hills, Allegheny County*, 76 A.2d 872, 875 (Pa. 1950).

The objective of statutory construction is to determine the legislature's intent. 1 Pa.C.S. § 1921(a) ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions."). Additionally, the language used by the legislature is the best indication of its intent. 1 Pa.C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). However, when the terms of a statute are not explicit, various factors may be considered in ascertaining legislative intent. 1 Pa.C.S. § 1921(c). Finally, the judiciary may employ certain presumptions in interpreting legislation. These include the presumption that the legislature "intends the entire statute to be effective and certain" and intends "to favor the public interest as against any private interest." 1 Pa.C.S. § 1922(2), (5).

Thus, we turn to the terms of the applicable zoning legislation. In 2013, the Philadelphia City Council amended the Philadelphia Zoning Code. The Zoning Code now reads in relevant part:

> General Criteria.
>
> The Zoning Board may grant a lesser variance than requested, and may attach such reasonable conditions and

> safeguards as it may deem necessary to implement this Zoning Code, including without limitation a limitation on the size or duration of the variance, consistent with § 14-303(9) (Conditions on Approvals). The Zoning Board shall, in writing, set forth each required finding for each variance that is granted, set forth each finding that is not satisfied for each variance that is denied, and to the extent that a specific finding is not relevant to the decision, shall so state. . . . Each finding shall be supported by substantial evidence. . . . **The Zoning Board shall grant a variance only if it finds each of the following criteria are satisfied:**
>
> (.a) The denial of the variance would result in an unnecessary hardship. The applicant shall demonstrate that the unnecessary hardship was not created by the applicant and that the criteria set forth in § 14-303(8)(e)(.2) (Use Variances) below, in the case of use variances, or the criteria set forth in § 14-303(8)(e)(.3) (Dimensional Variances) below, in the case of dimensional variances, have been satisfied;
>
> **(.b) The variance, whether use or dimensional, if authorized will represent the minimum variance that will afford relief and will represent the least modification possible of the use or dimensional regulation in issue**;
>
> (.c) The grant of the variance will be in harmony with the purpose and spirit of this Zoning Code;
>
> (.d) The grant of the variance will not substantially increase congestion in the public streets, increase the danger of fire, or otherwise endanger the public health, safety, or general welfare;

Philadelphia Zoning Code § 14-303(8)(e)(.1) (emphasis added).[12]

Related thereto, the Philadelphia Zoning Code specifically provides, with respect to a use variance:

> Use Variances.
>
> To find an unnecessary hardship in the case of a use variance, the Zoning Board must make all of the following findings:

[12] The Philadelphia Zoning Code, in relevant part, is consonant with the MPC, which likewise mandates 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." 53 P.S. § 10910.2(a)(5).

> (.a) That there are unique physical circumstances or conditions (such as irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions) peculiar to the property, and that the unnecessary hardship is due to such conditions and not to circumstances or conditions generally created by the provisions of this Zoning Code in the area or zoning district where the property is located;
>
> (.b) That because of those physical circumstances or conditions, there is no possibility that the property can be used in strict conformity with the provisions of this Zoning Code and that the authorization of a variance is therefore necessary to enable the viable economic use of the property;
>
> (.c) That the use variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and
>
> (.d) That the hardship cannot be cured by the grant of a dimensional variance.

Philadelphia Zoning Code § 14-303(8)(e)(.2).

As can be seen, for both dimensional and use variances, the Philadelphia Zoning Code, by its plain and unambiguous terms, contains a requirement that the variance be the "minimum variance that will afford relief and will represent the least modification possible of the use or dimensional regulation in issue." Philadelphia Zoning Code § 14-303(8)(e)(.1)(.b). Thus, while not contested by the parties, we initially make clear that a minimum variance inquiry is not limited to dimensional variances. It applies equally to use variances.

However, this determination does not end our inquiry. While Metal Green does not contest the application of the Philadelphia Zoning Code's minimal variance requirement, as set forth above, it contends that its building's Act 135 designation as blighted, its current status as a non-conforming use, and the benefits of redeveloping abandoned buildings, command a relaxation of the Code's minimum variance requirement. Indeed, Metal Green maintains that such an easing of the variance criteria

may be the only way to transform an abandoned and blighted property into a productive and beneficial use. In support of its assertion that the minimum variance requirement should be applied less stringently, it points to our decisions in *Marshall* and *Hertzberg*.

We first consider the express terms of the Philadelphia Zoning Code. The Code's minimum variance requirement is weighty, in that it presupposes a lack of ability to comply with an existing zoning ordinance, while nevertheless mandating proof that the application is both the "minimum" variance that will relieve the applicant from the requirements of the zoning ordinance, and that it constitutes the "least modification possible" from the ordinance's requirements. *Id*. Moreover, at least by its terms, there is no suggestion that its requirements are relaxed for certain hardships generally, or due to a blighted designation under Act 135. Furthermore, and related thereto, the structure of the Philadelphia Zoning Code is noteworthy. It necessitates the satisfaction of "each" criteria for the granting of either type of variance, then provides additional requirements for each type. Philadelphia Zoning Code § 14-303(8)(e)(.1). Significantly, the conditions identified for the granting of a use variance, as set forth above, focus upon demonstrating an "unnecessary hardship." Philadelphia Zoning Code § 14-303(8)(e)(.2).

Based upon the plain language of the Philadelphia Zoning Code, as well as its structure, we conclude that, while the redevelopment of blighted and abandoned buildings is salutary, and Act 135's purpose beneficial, the Zoning Code's minimum variance requirement does not consider such characteristics. Rather, we believe that these characteristics of a property, by their nature, fit more comfortably within a hardship analysis. Indeed, the unnecessary hardship requirement for a use variance is open ended, speaking in terms of physical "circumstances or conditions" of the property, clearly encompassing considerations of blight and abandonment. Philadelphia Zoning Code §§ 14-303(8)(e)(.1)(.a) and 14-303(8)(e)(.2).

Moreover, our decisions in *Marshall* and *Hertzberg* are entirely consistent with this view. In *Hertzberg*, our Court was faced with the question of whether the evidence presented to the zoning board established the existence of an unnecessary hardship, entitling a non-profit social service agency providing shelter to homeless women to a dimensional variance. While restating the requirements under the MPC for the granting of a variance, which included establishing that the variance was the minimum variance that would afford relief and was the least modification of the ordinance, 53 P.S. § 10910.2(a)(5), the Court's sole focus was on the unnecessary hardship requirement.[13] In this regard, the *Hertzberg* Court noted that an unnecessary hardship could be established by proof that (1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) that the property can be conformed to a permitted use only at a prohibitive expense; or (3) that the property has no value for any purpose permitted by the zoning ordinance. *Hertzberg*, 721 A.2d at 47.

After emphasizing the distinction between the requirements for granting a dimensional variance and a use variance, our Court formally distinguished the two with respect to the quantum of proof required to establish an unnecessary hardship, which we concluded was less when a dimensional variance was sought. *Id*. at 47-48. Further, we emphasized that, in making an unnecessary hardship determination, multiple factors were to be taken into account. We explained that, where the use of the property for any purpose was possible only through the reconstruction of the building or its demolition, where blighted or dilapidated conditions existed, and where an applicant had undertaken to remediate or renovate the areas for productive purposes, a "slight relaxation, or less stringent application of the variance criteria may be the only way the subject property will

[13] Indeed, the MPC's provision regarding the minimum variance requirement is virtually identical to the Philadelphia Zoning Code's minimum variance requirement. *Compare* 53 P.S. § 10910.2(a)(5) *with* Philadelphia Zoning Code § 14-303(8)(e)(.1)(.b).

be put to any beneficial use." *Id*. at 49 (emphasis and internal quotation marks omitted). The Court found that such factors "should be considered when evaluating whether an applicant for dimensional variances has established unnecessary hardship." *Id*. at 50.

Similarly, in *Marshall*, the Zoning Board granted, *inter alia*, a use variance to the Archdiocese of Philadelphia to repurpose a closed Catholic elementary school as an apartment complex for low-income seniors. Consistent with the plain language of the Philadelphia Zoning Code, we reaffirmed our precedent that the granting of a variance, distilled to its essence, involves establishing three essential requirements: (1) unnecessary hardship unique to the property; (2) the lack of adverse effect on the public health, safety, or general welfare; and (3) that the variance is the minimum that will afford relief with the least modification possible. *Marshall*, 97 A.3d at 329. While our Court noted the minimum variance requirement, our analysis in *Marshall*, like that in *Hertzberg*, focused solely on the unnecessary hardship requirement. After reiterating the *Hertzberg* factors for establishing an unnecessary hardship, we rejected the contention that to show such hardship an applicant must demonstrate that the property was valueless absent a variance, that it could not be used for any permitted purpose, or that a property owner was required to reconstruct a property to a conforming use regardless of the financial burden. *Id*. at 330.

We believe that our decisions in *Hertzberg* and *Marshall* are entirely consistent with a conclusion that the condition of a property, such as where it is blighted or abandoned, is an appropriate consideration in determining unnecessary hardship, but not for assessing the minimum variance requirement. Indeed, nothing in the Philadelphia Zoning Code suggests that the blighted or abandoned nature of a property is a factor when considering whether the requested use "will represent the minimum variance that will afford relief and will represent the least modification possible of the use or dimensional

regulation in issue." Philadelphia Zoning Code § 14-303(8)(e)(.1)(.b). *Hertzberg* and *Marshall* suggest just the opposite, as both focus on whether such conditions constitute an unnecessary hardship, reasoning that "[t]o hold otherwise would prohibit the rehabilitation of neighborhoods by precluding an applicant who wishes to renovate a building in a blighted area from obtaining the necessary variances." *Hertzberg*, 721 A.2d at 50. Additionally, nothing in Act 135 suggests that an abandoned or blighted designation warrants a relaxed standard regarding the minimum variance requirement for a use or dimensional regulation. Finally, in interpreting the Zoning Code, we must operate under the presumption that the municipality "intends the entire statute to be effective and certain" and intends "to favor the public interest as against any private interest." 1 Pa.C.S. §1922 (2), (5). Both of these considerations support our conclusion that the unnecessary hardship requirement is independent of the minimum variance requirement and that the minimum variance requirement should not be relaxed for blighted or abandoned buildings.

We stress that a variance is an exception to the otherwise expressed will of the citizens regarding the use of property in certain neighborhoods in the community. As our Court emphasized in *Hertzberg*, an application for a use variance is consequential — it is a request to "use the property in a manner that is wholly outside of zoning regulation." *Hertzberg*, 721 A.2d at 47. Metal Green erroneously suggests that unless there exists an alternative proposal that is feasible, any proposed use variance of blighted property satisfies the minimum variance requirement, in essence, requesting a pass with respect to Act 135 property. *See* Appellant's Reply Brief at 7. On the contrary, the burden is upon the applicant to establish each of the requirements for a use variance. Accepting Metal Green's view would undercut this burden. While the repurposing of blighted or abandoned buildings is to be encouraged, taking Metal Green's argument to its logical conclusion, it could propose a 200-unit apartment complex and it seems the minimum

variance requirement would still be met. In our view, this approach would essentially strip the minimum variance requirement from the Philadelphia Zoning Code.

In sum, we hold that, in light of the plain and unambiguous language of the Philadelphia Zoning Code, as amended in 2013, the minimum variance requirement applies equally to dimensional and use variances. Furthermore, we conclude that the minimum variance requirement in the Philadelphia Zoning Code may not be relaxed for blighted or abandoned properties; rather, considerations of blight or abandonment must be addressed under the Code's unnecessary hardship requirement. As thoughtfully expressed by Justice Saylor in his dissent in *Hertzberg*, "[j]udicial caution and restraint are particularly warranted in areas such as zoning, where the General Assembly and local lawmaking bodies have endeavored to develop and implement laws and regulations reflecting the policies that will facilitate land use appropriate to particularized local needs and concerns." *Hertzberg*, 721 A.2d at 54 (Saylor, J., dissenting). While we are mindful of the societal benefits of repurposing blighted and abandoned buildings, given the plain language of the Philadelphia Zoning Code, any relaxation of its requirements in this regard would be best addressed to Philadelphia City Council. Thus, for the above-stated reasons, we affirm this aspect of the Commonwealth Court's decision.[14]

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[14] The dissent would expand the consideration of blight or abandonment under the hardship requirement to both the minimum variance requirement and, at least implicitly, the public health, safety, and welfare requirement. Dissenting Opinion (Wecht, J.) at 7, 10. In its attempt to support this view, the dissent asserts that our decisions in *Hertzberg* and *Marshall* "merely applied a general principle to particular facts." *Id.* at 4. Yet, the dissent focuses less on our actual analysis in those decisions, which plainly involved only the hardship requirement, but on decisions cited therein. Indeed, the dissent emphasizes a single sentence – more specifically, the two-word phrase "variance criteria" – found in the Commonwealth Court's decision in *Vitti v. Zoning Board of Adjustment of the City of Pittsburgh*, 710 A.2d 653, 658 (Pa. Cmwlth. 1998) ("where the applicant for a variance has undertaken efforts to remediate or renovate those areas for a salutary, productive purpose, a slight relaxation, or less stringent application, of the variance criteria may be the only way the subject property will be put to any beneficial use"), to conclude that blight considerations should not be limited to the hardship requirement. Our first difficulty with

III. Standard of Review

We now turn to the second issue on which we granted allocatur: the proper standard of review to be applied by courts in reviewing zoning board decisions. Metal Green offers that the Commonwealth Court utilized a "classic standard of review," in which it engaged in a substantial evidence analysis. Appellant's Brief at 51. However, Metal Green maintains that the court's use of this standard was erroneous. According to Metal Green, the Commonwealth Court erred by failing to recognize that the Zoning Board did not weigh and resolve conflicts in the evidence or make credibility determinations. Metal Green submits that, where a zoning board fails to perform such functions, it deprives a reviewing court of a record to review the substantial evidence of record, and

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the dissent's reasoning is not only that *Vitti* dealt with a dimensional variance, but that, like *Hertzberg* and *Marshall*, it exclusively focused upon the hardship requirement. *Id*. at 657-659 (setting forth the standard "to establish that an unnecessary hardship exists," discussing how unnecessary hardship is proven, and holding that the moving party had "adequately demonstrated the existence of unnecessary hardship"). Moreover, from these two words — the slimmest of reeds — the dissent leaps to the unfounded conclusion that our Court "opened the door to [*Vitti*'s] suggestion that blight is relevant to variance applications generally, not just the unnecessary hardship criterion." Dissenting Opinion (Wecht, J.) at 5. Respectfully, while *Hertzberg* and *Marshall* do not *expressly* limit blight considerations to the hardship requirement, we find no basis in those decisions to relax variance requirements generally. The dissent's overly expansive reading of *Hertzberg* and *Marshall* is belied not only by the decisions themselves, but, as we have discussed, the language of the Philadelphia Zoning Code, the structure of the Code, and that blight and abandonment considerations align with established hardship criteria. Furthermore, any relaxation of the public health, safety, and welfare requirement is particularly troublesome as it is the very foundation for zoning regulation. Ultimately, the dissent offers policy reasons why all variance requirements should be relaxed to accommodate considerations of blight and abandonment. Additionally, while neither engaging in an *in pari materia* analysis, nor suggesting that Act 135 expressly applies to zoning variances – it does not – and after raising conflict preemption as potentially determinative without any discussion of its governing principles or their application here, *id.* at 7 n.19, the dissent engrafts Act 135 onto the statutory analysis, insisting that Act 135 should "loom large in the overarching inquiry." *Id.* at 7. Yet, as discussed, in zoning matters, our Court should act with caution and restraint; thus, in our view, the dissent's rationales for globally relaxing variance requirements are better addressed by the General Assembly.

thus contends that the Commonwealth Court erred by conducting its own substantial evidence analysis.

According to Metal Green, where a zoning board fails to credit or weigh unrebutted expert testimony, and where it relies on "speculative, subjective non-expert testimony," a reviewing court should apply a capricious disregard of the evidence standard. Appellant's Brief at 56. In support thereof, Metal Green argues that, because zoning boards are considered to be administrative agencies, they are subject to a substantial evidence standard under 2 Pa.C.S. § 704,[15] which, it contends, includes review for capricious disregard of the evidence, citing *Wintermyer v. WCAB*, 812 A.2d 478 (Pa. 2002). Applying this standard, Metal Green maintains that the Zoning Board capriciously disregarded the evidence, emphasizing that the Zoning Board failed to conduct credibility determinations and weigh the evidence, offered minimal reasoning, and provided no basis for its conclusions of law. Metal Green concludes that the Zoning Board's decision denying its request for a use variance disregarded "weighty, credible unrebutted expert testimony

[15] This section provides:

> The court shall hear the appeal without a jury on the record certified by the Commonwealth agency. After hearing, the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa.C.S. § 706 (relating to disposition of appeals).

2 Pa.C.S. § 704.

and uncontroverted facts and evidence relating to the non-conforming building, its history, its Act 135 status, and its productive reuse." Appellant's Brief at 63.

The Kraemers, while not separately addressing the standard of review question, submit that the Commonwealth Court properly deferred to the Zoning Board as the finder of fact as to whether Metal Green's witnesses established that its proposed use of the property was the minimum variance necessary. The Kraemers assert that the Zoning Board did not abuse its discretion or commit an error of law in its decision to deny the variance application, nor in not crediting the testimony of Metal Green's witnesses. Additionally, the Kraemers maintain that the Zoning Board's decision was supported by substantial evidence of record regarding the nature of the community in which the proposed apartment building would be constructed and the disruptive effect of such a building on the residential character of that community.

The standard of review governing the review of variance determinations has a lineage dating back well over a half century. Our Court has held that the standard of review when, as here, the trial court did not take any additional evidence, is limited to determining whether the zoning board committed an abuse of discretion or an error of law. *See, e.g., Township of Exeter v. Zoning Hearing Board*, 962 A.2d 653, 659 (Pa. 2009); *Noah's Ark Christian Child Care Center, Inc. v. Zoning Hearing Board of West Mifflin*, 880 A.2d 596, 596 (Pa. 2005); *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 639-40 (Pa. 1983); *National Land and Investment Co. v. Kohn*, 215 A.2d 597, 607 (Pa. 1965); *Sheedy v. Zoning Board of Adjustment of City of Philadelphia*, 187 A.2d 907, 909 (Pa. 1963); *Rogalski v. Township of Upper Chichester*, 178 A.2d 712, 713 (Pa. 1962); *Haas v. Zoning Board of Adjustment of Philadelphia*, 169 A.2d 287, 289 (Pa. 1961).

Under this well established standard, the term "discretion" connotes the exercise of judgment, wisdom and skill so as to allow a tribunal to "reach a dispassionate conclusion, and discretionary power can only exist within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge." *Coker v. S.M. Flickinger Co.*, 625 A.2d 1181, 1184 (Pa. 1993). Importantly, the exercise of discretion lies upon "the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions." *Id*. at 1184-85. Discretion is abused when the course pursued represents not merely an error of judgment. *Paden v. Baker Concrete Construction, Inc.,* 658 A.2d 341, 343 (Pa. 1995). Rather, "[a]n abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will." *Harman ex rel. Harman v. Borah*, 756 A.2d 1116, 1123 (Pa. 2000).

In applying this standard, our Court has warned that a reviewing court may not disturb the findings of the zoning board if the record indicates the findings are supported by substantial evidence. *Boundary Drive Assocs. v. Shrewsbury Twp. Board of Supervisors*, 491 A.2d 86, 90 (Pa. 1985). Substantial evidence, in turn, means relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association*, 462 A.2d at 639-40. Furthermore, we have cautioned that reviewing courts are not super boards of adjustment or planning commissions of last resort. *National Land and Investment Company*, 215 A.2d at 607; *Di Santo*, 189 A.2d at 137. Indeed, a court errs when it substitutes its judgment on the merits for that of a zoning board whose findings are supported by substantial evidence. *Marshall*, 97 A.3d at 331.

Regarding Metal Green's argument that, at least in this matter, the proper standard should include review for capricious disregard of the evidence, we note that the above stated abuse of discretion standard has been articulated as including assessments of

whether a lower tribunal acted with caprice. *Coker*; *Harman*. Moreover, earlier cases from our Court have referenced such a standard in reviewing zoning decisions. *See*, *e.g.*, *Appeal of Borden*, 87 A.2d 465, 466 (Pa. 1952) ("Our power of review in this case, however, is limited to determining whether the Board of Adjustment abused its discretion in authorizing the intervenors to proceed with the erection of the apartment houses asked for. Was the action of the Board arbitrary, capricious and unreasonable, or clearly in violation of positive law? If it was not, our duty is to affirm its action.").[16] More recently, the Commonwealth Court has reviewed certain zoning matters for a capricious disregard of the evidence. For example, in *Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807 (Pa. Cmwlth. 2005), the court engaged in a thoughtful discussion of the capricious disregard standard. As the court explained, "[a]ssuming the record contains substantial evidence, we are bound by the board's findings that result from resolutions of credibility and conflicting testimony rather than a capricious disregard of evidence." *Id*. at 811 (citing *Macioce v. Zoning Hearing Board of the Borough of Baldwin,* 850 A.2d 882 (Pa. Cmwlth. 2004)). The *Taliaferro* court added that a capricious disregard occurs only when the factfinder deliberately ignores relevant, competent evidence, and acts in deliberate and baseless disregard of it. *Taliaferro*, 873 A.2d at 814.

In *Wintermyer,* our Court considered the capricious disregard standard in the administrative law setting. After a thorough review of the history of the capricious disregard standard in Pennsylvania, Justice Saylor, writing for our Court, explained that the standard is one aspect of the review of an adjudication for an error of law:

> Since an adjudication cannot be in accordance with law if it is not decided on the basis of law and facts properly adduced,

[16] Similarly, "[f]or many years, the general standards governing appellate review in the administrative setting included a component of review for capricious disregard of evidence, in addition to the equally well established review for errors of law and manifest abuse of discretion." *Wintermyer,* 812 A.2d at 483–84 (footnote omitted)

> we hold that *review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court.* As at common law, this review will generally assume a more visible role on consideration of negative findings and conclusions.

Wintermyer, 812 A.2d at 487 (footnotes omitted) (emphasis added). Critically, however, we stressed the standard's limited nature, noting that it "serves only as one particular check to assure that the agency adjudication has been conducted within lawful boundaries—*it is not to be applied in such a manner as would intrude upon the agency's fact-finding role and discretionary decision-making authority.*" *Id*. at 487-88 (emphasis added). Thus, our Court reasoned that the capricious disregard standard is a component of a court's review of an administrative agency decision.

As the *Wintermyer* Court noted, the standard of review governing agency adjudications is codified in Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704 (reviewing court should affirm agency adjudication unless constitutional rights are violated, error of law is committed, or necessary findings are not supported by substantial evidence). Notably, the language of Section 704 of the Administrative Agency Law is identical to that in Section 754(b) of the Local Agency Law, 2 Pa.C.S. § 754(b), which governs review of adjudications by zoning hearing boards. Thus, because the language of the statutes is identical, we see no reason not to extend *Wintermyer*'s reasoning to zoning board decisions. *See Wintermyer,* 812 A.2d at 483-84. Moreover, there is, at any rate, indirect authority supporting the conclusion that judicial review in zoning matters includes a review for capricious disregard of evidence. *See, e.g., Macioce,* 850 A.2d at 887 n.9 (noting that board's findings that are the result of resolutions of credibility and conflicting testimony "rather than a capricious disregard of evidence" are binding); *Taliaferro*, 873 A.2d at 814-15.

In light of the above discussion, while we reaffirm the application by reviewing courts of our traditional review in zoning matters for an abuse of discretion, consistent with *Wintermyer*, we allow for review of a zoning board's decision for a capricious disregard of the evidence as part of our traditional standard of review, in appropriate cases. We caution, however, that, where substantial evidence of record supports a zoning board's findings, and the findings in turn support the board's conclusions, it should remain a rare instance where a reviewing court disturbs an adjudication based on a capricious disregard of the evidence standard. *See Wintermyer,* 812 A.2d at 487 n.14; *Taliaferro*, 873 A.2d at 815.

Having set forth the appropriate standard of review of zoning variance determinations, we consider the application of that standard in this matter. For the reasons that follow, we believe that the Zoning Board's decision is substantially deficient, precluding an appellate court from reviewing the minimum variance requirement. Specifically, the Zoning Board failed to make specific findings of fact, engage in credibility determinations, or offer sufficient rationale as to why the criteria for a use variance were not satisfied. The Commonwealth Court noted that, regarding the minimum variance requirement inquiry, the Zoning Board concluded that Metal Green "did not establish" that conversion to a smaller number of units was not possible. *Metal Green*, 237 A.3d at 614 (citing Zoning Board Determination, 8/31/2018, at 9). Yet, the Zoning Board did not expressly state whether Metal Green failed in its burden of *production* – that is, failed to provide sufficient evidence to establish this requirement – or its burden to *persuade* the Zoning Board to credit and rely upon Metal Green's evidence and grant its application. *Id*. The Commonwealth Court continued to determine that, based upon the evidence before the Zoning Board, "it appears that, although that testimony might have been

sufficient to *allow* the Board to rule in [Metal Green's] favor, the Board chose not to credit and/or weigh that evidence in [Metal Green's] favor." *Id*. (emphasis original).

More specifically, the Commonwealth Court pointed out that, in its findings regarding Ritter's testimony about the minimum variance requirement, the Zoning Board noted his statement that 18 apartment units "is the least that should be considered" because the building already exists and the alternative to development would be to demolish the building. *Id*. (citing Zoning Board Determination, 8/31/2018, at 4). In attempting to assess the meaning of this testimony, the court found that "[o]n one hand, the statement suggests that an approval of fewer units would not remedy the hardship and would result in [Metal Green] choosing to demolish the [b]uilding instead. On the other hand, that statement could simply be an expression of [Metal Green]'s preference for the proposed layout, and it does not explain *why* the existing [b]uilding could not viably support fewer units." *Id*. (emphasis original).

The Commonwealth Court also referenced Ritter's explanation that the requested 18 units would not be an "overuse" of the property, but noted that he did not establish whether 18 units is the *minimum* viable use of the property, nor did he give reasons for his belief that 18 units is not an "overuse." *Id*. Moreover, the court noted that Coyle stated, "in order to 'take advantage of what's there'—*i.e.*, the existing [b]uilding—the 'feasib[le]' number of units '*approaches* ... 18,' and that he 'wouldn't [start] out thinking about ... 10 or 12 or 14 units.' But he did not expressly discuss whether '10 or 12 or 14' units would be a *viable* (although less profitable) course, and he did not consider a project with a marginally smaller number of units—17, for example, or 16." *Id*. (emphasis original) (citation omitted).

Ultimately, the Commonwealth Court reasoned that the Zoning Board, as factfinder, declined to credit and/or weigh this testimony in favor of Metal Green. The

court went further, finding that, although the Zoning Board did not make explicit credibility and weight determinations, its conclusion that Metal Green "did not *establish*" satisfaction of the minimum variance requirement "fairly encapsulates those implicit determinations," and so the court concluded that it was not in a position to "second-guess those determinations or substitute [its] own judgment" for that of the Zoning Board. *Id*. at 614-15 (emphasis original).

Our independent review of the record confirms the Commonwealth Court's determinations that the Zoning Board did not set forth credibility or weight of evidence determinations, and did not provide the necessary reasoning for its conclusion that the minimum variance requirement was not met. In addition to the Commonwealth Court's identification of testimony potentially relevant to the minimum variance requirement, we observe that there was other testimony that could potentially satisfy this requirement. Specifically, Coyle, when describing the surrounding rental market, asserted that the apartment square footage in Metal Green's proposal was "right in the wheel house of the market." N.T. Zoning Board Hearing, 9/19/2017, at 188-89. Then, however, arguably mixing distinct concepts of competitive apartment square footage and the overall number of apartment units, when Coyle was asked whether "right in the wheel house with R-18 [18 apartment units], that is a number that is the least minimum you can give to afford relief for this?" he merely responded without elaboration or support, "[t]hat is what I believe, yes." *Id*. at 189.

We find that, contrary to Metal Green's assertions, its testimony did not definitively satisfy the minimal variance requirement. However, we believe that Metal Green offered testimony that, if credited, could potentially support a determination that the minimum variance requirement was met. Again, the Zoning Board failed to engage in any such analysis, leaving the parties and reviewing tribunals largely guessing as to the basis for

its determination that the Code's minimum variance requirement was not satisfied. For these reasons, we reject the Commonwealth Court's acceptance of the Zoning Board's "implicit determinations." Rather, in order to allow for effective review, a zoning board's variance decision must provide sufficient findings of fact, including credibility and weight of evidence determinations; conclusions based on these facts, and the reasons for granting or denying the variance. *Cf.* 53 P.S. § 10908(9) ("Where the application is contested or denied, each [zoning board] decision shall be accompanied by findings of fact and conclusions based thereon together *with the reasons therefor*." (emphasis added)). It is only with an adequate decisional foundation that the proper standard of review can be employed.

Here, the Zoning Board neglected to make explicit credibility determinations, failed to weigh the evidence of record, and did not set forth its reasoning as to why it believed Metal Green did not meet its burden. These failures are especially notable in light of the largely uncontradicted expert testimony offered by Metal Green that seemingly spoke to the minimum variance requirement. In light of what we view as an insufficient determination below, precluding review of the minimum variance requirement issue on appeal, we reverse the Commonwealth Court's decision in relevant part.

Were this the only potentially dispositive issue, we would remand this matter to the Zoning Board to set forth, as described above, an adequate decisional foundation for its minimum variance conclusion adverse to Metal Green, so that its decision could be reviewed. However, in light of the Commonwealth Court's determination on that issue, the court did not reach the Kraemers' second issue on appeal regarding whether Metal Green demonstrated that its requested use variance would not adversely affect the public safety, health, and welfare (the "public safety").[17] As a determination on that question

[17] *See supra* note 10.

could potentially moot the minimum variance inquiry, we remand this matter to the Commonwealth Court to address the Kraemers' second issue.

A use variance applicant must satisfy each of the Philadelphia Zoning Code's requirements. Thus, if the Commonwealth Court upholds the Zoning Board's determination that the public safety requirement was not satisfied, that will end the appeal. If the Commonwealth Court disagrees with the Zoning Board on that question, it must remand (while retaining jurisdiction) to the Zoning Board to set forth an adequate decisional foundation for its minimum variance conclusion, and then review that determination anew. Finally, we allow that the Commonwealth Court may determine, as we have today with respect to the minimum variance issue, that the Zoning Board did not adequately support its determination regarding the public safety issue. In that case, the court should remand for the Zoning Board to set forth an adequate decisional foundation on both issues, and then review both determinations.[18]

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[18] With respect to the remedy, the dissent would reverse the Zoning Board's decision, determining it "manifestly runs counter to the weight of the evidence," Dissenting Opinion (Wecht, J.) at 2, was erroneous "in light of the manifest sufficiency of Metal Green's evidence," *id*. at 12, and that "the record . . . strongly supports the contrary outcome," *id*. at 15. The dissent acknowledges that a fact-finding tribunal has the discretion to accept some, all, or none of the evidence presented, and that the Zoning Board herein failed to make credibility determinations or provide sufficient reasoning for its determination. Indeed, the dissent describes the "paucity of explanation," *id*. at 14, and that the Board "phoned in" its determination. *Id*. at 15. Nevertheless, the dissent would fill this void by itself assuming the role of the Zoning Board, and, in that role, ultimately weighing the Kraemer's evidence as "surprisingly thin," while describing Metal Green's evidence as "so strong," and on that basis would grant Metal Green its requested variance. In our view, the difficulty with the dissent's approach is two-fold. First, as noted above, the burden was, at all times, on Metal Green to establish the minimum variance requirement for a use variance, and, as we have detailed above, the evidence in support thereof was far from overwhelming. Second, while the dissent emphasizes the disservice to Metal Green, when the Zoning Board failed to fulfill its proper function, it necessarily harmed *both* parties, and the public, and precluded meaningful appellate review. While the dissent is certain of the proper result, contending that if the Zoning Board's "decision in this case doesn't reflect arbitrariness or caprice then nothing does," *id*. at 16, we lack the dissent's self-assuredness on this vague record, in light of the Board's unelaborated decision. To

For the above reasons, the order of the Commonwealth Court is affirmed in part, reversed in part, and the case is remanded with instructions.

Jurisdiction relinquished.

Chief Justice Baer and Justice Donohue join the Opinion Announcing the Judgment of the Court.

Justice Saylor files a concurring opinion.

Justice Mundy files a concurring and dissenting opinion in which Justice Dougherty joins.

Justice Wecht files a dissenting opinion.

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be clear, we have instructed the Commonwealth Court to remand to the Board, if it comes to that, for credibility determinations, a weighing of the evidence, and developed reasoning supporting its determination. It is only with full reasoning that a reviewing court may best perform its function. Finally, in straining to conclusively resolve Metal Green's appeal, the dissent *sua sponte* addresses the public safety issue which the Commonwealth Court did not reach, and decides that issue in Metal Green's favor as well. *Id*. at 14-15. Of course, that issue is far afield of the issues on which we granted allocatur, and that issue alone warrants a remand to the Commonwealth Court for consideration in the first instance. For this litany of reasons, which the dissent discounts or overlooks, we conclude a remand is the best approach.