

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION

76 SCHULTZ LLC,

Appellant,

vs

NO. 25-CV-0038

LANSFORD BOROUGH ZONING
HEARING BOARD,

Appellee

Counsel:

Michael A. Santanasto, Esquire

Counsel for Appellant

Cynthia S. Yurchak, Esquire

Counsel for Appellee

MEMORANDUM OPINION

Nanovic, P.J. – May 6, 2026

76 Schultz LLC (“Owner”) owns a commercial building located in a residential zoning district in the Borough of Lansford, Carbon County, Pennsylvania. The first floor of the building was previously used for commercial purposes and is currently used for storage. On the second floor are four residential apartments. Before the court is Owner’s appeal from the Lansford Borough Zoning Hearing Board’s (the “Zoning Hearing Board”) denial of its special use application to convert the commercial space on the first floor into two residential apartments, as well as the Board’s denial of its request for variances from the Lansford Borough Zoning Ordinance’s (the “Zoning Ordinance”) requirements for off-street parking and a 2,000 square feet size limitation restricting the number of dwelling units permitted on the Property. Owner also claims vested property rights under

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nonconforming use theories arising from the previous use of the Property for commercial purposes and because the building is a nonconforming structure covering one hundred percent of the lot area, thereby violating all of the yard and setback regulations applicable to new construction in the zoning district.

PROCEDURAL AND FACTUAL BACKGROUND

76 Schultz, LLC purchased the property located at 201 East Bertsch Street in the Borough of Lansford, Carbon County, Pennsylvania, by deed dated July 17, 2024 (the "Property"). At the time of purchase, the first floor of the Property was a vacant commercial area. On the second floor were four residential apartments: two occupied and two vacant and in disrepair. The Property is located within an R-2 Zoning District (Median Density Residential District) in the Borough. Commercial uses are not allowed in this District as a permitted use, special exception or conditional use.

With the goal of converting the existing commercial space on the first floor into two one-bedroom apartments, Laurence Turco and Corey Zbar, as record owners and/or equitable owners of the Property, filed a zoning permit application dated June 5, 2024, with the Borough's Zoning Officer on July 10, 2024. (Board Exhibit B-1; N.T., 11/20/24, p.59). By letter of July 18, 2024, the Zoning Officer denied the application noting that the conversion of non-residential buildings into residences is permitted as a conditional use in an R-2 Zoning District, referencing Article 5, Section 502 (relating to uses permitted in an R-2 Zoning District) and Article 7 (Conditional Uses) of the Zoning Ordinance,¹ and

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that to convert one nonconforming use into another nonconforming use required the grant of a special exception, referencing Article 9, Section 905 of the Zoning Ordinance (Changes of Nonconforming Uses). In this letter, the Zoning Officer found that “the existing use of the structure/property [as] a commercial storefront with apartments above [] is an existing nonconforming use.” (Board Exhibit B-2, Zoning Officer denial letter). Additionally, the Zoning Officer in his denial letter advised that for a change of use, off-street parking meeting the requirements of the Ordinance for the proposed new use must be satisfied, citing Article 11, Section 1109, but that no plans evidencing compliance with this requirement were submitted; that for multi-family residential uses, two parking spaces for each dwelling unit are required, meaning a total of four parking spaces would be required for the proposed conversion under Article 11, Section 1117(A)(3); that no parking plan was submitted with the application depicting the size of off-street parking spaces, citing Article 11, Section 1102; and that the design and dimensions of off-street parking areas had to be provided. Article 11, Section 1104.

Owner appealed the Zoning Officer's decision on August 16, 2024, and requested a hearing before the Zoning Hearing Board to determine (1) change of nonconforming use to another nonconforming use by a special exception – Article 9, Section 905; (2) parking relief as a pre-existing nonconforming use or Article 9, Section 905; and (3) any other relief necessary to convert the existing nonconforming commercial first floor use to a two-unit residential use as described in the June 5, 2024, application. (Board Exhibit B-3). This appeal was amended on November 5, 2024, by an “Amended Application for

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a Conditional Use/Variance/Special Exception” to identify 76 Schultz, LLC as the Owner/Appellant; described the present use as a “pre-existing/nonconforming mixed use” with one commercial first floor unit and four residential units; and requested the following with respect to the Property and the relief sought for converting the commercial unit into two additional residential units:

a. Special Exception pursuant to Article 6 of the Ordinance to change a nonconforming use of 4 residential units and a commercial space, to a 6 dwelling unit building pursuant to Section 905 of the Ordinance; b. Variance of Section 1109 (Change of use), Section 1117 (Off Street Parking Requirements), seeking a reduction of off-street parking from the required 12 spaces to zero spaces, and Section 719 (Conversion of Nonresidential to Residential) for the required square footage of 2,000 square feet and the required 2 parking spaces per unit; c. Interpretation as to Applicant’s property rights as being vested under nonconforming use theories.

(Board Exhibit B-9; N.T., 11/20/24, p.3).

A hearing on the appeal was held before the Zoning Hearing Board on November 20, 2024. At this hearing, Owner’s evidence established that at the time of purchase the Property consisted of four residential apartments on the second floor and a commercial space on the first floor. (N.T., 11/20/24, pp. 12, 16, 57-58). Two of the apartments on the second floor had been occupied for years before the purchase and two were vacant and in need of repairs and remodeling before they could be leased out. (N.T., 11/20/24, pp. 47, 57-58). By the time of the hearing, Owner had spent in excess of \$115,000.00 to remodel the two vacant apartments. (N.T., 11/20/24, pp. 12-16).

With respect to the first floor, the Owner’s evidence established that this area had been used for commercial purposes in the past. A 1910 Sandborn Map indicated that in

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1910 the Property was used as a restaurant and for grocery purposes. (N.T., 11/20/24, p. 21; Applicant Exhibit A-5 (Sandborn Map)). More recently, a hardware store was located in this space, however, the dates of this commercial use were not disclosed. (N.T., 11/20/24, pp. 12, 48, 52-53). At the time of purchase, no business was in operation on the first floor and the space was used to store furniture and appliances, sinks, doors, wood, pipes, and other building materials and supplies, as well as multiple additional items scattered throughout. (N.T., 11/20/24, pp. 11-12, 18-19; Applicant Exhibit A-4).

According to the site plan submitted by the Owner, the Property is a corner lot, bounded on the south by East Bertsch Street, on the west by South Walnut Street, and on the north and east by privately owned properties. (Applicant Exhibit A-3). The building sits on the property lines and covers the entire Property. (N.T., 11/20/24, pp. 19-20, 42-43). No off-street parking spaces exist on the Property. (N.T., 11/20/24, pp. 17, 30). Nor is there any room to locate off-street parking on the Property; to do so, would require a portion or all of the building to be torn down. (N.T., 11/20/24, pp. 20-22, 30, 42-43; Applicant Exhibit A-3). Additionally, the Borough's Zoning Officer confirmed what he had written in his July 18, 2024 denial letter and testified that "The current configuration of the 201 East Bertsch Street as four residential apartments plus one commercial space, would be pre-existing nonconforming property." (N.T., 11/20/24, pp. 7-8).

At the conclusion of the hearing, the only motion made and approved unanimously by the Zoning Hearing Board was a motion to deny the Owner's variance request, in particular with respect to the request for parking variances. (N.T., 11/20/24, pp. 60-61).

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A written decision on behalf of the Zoning Hearing Board containing findings of fact and conclusions of law was issued and signed for by the Board's solicitor on December 9, 2024. In that decision, the following findings of fact, *inter alia*, were made: no evidence was entered as to the uses made of the subject Property at the time the first Lansford zoning ordinance was enacted that did not permit a commercial use in the R-2 Zoning District (Finding No. 9); commercial uses are not permitted in the R-2 Zoning District, citing Section 502.1 (Finding No. 10); multi-family dwellings are permitted in the R-2 Zoning District as a special exception use, citing Section 502.2 (Finding No. 11); Owner seeks to convert a non-residential structure into a residential structure, citing Section 502.4 (Finding No. 21); and conversion of non-residential to residential in an R-2 Zoning District requires approval by the Borough Council as a conditional use, citing Sections 502 and 719 (Finding Nos. 23 and 24). The decision also made the following conclusions of law, *inter alia*: Owner's use is nonconforming, however, Owner failed to prove the exact nature of the nonconformity at the time zoning was first enacted (Conclusion No. 4); and the conversion of a non-residential building to a residential use can only be entertained by Lansford Borough Council, with review of the Lansford Borough Planning Commission, under Article 7 of the Zoning Ordinance, specifically citing Sections 702 and 719 (Conclusion No. 13).²

Pursuant to Section 1003-A of the Pennsylvania Municipalities Planning Code ("MPC"), 53 P.S. §11003-A, Owner filed a Notice of Land Use Appeal on January 7, 2025. In this appeal, Owner contended that its request to convert the existing

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nonconforming pre-existing mixed use of the Property to a nonconforming multi-family use by converting the commercial first floor unit into two single bedroom apartments was permitted as a special exception under Section 905 of the Lansford zoning ordinance. (Appeal, Paragraphs 9 and 15). Owner claimed in its appeal that it met all the criteria for a special exception under Section 905 (Appeal, Paragraph 16); that the Board erred in not accepting the Zoning Officer's conclusion in the denial letter of July 18, 2024, that "the existing use of the structure/property is a commercial storefront with apartments above, and is an existing nonconforming use" (Appeal, Paragraphs 10, 20, 22(a), (f)); and further erred in failing to grant its request for a special exception under Section 905 (Appeal, Paragraph 22(b)).

At a management conference held on March 18, 2025, the parties advised the court that no additional evidence was necessary to decide the appeal.³ Accordingly, argument was scheduled for July 15, 2025, with the parties to file briefs in support of their respective positions prior to that date. At the argument held on July 15, 2025, the parties stipulated that the sole issue that needed to be decided on the appeal was whether the Owner was entitled to convert the commercial space into two residential apartments based on the Zoning Ordinance and the evidence presented before the Zoning Hearing Board, and that the right of the Owner to maintain the four residential apartments on the second floor was not in dispute and they could be used for these purposes. (Argument, 7/15/25, pp. 48-53). Based on the July 15, 2025, argument, the court requested briefing

on additional issues set forth in our Order of July 22, 2025, which has been complied with by the parties.

DISCUSSION

Section 905 – Special Exception for Changes of Nonconforming Uses

Owner's appeal is based principally on the premise that it has met all listed criteria and is entitled to the grant of a special exception under Section 905 of the Borough Zoning Ordinance. It is not.

Section 905 states:

§ 465-905. Changes of nonconforming uses.

The Zoning Hearing Board may grant a special exception to allow one nonconforming use to be *changed to another nonconforming use*, if the Board finds that all of the following provisions will be met:

- A. No structural alterations are made.
- B. The proposed change shall be less objectionable in external effects than that of the previous or existing nonconforming use and shall be more consistent with its physical surrounding.
- C. There shall be no increase in traffic generation or congestion, including both vehicular and pedestrian traffic.
- D. There shall be no increase in the danger of fire or explosion.
- E. There shall be no increase in noise, smoke, dust, fumes, vapors, gases, heat, odor, glare, vibration, lighting or electrical disturbances.
- F. There shall be no increased threat to health by any reason, including that of rodent, vermin or otherwise.

Lansford Borough Zoning Ordinance, Section 905 (emphasis added).

By its terms, Section 905 only applies when the change is from one nonconforming use to another nonconforming use. "A lawful nonconforming use is a use predating the enactment of a prohibitory zoning restriction." DoMiJo, LLC v. McLain, 41 A.3d 967, 972

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(Pa.Cmwlt. 2012). See also MPC, 53 P.S. §10107 (Definition of term “nonconforming use”). “The right to maintain a pre-existing nonconformity is available only for uses that were lawful when they came into existence and which existed when the ordinance took effect.” Hager v. W. Rockhill Twp. Zoning Hearing Bd., 795 A.2d 1104, 1110 (Pa.Cmwlt. 2002). The initial burden of proving both the existence and legality of a nonconforming use is upon the landowner. Smalley v. Zoning Hearing Bd. of Middletown Tp., 834 A.2d 535, 538 (Pa. 2003).

Whether use of the Property at the time of Owner’s purchase meets the definition of a nonconforming use is an interesting and complicated question for a number of reasons,⁴ but need not be answered here because the new use of the Property for multi-family dwellings⁵ intended by Owner is clearly a permitted use by special exception in an R-2 Zoning District. Zoning Ordinance, Section 502(B)(1). “The important characteristic of a special exception is that it is a conditionally permitted use, legislatively allowed if the standards are met.” Siya Real Estate LLC v. Allentown City Zoning Hearing Bd., 210 A.3d 1152, 1157 (Pa.Cmwlt. 2019) (quoting Bray v. Zoning Bd. of Adjustment, 410 A.2d 909, 911 (Pa.Cmwlt. 1980)).⁶ A special exception is a type of permitted use; it is not a nonconforming use, the prerequisite to relief for a change of use as a special exception under Section 905.

Section 502(B)(1) – Special Exception for Multi-Family Dwellings

Having found that Owner’s path to a special exception is not through Section 905, we examine briefly whether Section 502(B)(1)’s allowance of a special exception for multi-

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family dwellings in an R-2 Zoning District – provided Owner meets the standards and criteria for a special exception set forth in Article VI (Special Exceptions) of the Zoning Ordinance, and notwithstanding that this basis for a special exception was never identified by Owner in its application to the Zoning Officer or appeal to the Zoning Hearing Board – provides an alternative basis for approval of Owner’s requested change of use as a special exception. The answer hinges on whether Section 502(B)(1)’s allowance of multi-family dwellings in an R-2 Zoning District by special exception is superseded by Section 502(D) which provides that the conversion of a non-residential building into residences in an R-2 Zoning District is permitted as a conditional use. While eligibility for a special exception is determined by the Zoning Hearing Board (Zoning Ordinance, Section 602 (General provisions for special exceptions)),⁷ eligibility for a conditional use is determined by the Borough Council, with the Borough Planning Commission having the authority to review and submit their recommendations to the Borough Council. See Zoning Ordinance, Section 702 (General provisions for conditional uses). Consequently, if the change Owner seeks is encompassed within the meaning of “the conversion of a non-residential building into residences,” and Section 502(D) controls *vis-a-vis* Section 502(B)(1), Owner has sought relief in the wrong forum and the Zoning Hearing Board is without subject matter jurisdiction to grant the request.

The Borough’s ordinance does not define what a “non-residential building” is, however, Section 719 captioned “Conversion of nonresidential building into residences” under Article VII (Conditional Uses) makes clear that this refers to a building or structure

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“not designed or intended for residential use at its time of original construction.” Section 719 in its entirety states:

§ 465-719. Conversion of nonresidential building into residences.

A structure or building, not designed or intended for residential use at its time of original construction, may be converted into residential use, subject to the following provisions:

- A. The structure or building structure or building shall be serviced by central sewers and central water.
- B. The number of dwelling units permitted shall be one dwelling unit for each 2,000 square feet or lot area.
- C. There shall be an accessory off-street parking area, providing two spaces for each proposed dwelling.
- D. All off-street parking areas shall be adequately lighted, with a lighting plan included within the submission of the required site plan. Such lighting shall be designed and installed in a manner to have all exterior lighting directed away from adjacent properties.

Lansford Borough Zoning Ordinance, Section 719.

As is evident from the Sandborn Map (Applicant Exhibit A-5), as early as 1910 – the earliest evidence presented – the building was being used for commercial purposes and Owner’s Exhibits further evidence that the commercial space on the first floor was not designed or intended for commercial use. See *also* Zoning Hearing Board Decision, Finding of Fact No. 7 and Conclusion of Law No. 4. Hence, it appears clear that what Owner intends – the conversion of a non-residential building into residences – fits within the meaning of Sections 502(D) and 719. See *also* Zoning Hearing Board Decision, Finding of Fact No. 21 and Conclusion of Law No. 13.

In considering the relationship between Section 502(B)(1) and Section 502(D), the

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Sections do not contradict one another and can be interpreted as being consistent with one another. While Section 502(B)(1) speaks generally to permitting multi-family dwellings in an R-2 Zoning District by special exception, Section 502(D) speaks to a much more specific and limited scenario: "Conversion of nonresidential building into residences." Under such circumstances, even if a conflict existed, specific provisions in a Zoning Ordinance take precedence over more general provisions. MarkWest Liberty Midstream & Resources, LLC v. Cecil Twp. Zoning Hearing Bd., 102 A.3d 549, 557 (Pa.Cmwlt. 2014), appeal denied, 113 A.3d 281 (Pa. 2015); *see also* Section 1933 of the Statutory Construction Act of 1972, 1 Pa.C.S.A. §1933 (Particular controls general) and Metal Green, Inc. v. City of Philadelphia, 266 A.3d 495, 507 (Pa. 2021) (applying the principles of the Statutory Construction Act to the construction of local ordinances).

Variances at Issue; Claim of Nonconforming Use/Structure

Finally, we address whether the denial of Owner's requested variance from the Zoning Ordinance's off-street parking requirements can stand.⁸ Owner's goal – to convert the commercial space into two apartments – required the addition of two off-street parking spaces for each new dwelling unit (*i.e.*, a total of four off-street parking spaces was required) regardless of the legal theory on which this objective was based: whether as a conditional use under Section 719 – the conversion of a non-residential building into residences (*see* Section 719(C)) – or as a change of use to multi-family dwellings by special exception under Sections 502(B)(1) and 1109 in conjunction with Section 1117(A)(3) (Off-street parking requirements). Owner sought to be relieved from providing

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any new additional off-street parking spaces. This request for a parking variance was denied outright at the conclusion of the Zoning Board hearing with no explanation. (N.T., 11/20/24, pp. 60-61).

A dimensional variance involves “a request to adjust zoning regulations to use [] property in a manner consistent with [those] regulations, in contrast to use variances which involve a request to use property in a manner that is wholly outside zoning regulations.” Guy v. Zoning Hearing Board of the Borough of Sewickley, 2026 WL 923181 *2, ___ A.3d ___ (Pa.Cmwlth. 2026) (Memorandum Opinion) (citation and internal quotation marks omitted). “Dimensional variances consequently pose a lesser potential threat to the public interest, as they do not create the same degree of deviation from zoning regulations as their brethren. ... In keeping with this, the quantum of proof required to establish unnecessary hardship is indeed lesser when a dimensional variance, as opposed to a use variance, is sought.” Guy, 2026 WL 923181 *2 (citation and quotation marks omitted). Owner’s request to eliminate required off-street parking under the ordinance is one for a dimensional variance. See Mitchell v. Zoning Hearing Bd. of the Borough of Mount Penn, 838 A.2d 819, 828-29 (Pa.Cmwlth. 2003).

While a dimensional variance can only be granted with respect to a permissible use of the Property, the granting of a dimensional variance for either a conditional use or special exception is not dependent on the conditional use or special exception being first approved. Rather, the reverse is true: the dimensional variance is a condition precedent to approval of a special exception or conditional use. See Omiridis v. Zoning Hearing Bd.

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of City of Chester, 531 A.2d 1196, 1198 (Pa.Cmwlt. 1987); Sheetz, Inc. v. Phoenixville Borough Council, 804 A.2d 113, 115 (Pa.Cmwlt. 2002), appeal denied, 820 A.2d 706 (Pa. 2003).

In Omiridis a sit-down restaurant which applicant desired to open was permitted by special exception. Based on the square footage of floor space proposed for patron seating, the zoning ordinance required 26 off-street parking spaces for uses of this type. Because the applicant's plan accounted for between 22 and 24 spaces only, in reversing the trial court which had held that substantial compliance with the parking requirement was sufficient, the Commonwealth Court held a variance was required and that this was a pre-condition to approval of the use as a special exception. In doing so, the Court found the parking requirement analogous to the lot size requirement posited in R. Ryan, Pennsylvania Zoning Law and Practice, §5.2.1 (1970). There, the following example was given:

[A]n owner may be permitted to convert a large residence into apartments, by special exception, if the lot satisfies certain size requirements. This provision is not a 'standard' for judging the special exception application. Rather, it is more in the nature of a condition precedent to the right to seek a special exception. If, for example, the applicant's lot is too small, he must seek both (i) a variance from the lot size requirement and (ii) a special exception seeking permission to install apartments under the ordinance as varied. The special exception standards will not come into play unless the variance is granted.

Omiridis, 531 A.2d at 1198.

A similar situation arose in Sheetz where the applicant met all of the specific objective requirements of the zoning ordinance to obtain conditional use approval for a

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service station, but whose application was denied by the borough council because, *inter alia*, the provisions made for the trash enclosure, parking area, freestanding roof and fuel pumps violated the ordinance's side yard requirement. In affirming the trial court, which had upheld the council's decision, the Commonwealth Court held that in addition to establishing compliance with the specific objective requirements detailed in the ordinance for the grant of a conditional use, the applicant must bring the proposal within all specific requirements expressed in the ordinance, including those "[s]pecific requirements applicable to such kind of use even when not a special exception – e.g., setback limits or size maximums *or parking requirements* applicable to that type of use whenever allowed, as a permitted use or otherwise." Sheetz, 804 A.2d at 115 (emphasis added) (quoting Bray v. Zoning Board of Adjustment, 410 A.2d 909, 911 (Pa.Cmwlth. 1980)). Absent compliance with the general provisions of the ordinance applicable to the type of use at issue, in addition to those specifically applicable to a request for a conditional use or special exception, the applicant is not entitled to approval as a conditional use or special exception.⁹

In addition to requesting a variance from the off-street parking requirements of the ordinance, the amended application filed on November 5, 2024, also requested a variance from the minimum 2,000 square feet of lot area required by Section 719(B) of the Zoning Ordinance for each dwelling unit in a non-residential building converted into residences. (Board Exhibit B-9; Board Decision, Finding of Fact No. 27).¹⁰ Other than recognizing that a variance from the number of dwelling units allowed on the Property

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under Section 719(B) based on lot area was requested, the Board's decision makes no written findings specific to this request and does not expressly rule on the issue. Nor did the Owner present any evidence explaining why it was necessary to subdivide the commercial space into two dwelling units or that an unnecessary hardship would result if it was required to limit the first floor space to one dwelling unit or in some other manner integrate it with the upstairs apartments.

To obtain a variance from the requirements of a zoning ordinance, the applicant must meet five criteria.

One seeking a variance must establish that (1) the zoning ordinance imposes unnecessary hardship resulting from unique physical conditions of a property; (2) a variance is necessary to enable a reasonable use of the property; (3) the asserted hardship was not self-inflicted; (4) the grant of a variance will not alter the essential character of the neighborhood, nor substantially or permanently impair appropriate use or development of the adjacent property, nor be detrimental to the public welfare; and (5) the requested variance represents the minimum variance that will afford relief and the least possible modification of the regulation.

Mitchell, 838 A.2d at 828, citing 53 P.S. §10910.2(a). See *also* Lansford Borough Zoning Ordinance, Section 1509(B).

“In order to establish unnecessary hardship required for the grant of a use variance, an applicant must demonstrate that the property cannot be used for a permitted purpose, that the cost to conform the property for a permitted purpose is prohibitive, or that the property has no value for a permitted purpose.” Singer v. Philadelphia Zoning Bd. of Adjustment, 29 A.3d 144, 151 (Pa.Cmwlth. 2011). For a dimensional variance, the

standard of establishing unnecessary hardship is more relaxed. Under Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 721 A.2d 43 (Pa. 1998), “courts may consider multiple factors in determining whether the applicant established unnecessary hardship for a dimensional variance, including the cost of the strict compliance with the zoning ordinance, the economic hardship that will result from denial of a variance, and the characteristics and conditions of the surrounding neighborhood.” Mitchell, 838 A.2d at 828.¹¹ In Mitchell, the Court held this standard was met holding that “[w]here, as here, the evidence demonstrates that the only possible way of strictly complying with the parking requirement is through extensive reconstruction or demolition of the building at a very high cost rendering it economically infeasible, unnecessary hardship for justifying a dimensional variance is shown.” Mitchell, 838 A.2d at 829¹²; *accord* Saltzman v. Zoning Hearing Board of the Borough of Mount Penn, 350 A.3d 1087, *5 (Pa.Cmwlth. 2025) (Memorandum Opinion).

In either instance, whether as a use variance or dimensional variance, “[t]he burden on an applicant seeking a variance is a heavy one, and the reasons for granting the variance must be substantial, serious and compelling.” Singer, 29 A.3d at 149. The burden is a heavy one and “a variance should be granted sparingly and only under exceptional circumstances.” Mitchell, 838 A.2d at 828.

Although we find that the Board's decision has adequately addressed and explained why the Owner is not entitled to a special use exception under Sections 905 (Changes of nonconforming uses from one nonconforming use to another) and 502(B)(1)

(Uses permitted by special exception – multi-family dwellings) of the Zoning Ordinance, and why it cannot grant Owner's request to convert a non-residential building into residences under Section 719 (Conversion of nonresidential building into residences), since this requires conditional use approval by the Borough's Council, the Board's decision fails to make the necessary findings of fact and examination required under the Municipalities Planning Code to determine whether Owner has met the criteria entitling it to a variance from either the Zoning Ordinance's off-street parking requirements or the number of dwelling units permitted on its Property when a non-residential building is converted into residences under Section 719(B). It is the Board's duty to make essential findings of fact and credibility determinations sufficient to support the Board's Conclusions of Law that the proposed use and variances requested will have a negative impact on the health, safety, welfare and convenience of the public. See Board Decision, Conclusions of Law Nos. 10 and 20. Guy v. Zoning Hearing Board of the Borough of Sewickley, 2026 WL 923181 *4, ___ A.3d ___ (Pa.Cmwlt. 2026) (Memorandum Opinion) (citing Domeisen v. Zoning Hearing Bd., O'Hara Twp., 814 A.2d 851, 860 (Pa.Cmwlt. 2003)). This is particularly true where the variances requested are dimensional variances and the standard for determining a hardship relaxed.

The Board's findings do not address whether: (1) the Zoning Ordinance imposes unnecessary hardship resulting from physical conditions of the Property¹³ under Hertzberg's relaxed standard for establishing unnecessary hardship; (2) an off-street parking variance is necessary to enable a reasonable use of the Property, which has no

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off-street parking and where none can be provided absent removal of all or part of the building, particularly, where, as in this case, the Board appears to have concluded that the former commercial use was abandoned and hence, the Property may no longer be used for commercial purposes (Conclusion of Law No. 7), and Owner's intended use is for a permitted residential use; (3) the asserted hardship was or was not self-inflicted; and (4) the requested variance represents the minimum variance that will afford relief and the least possible modification of the regulation.

With respect to the fifth and final criteria for granting a variance – that the grant of a variance will not alter the essential character of the neighborhood, nor substantially or permanently impair appropriate use or development of the adjacent property, nor be detrimental to the public welfare – the Board made several findings of fact in which it summarized public comments made by four individuals during the hearing raising concerns as to parking and congestion on the streets and the availability of space for existing residents to park (Decision, Finding of Fact No. 14; N.T., 11/20/24, pp. 45-47, 49, 54-55, 57) and the placement of garbage put out for collection (Decision, Finding of Fact No. 15; N.T., 11/20/24, pp. 45, 48), yet failed to comment about Owner's evidence addressing these concerns and failed to make any relevant credibility determinations or any specific findings or conclusions that the addition of two residential apartments is going to alter the essential character of the neighborhood, as opposed to being compatible with adjoining properties and what is already there. Owner's property manager, a real estate broker and owner of a property management company, testified that less than fifty percent

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of the tenants she manages have a car; of those that have a car, it's a one-car household; many take public transportation; and these are going to be one-bedroom apartments. (N.T., 11/20/24, pp. 37, 59-60). On the issue of garbage disposal and collection, Owner committed to comply with any requirements of the Borough and do the same as the other residents and businesses in the area. (N.T., 11/20/24, pp. 23-24, 39, 42, 50-54, 60).

The Board's findings are conspicuously silent on where, for instance, do other residents and businesses in this R-2 Zoning District place their garbage. How do Owner's plans differ. What provisions do these residents and businesses have for parking. Or do most of these residents and businesses park on the streets and also have no area for off-street parking such that most, if not all, are also nonconforming as to this requirement of the Ordinance. Ultimately, though, the Board needs to address if the effect of the parking requirements and physical ability of the Property to comply is to deny use of the commercial space for business purposes or as living quarters, is this legally sustainable.

In sum, the Board failed to make sufficient findings of fact and conclusions of law as to Owner's requested variances or whether the size and configuration of the building now existing on the Property, which covers a hundred percent of the lot area, and was in existence since at least 1910 (see Sandborn Map, Applicant Exhibit No. A-5), is a legally nonconforming structure such that the Property enjoys nonconforming rights vis-à-vis the off-street parking requirements of the Zoning Ordinance.¹⁴ Guy, 2026 WL 923181 *4; Weston v. Hanover Township Zoning Hearing Board, 2026 WL 923098 *6, ___ A.3d ___ (Pa.Cmwlth. 2026); Nettleton v. Zoning Board of Adjustment of the City of Pittsburgh, 828

A.2d 1033, 1036-37 (Pa. 2003) (holding that the owners of structures which are legally nonconforming as to the dimensional requirements of a zoning ordinance later enacted have a vested property right in the continuance of such nonconformity; approving a vertical addition as of right to a pre-existing structure which did not comply with current setback requirements).

“[W]here a zoning hearing board has developed a full and adequate record, but has made inadequate factual findings, the trial court should remand the matter to the board to make the essential factual determinations.” Weston, 2026 WL 923098 *5. “It is the zoning hearing board’s function to weigh the evidence before it, and it is the sole judge of the credibility of witnesses and the weight afforded their testimony.” Weston, 2026 WL 923098 *6. This cannot be done by the court on appeal where no evidence has been taken by the court; to do so would usurp the fact-finding role of the zoning hearing board. Id. Moreover, in those instances where “a full and complete record of the proceedings before the local agency was not made, the court may... remand the proceedings to the agency for the purpose of making a full and complete record or for further disposition in accordance with the order of the court.” 2 Pa.C.S.A. §754(a). “This principle applies even when remand would be inconvenient or time-consuming.” Weston, 2026 WL 923098 *5.

The issue of whether Owner is entitled to the dimensional variances it requested is of particular significance here in the event Owner decides to seek a conditional use before Borough Council, since the exclusive jurisdiction for granting variances is with the

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Zoning Hearing Board, not the Borough Council. See 53 P.S. §10909.1(a)(5); Lansford Borough Zoning Ordinance, Section 1509(B)(1). In remanding this matter to the Zoning Hearing Board, whether additional testimony should be taken or permitted to supplement the record already made will be within the discretion of the Board.¹⁵

CONCLUSION

In accordance with the foregoing, we have determined that the Zoning Hearing Board properly denied Owner's application to convert the vacant commercial area into two residential apartments to the extent it sought a special exception pursuant to Section 905 of the Ordinance: conversion of one nonconforming use to another nonconforming use. In short, the multi-family dwelling sought – a six-dwelling unit building – is a permitted use, not a nonconforming one.

Owner's alternative reliance on Section 502(B)(1)'s allowance of multi-family dwellings in an R-2 Zoning District by special exception, in conjunction with the applicable change of use provision under Section 1109, while facially attractive, is overridden by Section 502(D), which because of its specific application to the conversion of a non-residential building into residences – the case before us – takes precedence. Section 502(D), similar to Section 502(B)(1), treats the conversion as a permitted use, specifically as a conditional use needing to comply with Section 719's (Conversion of nonresidential building into residences) standards, which places the matter before the governing body, Lansford Borough Council, not before the Zoning Hearing Board.

Perhaps, foreseeing the need for Council's approval as a conditional use, Owner

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applied for variances from Section 719(B) and (C)'s requirements that the number of dwelling units permitted in a conversion be limited to the square footage of the lot size divided by 2000 square feet and the requirement of two off-street parking spaces for each new dwelling unit requested, respectively. Since Owner seeks to convert the commercial space into two residential apartments, this would require four off-street parking spaces. Not only would this work an unnecessary hardship, owner contends, because the building on the Property covers the entire lot and no room exists for on-lot off-street parking, Owner also argues that the building is a pre-existing nonconforming structure whose status as such entitles it to the protections afforded lawful, nonconforming structures, including exemption from the Zoning Ordinance's dimensional requirements which are at odds with its protected status, and inclusive of "the right to expand such a nonconforming structure so long as no regulatory nonconformity is thereby created or increased." Nettleton, 828 A.2d at 1039 n.8. Because the Zoning Hearing Board alone has the sole authority to decide variance requests, and whether a structure is nonconforming and entitled to nonconforming dimensional protections, which issues must be resolved before the matter can be decided by Borough Council as a conditional use, and because the Zoning Hearing Board has failed to make critical and necessary findings and conclusions with respect to Owner's variance requests and whether the Property is entitled to constitutional protections against the Zoning Ordinance's off-street parking requirements as a lawful nonconforming structure, we have remanded the matter to the Zoning Hearing

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Board to decide these issues.

BY THE COURT:

/s/ President Judge Roger N. Nanovic
P.J.

¹ The current zoning ordinance for the Borough and the one applicable to this appeal is that enacted in 2003. Previous zoning ordinances were enacted by the Borough in 1986 and 1992. See Zoning Hearing Board's Brief lodged on June 17, 2025, pp. 8-9, n.6. References to section numbers in this Opinion, unless otherwise indicated, refer to sections of the Borough's Zoning Ordinance.

² In Smith v. Hanover Zoning Hearing Bd., 78 A.3d 1212 (Pa.Cmwlth. 2013), appeal denied, 89 A.3d 1286 (Pa. 2014), the applicant for permits to erect two billboards argued the zoning hearing board violated the Sunshine Act, 65 Pa.C.S.A. §§ 701-716, by issuing a written decision containing findings of fact and conclusions of law explaining the rationale for the vote taken at a public hearing denying the applications, at which time the reasons for the denial were not stated, contending the board must have held an unauthorized executive session after the vote such that under Section 713 of the Sunshine Act, 65 Pa.C.S.A. §713, the written decision should be voided resulting in a deemed approval under Section 908(9) of the Municipalities Planning Code, 53 P.S. §10908(9). The Court denied applicant's challenge concluding the formal action to be taken at a public meeting under the Sunshine Act is the actual vote on the decision, that it is the Municipalities Planning Code which requires the issuance of a written decision with findings of fact and conclusions based thereon together with the reasons therefore (53 P.S. §10908(9)), that there was no basis to conclude the board held an illegal executive session, and that there was no contradiction between the oral decision voted on by the board and the subsequent written decision. The Court distinguished the case of Washington Township v. Gillette, 1994 WL 902058 (C.P. Erie Co. 1994) which voided a zoning hearing board's written decisions because they were different from those orally made at the hearings. Owner has not challenged the Board's action in this regard and such error, if it exists, has been waived. Guy v. Zoning Hearing Board of the Borough of Sewickley, 2026 WL 923181 *3, ___ A.3d ___ (Pa.Cmwlth. 2026) (Non-Precedential Memorandum Opinion) (citing Harrisburg Gardens, Inc. v. Susquehanna Twp. Zoning Hr'g Bd., 981 A.2d 405, 415 (Pa.Cmwlth. 2009)).

³ The court's scope of review when no additional evidence is heard by the trial court, as was the case here, was set forth in Mitchell v. Zoning Hearing Bd. of the Borough of Mount Penn, 838 A.2d 819 (Pa.Cmwlth. 2003) as follows:

This Court's scope of review in a zoning case differs depending on whether the trial court took additional evidence. Where the trial court took no additional evidence on the merits of the zoning appeal, this Court reviews the decision of the zoning hearing board to determine whether the board committed an error of law or a manifest abuse of discretion. Valley View Civic Ass'n v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983); Mehring v. Zoning Hearing Board of Manchester Township, 762 A.2d 1137 (Pa.Cmwlth. 2000). Where the trial court took any additional evidence on the merits, however, it must determine the case *de novo*, making its own findings of fact based on the record made before the board as supplemented by the additional evidence; this Court must then determine on appeal whether the trial court, not the board, committed an error of law or an

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abuse of discretion. Section 1005-A of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, added by Section 101 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 11005-A; De Cray v. Zoning Hearing Board of Upper Saucon Township, 143 Pa.Cmwth. 469, 599 A.2d 286 (1991).

Id. at 825.

The function of the zoning hearing board is to weigh the evidence before it; it is the sole judge of the credibility of witnesses and the weight afforded their testimony. Weston v. Hanover Township Zoning Hearing Bd. and Hanover Township, 2026 WL 923098 *6, ___ A.3d ___ (Pa.Cmwth. 2026). In judging the credibility of witnesses where no evidence was taken by the trial court, the trial court exceeds its scope of review by usurping the fact-finding function of the Zoning Hearing Board. Id.

In a land use appeal, where the trial court does not take additional evidence, this Court's ... review is limited to determining whether the local [agency] committed an error of law or an abuse of discretion. ...The [agency] abuses its discretion when its findings of fact are not supported by substantial evidence." Residents Against Matrix v. Lower Makefield Twp., 845 A.2d 908, 910 (Pa.Cmwth. 2004) (cleaned up). "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Eureka Stone Quarry, Inc. v. Dep't of Env't Prot., 957 A.2d 337, 344 (Pa.Cmwth. 2008) (cleaned up).

Guy v. Zoning Hearing Board of the Borough of Sewickley, 2026 WL 923181 *1 n.3, ___ A.3d ___ (Pa.Cmwth. 2026) (Non-Precedential Memorandum Opinion).

⁴ For instance, what in fact is the nonconforming use. Is it the mixed use of the Property for both commercial and residential purposes or is it the commercial use alone. When did it begin, when did it become illegal, under what zoning ordinance, and what was the nature of the nonconformity. "The property owner has the burden to prove the existence of a nonconforming use, which requires conclusive proof by way of objective evidence of the precise extent, nature, time of creation, and continuation of the alleged nonconforming use." Barnabei v. Chadds Ford Twp. Zoning Hearing Bd., 118 A.3d 17, 23 (Pa.Cmwth. 2015) (citation and quotation marks omitted); Shyam Ventures, LLC v. Zoning Hearing Bd. of Borough of Castle Shannon, 313 A.3d 314, 320 (Pa.Cmwth. 2024) (quoting Barnabei), appeal denied, 327 A.3d 182 (Pa. 2024). "The manner of use and the dates of its existence are questions of fact on which a reviewing court defers to the factfinder; however, the legality of a use is a question of law over which our review is plenary." Hafner, 974 A.2d 1204, 1211 (Pa.Cmwth. 2009).

As to the existence of a nonconforming use, is the Zoning Officer's conclusion in his denial letter and testimony before the Board that the existing use of the Property for both commercial and residential purposes was an existing nonconforming use binding on the Board and unassailable as contended by Owner because not included as part of Owner's appeal to the Board. And, if Owner's original application presented to the Zoning Officer is treated as a request for a special exception first presented to the zoning officer in accordance with Section 1510(A)(1) of the Zoning Ordinance, was the Zoning Officer's denial really a "determination" within the meaning of the Municipalities Planning Code, 53 P.S. 10107(b) (Definition of "determination"), and hence appealable to the Zoning Hearing Board under 53 P.S. 10909.1(a)(3), or simply an advisory opinion non-binding on the Board or the Owner since, while the Zoning Hearing Board has appellate jurisdiction over an appeal from a "determination" of a zoning officer denying a permit application, it has original jurisdiction to hear applications for a special exception under Section 10909.1(a)(6). See *also* Section 1508(B) and (E) of the Zoning Ordinance captioned "Jurisdiction of Zoning Hearing Board." Section 1510(a)(1) provides that an application for a special exception use shall not be submitted to or considered by the Zoning Hearing Board until the applicant first submits an application for a zoning permit to the zoning officer for the zoning officer to determine whether the proposed use requires

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any variances from the Zoning Hearing Board in addition to securing a special exception approval. Similarly, with respect to variance applications, see Section 1509(A) of the Zoning Ordinance.

The denial of such application does not appear to be a “determination” as such term is defined in the Municipalities Planning Code: “final action by an officer, body or agency charged with the administration of any land use ordinance or application thereunder...” 53 P.S. §10107(b) (Definitions). See also 53 P.S. §10614 (“The zoning officer shall administer the zoning ordinance in accordance with its literal terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the zoning ordinance”). Compare Friends of Lackawanna v. Dunmore Borough Zoning Hearing Board, 227 A.3d 37, 45 (Pa.Cmwlth. 2020), appeal denied, 240 A.3d 874 (Pa. 2020), noting that a preliminary opinion creates no vested rights in the landowner and holding that “Section 909.1(a)(3) does not confer jurisdiction on a zoning hearing board to consider the merits of a preliminary opinion issued under Section 916.2 of the Municipalities Planning Code: [that] a preliminary opinion is not a “determination” for purposes of Section 909.1(a)(3).”

Finally, assuming a pre-existing nonconforming use was established by the Owner, was it abandoned under Section 908(B) of the Zoning Ordinance, as contended by the Board, which provides for the termination of a nonconforming use if it is discontinued for a continuous period of one year without documented intent of resuming operations. See Latrobe Speedway, Inc. v. Zoning Hearing Board of Unity Township, 720 A.2d 127, 132 (Pa. 1998) (holding that abandonment ordinances give rise to a rebuttable presumption of abandonment, which when rebutted, shifts the burden back to the party seeking to establish abandonment).

⁵ A dwelling unit is defined as “[o]ne or more rooms physically arranged so as to create an independent housekeeping establishment for occupancy by one family with separate bathroom, toilet and sanitary facilities and facilities for cooking and sleeping for exclusive use by the family residing therein.” Zoning Ordinance, Section 202 (definition of “dwelling unit”). This definition encompasses residential apartments. Additionally, a multi-family dwelling is defined as “[a] building containing three or more dwelling units entirely separated by vertical walls or horizontal floors, unpierced except by access to the outside or to a common cellar.” Zoning Ordinance, Section 202 (definition of “dwelling, multiple”).

⁶ The full quote in Siya discussing a special exception is as follows:

“Generally speaking, ‘[a] special exception is not an exception to a zoning ordinance, but rather a use which is expressly permitted, absent a showing of a detrimental effect on the community.’” Tower Access Grp., LLC v. S. Union Twp. Zoning Hearing Bd., 192 A.3d 291, 300 (Pa. Cmwlth. 2018) (quoting Manor Healthcare Corp. v. Lower Moreland Twp. Zoning Hearing Bd., 139 Pa.Cmwlth. 206, 590 A.2d 65, 70 (1991)). “The important characteristic of a special exception is that it is a conditionally permitted use, legislatively allowed if the standards are met.” Bray v. Zoning Bd. of Adjustment, 48 Pa.Cmwlth. 523, 410 A.2d 909, 911 (1980). As this Court has explained, “[a]n applicant for a special exception has both the duty of presenting evidence and the burden of persuading the [board] that his proposed use satisfies the objective requirements of the zoning ordinance for the grant of a special exception.” Berner v. Montour Twp. Zoning Hearing Bd., 176 A.3d 1058, 1069 (Pa.Cmwlth.), appeal granted in part on other grounds, 190 A.3d 593 (Pa. 2018) (citing Manor HealthCare). “Once the applicant meets his burden of proof and persuasion, a presumption arises that [the proposed use] is consistent with the health, safety and general welfare of the community.” *Id.* “The burden then normally shifts to the objectors to the application to present evidence and persuade the [board] that the proposed use will have a generally detrimental effect on health, safety, and welfare.” *Id.* “The evidence presented by objectors must show, to a high degree of probability, that the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community.” *Id.*

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In Berner, this Court discussed our seminal case of Bray, which set forth the presentation and persuasion obligations of the parties in the context of an application for a special exception. We stated:

In Bray, this Court outlined the rules regarding the “initial evidence presentation duty (duty) and persuasion burden (burden) in special exception cases” as follows:

Specific requirements, *e.g.*, categorical definition of the special exception as a use type or other matter, and objective standards governing such matter as a special exception and generally:

The applicant has both the duty and the burden.

General detrimental effect, *e.g.*, to the health, safety and welfare of the neighborhood:

Objectors have both the duty and the burden; the ordinance terms can place the burden on the applicant but cannot shift the duty.

General policy concern, *e.g.*, as to harmony with the spirit, intent or purpose of the ordinance:

Objectors have both the duty and the burden; the ordinance terms cannot place the burden on the applicant or shift the duty to the applicant.

Siya Real Estate LLC v. Allentown City Zoning Hearing Bd., 210 A.3d 1152, 1156-57 (Pa.Cmwth. 2019).

⁷ See *also* Section 1508(E) of the Zoning Ordinance placing exclusive jurisdiction to hear and render final adjudications with respect to applications for special exceptions with the Zoning Hearing Board.

⁸ The Board’s statement on pages 8 and 9 of its Brief lodged on June 17, 2025, that Owner has not challenged Nos. 20 and 21 of its Conclusions of Law as they relate to a variance appears to be misplaced. See Notice of Land Use Appeal, Part II: Basis for Relief, Paragraph 22(g), (h). See also Paragraph 21 of the Appeal as it relates to Owner’s claim of a constitutional right to continue a pre-existing nonconforming use. Therefore, we believe it appropriate to discuss these issues.

⁹ In Sheetz, Inc. v. Phoenixville Borough Council, 804 A.2d 113 (Pa.Cmwth. 2002), the Court specifically noted that because conditional uses and special exceptions are virtually identical, an application for a conditional use is analogous to a special exception and the burden of proof standards are the same for both. 804 A.2d at 116 n.5; accord Feldman v. Board of Supervisors of East Caln Township, 48 A.3d 543, 548 n.10 (Pa.Cmwth. 2012), appeal denied, 71 A.3d 245 (Pa. 2013). Both are permissive uses under the zoning ordinance; both condition approval on meeting specific objective criteria set forth in the ordinance as to such use; and both provide that in addition to meeting such objective criteria, before approval will be granted the use must comply with all other ordinance provisions applicable to uses of that type permitted in the particular zoning district where the requested special exception/conditional use is located.

¹⁰ Section 719(B) of the Zoning Ordinance entitled “Conversion of non-residential building into residences” limits the number of dwelling units in a multi-family building to one dwelling unit for each 2,000 square feet of lot area. The Board computed Owner’s lot size to be approximately 2,800 square feet which equates to permitting only one dwelling unit in the building. (Board Decision, Finding of Fact No. 25). According to the evidence presented at the hearing held on November 20, 2024, the first floor commercial space which Owner seeks to convert into two residential apartments is just under 1,500 square feet. (N.T., 11/20/24, p.50).

¹¹ While acknowledging that a lesser quantum of proof is required to establish unnecessary hardship for a dimensional variance, the Commonwealth Court has also emphasized the following qualification:

Ever since our Supreme Court decided Hertzberg, we have seen a pattern of cases arguing that a variance must be granted from a dimensional requirement that prevents or financially

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burdens a property owner's ability to employ his property exactly as he wishes, so long as the use itself is permitted. Hertzberg stands for nothing of the kind. Hertzberg articulated the principle that unreasonable economic burden may be considered in determining the presence of unnecessary hardship. It may also have somewhat relaxed the degree of hardship that will justify a dimensional variance. However, it did not alter the principle that a substantial burden must attend all dimensionally compliant uses of the property, not just the particular use the owner chooses. This well-established principle, unchanged by Hertzberg, bears emphasizing [.]

Yeager v. Zoning Hearing Board of the City of Allentown, 779 A.2d 595, 598 (Pa.Cmwlth. 2001) (emphasis in original) (quoted with approval in Singer, 29 A.3d at 149). See also Township of Northampton v. Zoning Hearing Bd. of Northampton Twp., 969 A.2d 24 (Pa.Cmwlth. 2009) (rejecting applicant's request for variance from ordinance's off-street parking requirements where no evidence of hardship presented even under relaxed Hertzberg standard and evidence revealed applicant could use property in a manner consistent with ordinance requirements). "The onus is thus on the applicant to firmly establish that a substantial burden... attends *all* dimensionally compliant uses of the property, not just the particular use that the applicant has chosen." Guy v. Zoning Hearing Board of the Borough of Sewickley, 2026 WL 923181 *3, ___ A.3d ___ (Pa.Cmwlth. 2026) (Memorandum Opinion) (citation and quotation marks omitted).

¹² In Mitchell, the Court detailed the evidence supporting this conclusion as follows:

The School District presented the following evidence to support the request for a variance. The subject property was occupied by the former high school for more than sixty years until it was abandoned in 1989. Due to the series of subsequent additions to the original building, the current building occupies almost the entire lot leaving no room for off-street parking. In addition, the subject lot is on a slope dropping approximately twenty feet across its length. Because of such topography and lack of available parking spaces on the lot, the only way to provide off-street parking is to demolish a portion of the building. Demolition of some part of the building, however, will present structural problems to the remaining building. Moreover, demolition of the portion of the building currently occupied by the gymnasium to provide thirty-two parking spaces would cost \$800,000, or about 15% of the total costs of renovating the subject property.

Mitchell v. Zoning Hearing Bd. of the Borough of Mount Penn, 838 A.2d 819, 829 (Pa.Cmwlth. 2003).

¹³ "A variance, whether labeled dimensional or use, is appropriate only where the *property*, not the person, is subject to hardship." Guy v. Zoning Hearing Board of the Borough of Sewickley, 2026 WL 923181 *3, ___ A.3d ___ (Pa.Cmwlth. 2026), (Memorandum Opinion) (citations and quotation marks omitted) (emphasis in original). To the extent the Zoning Hearing Board's finding that Owner "did not investigate the availability of any areas in the vicinity that could be utilized for parking," (Decision, Finding of Fact No. 28), has a bearing on whether a variance should be granted, this appears to be an improper consideration. See Grace Building Co., Inc. v. Hatfield Twp., 329 A.2d 925, 927 (Pa.Cmwlth. 1974).

¹⁴ Owner has argued, at least with respect to parking, that no variance is required since the business traffic generated from the previous use of the Property for commercial purposes and the associated need for customer parking clearly exceeded that for two residential apartments, and that the pre-existing nonconforming right to park on the streets in connection with the Property continued to exist and was not abandoned. In effect, Owner argues that the total impact upon the neighborhood and parking resulting from the residential conversion of the commercial space will be less than the total impact which existed prior to this change. The evidence presented does not appear to support this later argument since other than making a common sense argument that a commercial use would naturally be more intensive than a residential use, Owner presented no evidence as to the amount of customer traffic actually generated by the former commercial use, and how it was accommodated. An argument could also be made that because the prior nonconforming use had ended, any accessory nonconforming use with respect to parking also

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ended. In any event, the question of “whether a special exception [or conditional use] should be granted on the basis that a nonconforming use exists or the new use is [a] less intensive use is for a zoning board to decide, Section 912.1 of the MPC, not council.” Maple Street A.M.E. Zion Church v. City of Williamsport, 7 A.3d 319, 324-325 (Pa.Cmwlt. 2010). Here, the Board decided this issue against Owner with inadequate factual findings and without full consideration of the evidence and the applicable law. (Board Decision, Finding of Fact No. 30). It’s important to note as well that the question of whether a legally pre-existing *nonconforming use* is protected is related but not identical to whether the building as a *nonconforming structure* entitles the Owner to be relieved of the off-street parking requirements of the Ordinance for a permitted multi-family use discussed in the text.

¹⁵ The Board and parties are hereby reminded that it is not our intention to open up for re-litigation all those issues which were raised or could have been previously raised before the Board or this court, but only the limited issues of whether Owner has established entitlement to those variances requested related to conversion of the first floor commercial space to residential use and whether a lawful nonconforming right to be excused from the off-street parking requirements of the Ordinance runs with the Property. Relevant to this remand is the law of the case doctrine which “refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter.” Commonwealth v. Starr, 664 A.2d 1326, 1331 (Pa. 1995).