IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C&B Development, LLC, Appellant	:	
v.	:	No. 982 C.D. 2025
Maxatawny Township Zoning Hearing Board, Maxatawny Township Board of Supervisors, State System of Higher Education and Kutztown University, Steve D. Wilson, Nicholas Prikis, and Sophie Pittas	:	Argued: September 14, 2026

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE STACY WALLACE, Judge
HONORABLE STELLA M. TSAI, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: October 14, 2026

C&B Development, LLC (Landowner) appeals from the July 14, 2025 Order of the Court of Common Pleas of Berks County (trial court), which affirmed (1) the Maxatawny Township Zoning Hearing Board's (ZHB) determination that the proposed private road/access drive to Landowner's proposed warehouse facility is an impervious surface subject to the provisions of Section 593(c) of Maxatawny Township Zoning Ordinance Number 2022-08 (Zoning Ordinance Number 2022-08)[1] and (2) the

[1] Zoning Ordinance Number 2022-08 modified, revised and/or amended certain provisions of the Maxatawny Township Zoning Ordinance of 2012 (Zoning Ordinance of 2012), with the amendments taking effect on October 13, 2022. We reference each zoning ordinance separately where appropriate.

ZHB's denial of Landowner's alternative request for a dimensional variance. After careful review, we affirm.

I. Factual and Procedural Background

Landowner is the equitable owner of a 75.5-acre tract of land (Property) currently improved with a restaurant, mobile home park, and airport.[2] It has frontage only on Kutztown Road. The Property contains portions that are located in three different zoning districts: C-1 (Commercial District), L-I (Light Industrial District) and AP-1 (Agricultural Preservation District). The area surrounding the Property contains a mix of commercial and residential uses and the Kutztown University campus.

Landowner seeks to demolish all existing uses and buildings and construct a commercial building and a 709,000-square-foot warehouse facility on the L-I District portion of the Property. Warehouses are a permitted use in the L-I District subject to conditional use approval from the Maxatawny Township Board of Supervisors. The portion of the Property zoned L-I, where the proposed warehouse would be located, can only be accessed from the Property's sole frontage on Kutztown Road via a proposed private road (Road A) that would need to be constructed from Kutztown Road through the C-1 District.

As part of Landowner's construction planning process, it submitted a Conditional Use Plan to the Maxatawny Township Zoning Officer on July 28, 2023, and a Land Development Plan on August 14, 2023. Based on the positioning of the proposed warehouse and its proximity to residential structures, there was no possibility the proposed road, Road A (which connects the warehouse to Kutztown Road), could be located more than 500 feet from those residences.

[2] Landowner owns the Property by way of a purchase agreement dated August 23, 2022. Nicholas Prikis and Sophie Pittas (Prikis and Pittas) are the record owners.

Christopher Falenki, Township Engineer and Alternate Zoning Officer, submitted a review of the Conditional Use Application on August 14, 2023, raising numerous zoning concerns, including that Landowner's planned access to the warehouse did not comply with the setback for impervious surfaces required by Section 593(c) of Zoning Ordinance Number 2022-08. Specifically, Section 593(c), entitled "Warehouses, Wholesale and/or Distribution Facility," states:

> All principal **and accessory uses**, which shall include the proposed buildings **and all related impervious surfaces required for the warehouse**, wholesale and/or distribution facility shall comply with the following setback or separation requirements. (1) The uses shall be located **at least 500 feet** from a principal building occupied by an existing residential, institutional or educational use. . . .

Zoning Ordinance Number 2022-08, § 593(c); Supplemental Reproduced Record (S.R.R.) at 264b (emphasis added).

On August 16, 2023, Zoning Officer Christopher Paff and Jerome Skrincosky, a certified planning and zoning consultant retained by the Township, jointly wrote and sent a Review Letter to the Township Planning Commission, raising concerns regarding the proposed new Road A's noncompliance with Section 593(c) of Zoning Ordinance 2022-08, specifically noting, *inter alia*, that

> Road A is proposed as an improved private road extending from West Kutztown Road, which shall provide vehicular access to Lots 1 and 2. Road A is necessary for required access to the proposed Warehouse facility. Road A does not meet the 500-foot isolation distance from all residential uses. Further discussion on site accessibility issues shall be considered as part of this Conditional Use Application and/or the Preliminary Subdivision and Land Development Plan Application.

(Reproduced Record (R.R.) at 5a.)[3]

On August 31, 2023, Zoning Officer Paff sent Landowner a Zoning Determination Letter notifying it that the issue of Road A's compliance with Section 593(c) of Zoning Ordinance 2022-08 remained unresolved and that it was his determination that the proposed road was an impervious surface,[4] and thus not compliant with the setback requirements of Section 593(c), which requires all principal and accessory uses[5] of a warehouse/distribution center be at least 500 feet from any existing residential use. *Id.* at 13a. He advised Landowner that it would need to request and receive a zoning variance from the ZHB before continuing with the conditional use application. Zoning Officer Paff explained in his August 31, 2023 Zoning Determination Letter, that:

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[3] In what it describes as an "important contextual note," Landowner recounts allegations and arguments from the case docketed in the trial court at Civil Case No. 24-3541, which is an entirely separate lawsuit filed by Landowner against the Township claiming inverse/*de facto* condemnation and perceived conspiracies against its development plans. *See* Landowner's Brief at 7, n.8; 11, n.12; 19, n.14. The Reproduced Record also includes copies of discovery documents and depositions filed in that case (some under the wrong docket number). *See* R.R. at 88a-100a, 101a-34a (deposition transcript); 137a-54a (discovery dispute); 155a-58a; 173a; 179a-227a (deposition transcript); 228a-31a (discovery motion); 246a-372a; 373a-81a (discovery dispute); 394a (discovery order). The law is well settled that an appellate court may not consider documents that are not part of the certified record. *See Commonwealth v. Spotz*, 18 A.3d 244 (Pa. 2011). Accordingly, we will not consider any deposition transcripts, filings or factual allegations that are not part of the certified record in the underlying land use appeal. *In re Powell*, 260 A.3d 298, 310 (Pa. Cmwlth. 2021) (declining to consider facts which did not appear in the certified record).

[4] "Impervious surface" is defined as a "surface which prevents the percolation of water into the ground (*i.e.* roads, buildings, sidewalks, drives, loading areas, parking areas, stone and paved recreation courts)." Zoning Ordinance of 2012, § 202; S.R.R. at 265b.

[5] "Accessory use" is defined as "a use customarily incidental and subordinate to the principal use or building and located on the same lot as the principal use or building." Zoning Ordinance of 2012, § 202; S.R.R. at 270b.

> Both the Preliminary Plan and the [Conditional Use] Plan show property lines to suggest 3 lots. The unlabeled 3rd lot contains proposed new Road "A". Proposed new Road "A", whether part of proposed Lot 1 or a new stand-alone lot or proposed new right of way, is necessary and required to provide access to the new Lot 2. Proposed Road "A" is less than 500-feet from existing, residential uses, and as such, the proposed new road is NOT compliant with Section 593(c)(1) of [Zoning Ordinance] 2022-08.
>
> Road "A" is a proposed new impervious surface capable of extending vehicular access to the proposed warehouse use on proposed new Lot 2. As proposed, Road "A" requires Zoning Relief in the form of a variance from Section 593(c)(1) of [Zoning Ordinance] 2022-08.
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> * * *
>
> We are sending this Zoning determination letter so that you may have the opportunity to request to continue, to a later date, your scheduled Conditional Use Hearing while you apply for the necessary Zoning Relief to the [ZHB.][6]

Id. at 13a (emphasis in original).

On September 6, 2023, Landowner appealed to the ZHB, asking it to (1) overturn Zoning Officer Paff's determination that Road A is an "accessory use" to the warehouse use and that, therefore, the 500-foot setback required by Section 593(c) of Zoning Ordinance Number 2022-08 applies or, in the alternative, (2) grant a dimensional variance from the 500-foot-setback requirement.

The ZHB conducted public hearings regarding Landowner's application. Public hearings were held on October 24, 2023, November 20, 2023, and January 4, 2024. Zoning Officer Paff did not attend the hearings on advice of his attorney because the record owners of the Property, Prikis and Pittas, had filed a complaint in federal

[6] Section 901(b) of Zoning Ordinance of 2012 specifically provides that all required zoning relief must be obtained before a Conditional Use hearing can proceed.

court against him, the Township, the ZHB, an adjoining neighbor, and individual Township supervisors in connection with the warehouse project. (S.R.R. at 58b-59b.) Landowner called Christopher Falenki as an adverse witness in his capacity as Alternate Zoning Officer. At the end of the first hearing, Landowner's counsel requested and was given the opportunity to subpoena Zoning Officer Paff to compel his attendance at the next hearing. *Id.* at 83b-84b. At the beginning of the second hearing on November 20, 2023, Landowner announced that it no longer intended to call Zoning Officer Paff and expressly withdrew its intention to subpoena him to testify. *Id.* at 103b. Landowner presented its own engineer at the second hearing, who admitted that Road A supports the proposed "warehouse facility use" and that the only way one can reach the proposed warehouse is by way of the proposed Road A. *Id.* at 145b-46b.

On January 15, 2024, the ZHB issued a written decision sustaining Zoning Officer Paff's August 31, 2023 decision that Road A is an accessory use to the warehouse that does not meet the setback requirements of Section 593(c). The ZHB agreed with Zoning Officer Paff's interpretation of the Zoning Ordinance "given that Road A is clearly [an] impervious surface associated with the [w]arehouse, and is therefore subject to the provisions of [Section] 593[(c)]." (R.R. at 36a.) The ZHB also denied Landowner's request for a variance because the Property could be used for a multitude of permitted uses under the Zoning Ordinance that do not include Section 593(c)'s 500-foot buffer requirement. *Id.* at 37a. The ZHB further determined that the placement of Road A would negatively impact the surrounding community by placing hundreds of tractor trailers and other vehicles onto Kutztown Road and directly into an area that is largely residential in nature. *Id.*

Landowner appealed to the trial court, which did not receive any additional evidence. Landowner disputed, *inter alia*, the ZHB's determination that Landowner did not establish the existence of an unnecessary hardship, the ZHB's determination Landowner was not prevented from complying with the provisions of the Zoning Ordinance when the only access to the Property is from Kutztown Road, the ZHB's failure to interpret various ambiguities in the Zoning Ordinance in favor of Landowner, and the ZHB's failure to grant the requested variance.

On July 14, 2025, the trial court affirmed the ZHB's decision. Specifically, the trial court determined the ZHB's application of Section 593(c) was supported by substantial evidence. The trial court also determined that the ZHB did not manifestly abuse its discretion in its denial of Landowner's variance request, as Landowner failed to carry its burden in demonstrating unnecessary hardship on account of the Property.

On August 1, 2025, Landowner filed a notice of appeal to this Court, contesting the trial court's July 14, 2025 decision. On October 1, 2025, the trial court issued its opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a).

II. Issues

On appeal,[7] Landowner raises the following three issues: (1) whether the ZHB abused its discretion by affirming Zoning Officer Paff's determination that Road

[7] "Where a court of common pleas takes no additional evidence in reviewing a land use appeal determination by a zoning hearing board, this Court's review is limited to determining whether the local governing body that issued the challenged decision abused its discretion or committed an error of law. *Miravich v. Township of Exeter, Berks County*, 54 A.3d 106, 110 n.4 (Pa. Cmwlth. 2012); *see also Metal Green Inc, v. City of Philadelphia*, [] 266 A.3d 495, 513 ([Pa.] 2021)." *In re Appeal of City Turf Club Op Co.*, 308 A.3d 351, 357 (Pa. Cmwlth. 2024).

An abuse of discretion occurs when the fact finder 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. *Metal Green Inc.*, 266 A.3d at 513. Under this standard, a reviewing court

(Footnote continued on next page…)

A is an accessory use subject to Section 593(c) of Zoning Ordinance Number 2022-08 without taking his testimony; (2) whether the ZHB failed to interpret the Zoning Ordinance in favor of Landowner pursuant to Section 603.1 of the Pennsylvania Municipalies Planning Code (MPC),[8] 53 P.S. § 10603.1; and (3) whether the ZHB committed an error of law by applying an incorrect legal standard to Landowner's request for a dimensional variance.

III. Discussion

A. Zoning Officer Paff's Absence from the Hearings

Landowner argues that the ZHB abused its discretion when it affirmed Zoning Officer Paff's determination that Road A is an accessory use subject to Section 593(c) without hearing his testimony. It maintains that without the Zoning Officer's explication of the factors considered in his statutory and factual analysis contained in the August 31, 2023 Zoning Determination Letter, the ZHB could not have "lawfully" agreed with his conclusion. (Landowner's Br. at 20-21.) Landowner also contends that the ZHB was required to draw an "adverse inference" from Zoning Officer Paff's failure to testify and conclude that whatever testimony he would have given would have been unfavorable to the Township. Finally, alluding to the conspiracy theory raised in its separate and still pending inverse condemnation case, Landowner argues that the ZHB erred in rendering its decision without hearing from Zoning Officer Paff

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may not disturb the factual findings of a zoning hearing board if the record indicates those findings are supported by substantial evidence. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *In re Rural Route Neighbors*, 960 A.2d 856, 860 n.4 (Pa. Cmwlth. 2008). Further, a zoning hearing board's function is to weigh evidence, and it is the sole judge of the credibility and weight of the witnesses' testimony. *RDM Group v. Pittston Township Zoning Hearing Board*, 311 A.3d 1216, 1224 (Pa. Cmwlth. 2024).

[8] Act of July 31, 1968, P.L. 805, *as amended*, added by the Act of December 21, 1988, P.L. 1329.

as to his "inexplicable change in position" from his statement in the August 16, 2023 Review Letter that "[f]urther discussion on site accessibility issues shall be considered" to his conclusion in his August 31, 2023 Zoning Determination Letter that Road A constitutes an "accessory use" to the warehouse. *Id.* at 17-18.

We disagree that the absence of Zoning Officer Paff from the ZHB hearings is grounds for reversal.

Zoning hearing boards hold independent and final authority to interpret and apply zoning ordinances. The MPC grants the zoning hearing board jurisdiction to hear and render final adjudications on matters including appeals from zoning officers' permit actions, validity challenges, and variance and special exception applications. 53 P.S. § 10909.1.[9] Because the zoning hearing board itself holds this interpretive authority and expertise, it does not need the zoning officer's testimony as a prerequisite to rendering an interpretation.

Here, testimony from Zoning Officer Paff as to his interpretation of the setback requirement, although perhaps informative, was not essential to the ZHB's ability to independently interpret and apply the Zoning Ordinance and determine ultimately whether Road A was an accessory use to the warehouse subject to the setback requirements for impervious surfaces in Section 593(c). Landowner's engineer conceded before the ZHB that Road A was an impervious surface and that without it there can be no warehouse on the Property. He also opined there was no way to construct a roadway across the Property without passing within the prohibited distance from existing residences. (S.R.R. at 160b.) The ZHB also heard the testimony of Christopher Falenki, the Alternate Zoning Officer and Township Engineer, who authenticated the Township's exhibits demonstrating that several hundred feet of

[9] Added by the Act of Dec. 21, 1988, P.L. 1329.

Landowner's proposed road violated Section 593(c)'s setback rule. (R.R. at 236a.) It was for the ZHB to hear this evidence and decide for itself the question involving the interpretation of Section 593(c). Zoning Officer Paff's absence did not impede that undertaking in any way.

Next, to the extent that Landowner suggests it was the ZHB's obligation to secure Zoning Officer Paff's appearance at the hearing, we reject the argument. If Landowner believed Zoning Officer Paff's testimony was essential for the ZHB's understanding of Landowner's presentation of evidence, then Landowner could have compelled his attendance by subpoena pursuant to Section 908(4) of the MPC, 53 P.S. § 10908(4). Section 908(4) of the MPC grants the zoning hearing board chairman "the power to . . . issue subpoenas to compel the attendance of witnesses and the production of relevant documents and papers, including witnesses and documents requested by the parties." However, this provision empowers parties to request subpoenas—it does not impose an obligation on the zoning hearing board to affirmatively secure evidence on behalf of an applicant.

In fact, at the end of the first hearing, the ZHB gave Landowner the opportunity to subpoena Zoning Officer Paff to compel his attendance at the next hearing. However, at the beginning of the second hearing, Landowner announced that it no longer intended to call him and expressly withdrew its intention to subpoena him to testify. If Landowner's case might have been aided by the testimony of Zoning Office Paff, the clear opportunity to call him as of cross-examination was available. Having failed to avail itself of that opportunity, it cannot now be heard to claim prejudice from his absence.

Additionally, the trial court did not err in declining to draw an adverse inference based on Zoning Officer Paff's absence from the hearing. An adverse

inference may be drawn when a potential witness is available only to one of the parties and the witness has special information material to the issue. *Commonwealth v. Moore*, 309 A.2d 569, 570 (Pa. 1973). In such an instance, the fact finder may infer that the testimony of the witness would have been unfavorable. *Id.* However, an adverse inference will not aid a party with the burden of proof when that party has failed to satisfy their burden. *Fitzpatrick v. Philadelphia Newspapers, Inc.*, 567 A.2d 684, 688 (Pa. Super. 1989).[10] Here, Landowner could have subpoenaed Zoning Officer Paff or arranged with the Township's attorney to have him present at the hearing, but it did not. Consequently, the trial court did not err in declining to draw an adverse inference.

Accordingly, Landowner's first issue concerning Zoning Officer Paff's absence from the hearing merits no relief.

B. Conflict Between Sections 407.1(c) and 593(c)

Next, Landowner argues that a "conflict" exists between "Section 407.1(c)[11] **of Zoning Ordinance of 2012**, which it contends permits warehouses "by right" in the L-I zoning district, and Section 593(c) **of Zoning Ordinance Number 2022-08**, which requires that all "related impervious surfaces required for the warehouse" be located at least 500 feet from residential, institutional, and educational buildings. It argues that "these two provisions of the Township's Zoning Ordinance, when read together, prohibit the [] Property owner from employing the [] Property **for a permitted use** when any 'related impervious surfaces required for the warehouse' [are] located within 500 feet of a dwelling." (Landowner's Br. at 21-22) (emphasis

[10] While Superior Court decisions are not controlling in this Court, we may cite them for their persuasive value. *Department of Environmental Protection v. Service Station Co. Inc.*, 357 A.3d 206, 210 n.1 (Pa. Cmwlth. 2025).

[11] Throughout its Brief, Landowner mistakenly cites to Section 407.1(b), which pertains to "Research Establishments subject to Section 567(b) of [the] Ordinance."

added). It maintains that since these two provisions conflict, when the ZHB was faced with the question of whether Road A was a "related impervious surface[] required for the warehouse," it should have interpreted that language "in favor of the property owner and against any implied extension of the restriction." *Id.* That is, the ZHB should have found Road A was not a "related impervious surface required for the warehouse." We disagree.

At the outset, we note in making this argument, Landowner relies on an outdated provision of the Zoning Ordinance of 2012, which designated "Wholesaling, Warehousing, and Distribution" as a "permitted principal use." *See* Zoning Ordinance of 2012, *former* § 407.1(c). On October 8, 2022, the Township Supervisors amended this provision by changing the designation of "Warehouses, Wholesale and/or Distribution Facilities" from a "permitted principal use" to "a use permitted by **conditional use** within the L-I zoning district, subject to the provisions specified under Section 593 of the Zoning Ordinance." *See* Zoning Ordinance Number 2022-08, § 407.4(nn) (emphasis added). The October 8, 2022 amendments became effective on October 13, 2022. Landowner submitted its conditional use plan on July 28, 2023, which was after the effective date of the amendments. In fact, Landowner's expert Steve Walsh confirmed that Landowner intended to proceed under the **new** Zoning Ordinances enacted in 2022, and that this triggered the conditional use hearing. (S.R.R. at 156b.) Therefore, Landowner's argument that it has been improperly deprived of a use permitted **by right** is incorrect because its intended use of the Property as a warehouse is not in fact permitted as of right.

With that initial matter corrected, the issue then is whether irreconcilable differences exist between Sections 407.4(nn) and 593(c) of Zoning Ordinance Number 2022-08. A conflict between statutes or portions of statutes exists only where there are

irreconcilable differences. *In re Borough of Downingtown*, 161 A.3d 844 (Pa. 2017). An irreconcilable difference arises when it is not possible to harmonize the wording of both statutes. *See County of Fulton v. Secretary of the Commonwealth*, 330 A.2d 481, 508-09 (Pa. Cmwlth. 2024).

Section 603.1 of the MPC entitled "Interpretation of ordinance provisions" provides:

> In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, **where doubt exists as to the intended meaning** of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.

53 P.S. § 10603.1 (emphasis added). By its clear language, a zoning hearing board should employ Section 603.1 of the MPC whenever it is called upon to interpret the language of a zoning ordinance and doubt exists as to the intended meaning of that language.

Section 407.4(nn) of Zoning Ordinance Number 2022-08 explains what are considered uses permitted by conditional use approval in the L-I zoning district. Specifically, it provides that "the following uses permitted by conditional use within the L-I zoning district" include "Warehouse, wholesale and/or distribution facility, **subject to Section 593 of the Zoning Ordinance**." Zoning Ordinance Number 2022-08, § 407.4(nn) (emphasis added). In turn, Section 593(c) of Zoning Ordinance Number 2022-08 relates to the structures themselves and related setback requirements. The clear import of these two provisions is that in the Township, construction of a warehouse requires a conditional use permit that sets forth a plan for development devoid of any impervious surfaces (roads) within 500 feet of any residential or educational buildings. They clearly intend to direct warehouse uses to other parts of

the Township's other industrial zones where there is no adverse impact on residential properties or college students living nearby.

It is beyond cavil that a use permitted by conditional use does not exempt a property owner from complying with the setback requirements of a zoning ordinance. Section 603(b) of the MPC authorizes municipalities to enact zoning ordinances that regulate dimensional standards such as setbacks as a valid exercise of the zoning power. 53 P.S. § 10603(b). An applicant seeking conditional use approval must prove compliance with both the use-specific and general conditional use standards and criteria explicitly set forth in the applicable zoning ordinance. *In re AMA/American Marketing Association, Inc.*, 142 A.3d 923, 932 (Pa. Cmwlth. 2016); *In re Thompson*, 896 A.2d 659 (Pa. Cmwlth. 2006).

Here, the Zoning Ordinance permits a warehouse in the L-I zoning district **subject to** the setback requirements stated in Section 593(c) of the Zoning Ordinance. The evidence before the ZHB demonstrated that Road A plainly encroached the required setbacks. The fact that, due to the nature of the surrounding properties, Landowner cannot physically place a warehouse on this particular lot that meets the restrictive setbacks in Section 593(c) does not create an "internal conflict" requiring interpretation under Section 10603.1, which required the ZHB to find in Landowner's favor that Road A is not an impervious surface.

Expanding on its argument, Landowner next argues that the ZHB should have interpreted Section 593(c) in its favor because of the sweeping implications of the determination that Road A is subject to Section 593(c)'s setback requirements. According to Landowner,

> [t]he Township zoned an inaccessible portion of the [] Property L-I without allowing any direct access to the cloistered L-I zoned land from Kutztown Road, and the ZHB

> adopted the Zoning Officer's interpretation of Section 593(c) in such a way that any road from the L-I zoned land through the C-l zoned land is "accessory" to the proposed L-I use. Appellees thereby leave [Landowner] with no use as of right for the L-I zoned portion of the [] Property.
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> ****
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> In point of fact, the proposed Road A is required for any use of the L-I zoned portion of the [] Property, thus it is not singularly "required for the warehouse." The ZHB's reading of Section 593(c) impermissibly restricts the use of the entire [] Property by implication[.]

(Landowner's Br. at 26-27.)

We find no merit to this argument. First, neither Zoning Officer Paff nor the ZHB determined that Road A was an accessory use to **any and all** potential permitted and conditional uses of the L-I zoned portion of the Property. Rather, the determination that Road A was an accessory use was limited to Landowner's proposed **warehouse use**. To argue at this juncture that this determination will necessarily impact all of Landowner's future development efforts is speculative. As the trial court aptly noted:

> [Landowner's] plan did not include any other proposed uses for the Property aside from the warehouse/distribution facility. No additional uses were included in the plan or in the testimony before the ZHB, nor were any additional credible commercial uses presented to the [t]rial [c]ourt during argument. The [t]rial [c]ourt may not conjure some other potential use when evaluating the application of the Zoning Ordinance to the specific proposed use presented by [Landowner's] application, despite its long[-]term vision for the Property.

(Trial ct. op., 10/5/2024, at 7.)

Moreover, Landowner points to no testimony of any land planner or expert that established that the Property could **not** be used for numerous **other** industrial uses

where these setback requirements were not required. On that point, the trial court observed that "[w]arehouses are but one of [] permitted use[s]" in the L-I zoning district by the Township's zoning regulations, and "one of the few permitted uses subject to the 500-foot setback provision. Most of the other permitted uses would have 200-foot setback requirements associated with the access road." (Trial ct. op., 10/5/24, at 9-10) (citation and footnote omitted). The trial court was not incorrect. Uses permitted by right in the L-I zoning district include:

> light manufacturing of beverages, confections, creams, all food products, packaging, packing, ceramics, clothing, plastics, electrical goods, furniture, hardware, tools, and patterns, scientific instruments, toys, cosmetics, drugs, and other products assembled or fabricated from previously prepared metallic and nonmetallic materials, **provided all activity is carried on in an enclosed building not exceeding 25,000 square feet of gross floor area**, **and subject to Section 565 of this Ordinance.**

Zoning Ordinance Number 2022-08, § 407(d) (emphasis added). Section 565 (Industrial Activities and/or Manufacturing Uses), in turn, sets forth several requirements pertaining to environmental performance standards for that use, including traffic impact studies, idling trucks, berms, storage of parts and equipment, noise and vibration controls, and hazardous waste disposal. Relevant here, Section 565(c) requires that all principal and accessory uses containing **more than 100,000 square feet of gross floor area** shall comply with the following requirements:

> (c) Industrial activities and/or manufacturing uses containing more than 100,000 square feet of gross floor area shall comply with the following requirements:
>
> (1) All principal and accessory uses, which shall include the proposed buildings and all related impervious surfaces required for the industrial activities and/or manufacturing

use shall comply with the following setback or separation requirements:

(i) The uses shall be located at least 500 feet from a principal building occupied by an existing residential, institutional or educational use.

(ii) The uses shall be located at least 200 feet from a designated residential zoning district[.]

Zoning Ordinance Number 2022-08, § 565(c). Thus, although Section 565(c) contains a similar 500-foot setback for accessory uses/impervious surfaces, that particular setback requirement does not apply to uses permitted by right **in the L-I zoning district** because those uses by definition are limited to **no more than 25,000 square feet** of gross floor area. Therefore, Landowner's argument that the ZHB's interpretation of Section 593(c) leaves it with no use as of right for the L-I zoned portion of the Property is untenable.[12]

C. Legal standard applied to Landowner's request for a dimensional variance

In its final issue, Landowner argues that the ZHB erred and abused its discretion by denying its alternative request for a dimensional variance. It contends that the ZHB required it to establish "no possible uses" for the Property in the absence of a variance. (Landowner's Br. at 30.) It claims that the trial court errantly affirmed this decision.

[12] To the extent Landowner contends that the Zoning Ordinance effectively excludes every plausible proposed use of the L-I portion of the Property, the MPC provides the exclusive procedural vehicle for challenging a zoning ordinance on such substantive grounds. *See* 53 P.S. § 10609.1, added by the Act of June 1, 1972, P.L. 333. As the trial court noted in its July 14, 2025 order, "[Landowner] does not challenge the validity of the Zoning Ordinance itself by procedure, nor does [Landowner] challenge the setback requirements as unlawful or patently egregious." (Trial ct. op., 10/1/2025, at 7.) Therefore, it is improper for Landowner to attempt to raise the issue for the first time in this appeal.

The Zoning Ordinance of 2012 mandates that the ZHB may not grant an applicant's request for a variance unless it finds that the applicant has proven the following:

> (a) That there are unique physical circumstances or conditions including irregularity, narrowness, or shallowness of lot size, of shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions, and not circumstances or conditions generally created by the provisions of the Zoning Ordinance in the neighborhood or district in which the property is located;
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> (b) That because of such physical circumstances or conditions, **there is no possibility that the property can be developed in strict conformity with the provisions of the Zoning Ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of such land**, structure, or building;
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> (c) That such unnecessary hardship has not been created by the appellant, subsequent to the adoption of this Ordinance, whether in violation of the provisions hereof or not, and that such circumstances or conditions are such that strict application of the provisions of this Ordinance would deprive the applicant of the reasonable use of such land, structure, or building;
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> (d) That for reasons fully set forth in the findings of the [ZHB], the granting of the variance is necessary for the reasonable use of land or buildings and that the variance as granted by the [ZHB] is the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue;
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> (e) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair

> the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

Zoning Ordinance of 2012, § 803.4 (emphasis added).[13]

"When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations." *Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh*, 721 A.2d 43, 47 (Pa. 1998). Accordingly, "the grant of a dimensional variance is of lesser moment than the grant of a use variance," and, therefore, "the quantum of proof required to establish unnecessary hardship is indeed lesser when a dimensional variance, as opposed to a use variance, is sought." *Id.* at 47-48.

However, this does not mean that "dimensional requirements . . . [are] 'free-fire zones' for which variances could be granted when the party seeking the variance merely articulated a reason that it would be financially 'hurt' if it could not do what it wanted to do with the property[.]" *Society Created to Reduce Urban Blight v. Zoning Board of Adjustment of City of Philadelphia*, 771 A.2d 874, 877 (Pa. Cmwlth. 2001). "Although a property owner is not required to show that his or her property is valueless unless a variance is granted, mere economic hardship will not[, in and] of itself[,] justify a grant of a variance." *Marshall v. City of Philadelphia*, 97 A.3d 323, 330 (Pa. 2014) (some punctuation omitted). Nor are "personal . . . considerations . . . sufficient grounds upon which to base the grant of a variance." *Borough of Latrobe v. Sweeney*, 331 A.2d 925, 927 (Pa. Cmwlth. 1975). "A variance, whether labeled dimensional or use, is appropriate 'only where the **property**, not the person, is subject to hardship.'" *Yeager v. Zoning Hearing Board of City of Allentown*, 779 A.2d 595,

[13] The Zoning Ordinance's standards for a variance are consistent with Section 910.2 of the MPC, 53 P.S. § 10910.2.

598 (Pa. Cmwlth. 2001) (quoting *Szmigiel v. Kranker*, 298 A.2d 629, 631 (Pa. Cmwlth. 1972)) (emphasis in original). The onus is thus on the applicant to firmly establish that "a substantial burden . . . attend[s] **all** dimensionally compliant uses of the property, not just the particular use [that the applicant has chosen]." *Id.* (emphasis in original). Accordingly, our appellate courts have "consistently reject[ed] requests for dimensional variances where proof of hardship is lacking. Where no hardship is shown, or where the asserted hardship amounts to a landowner's desire to [develop a property as it sees fit], the unnecessary hardship criterion required to obtain a variance is not satisfied[.]" *Society Hill Civic Association v. Philadelphia Zoning Board of Adjustment*, 42 A.3d 1178, 1187 (Pa. Cmwlth. 2012).

Here, the ZHB found the following:

> 18. The granting of the requested variance is not necessary for the reasonable use of the [] Property. **The [] Property may be used for a multitude of permitted uses under the Zoning Ordinance that do not include the 500' buffer requirement contained in §593(c)(l).**
>
> 19. Although any development on the [] Property would likely need to access the [] Property from Kutztown Road, as previously stated, **most of the permitted uses within the applicable zoning districts do not have the 500' buffer requirement provided for in §593(c)(l) and [Landowner] likely would not require relief before the [ZHB].**
>
> 20. Accordingly, **the grant of the variance is not necessary for the reasonable use of the land or buildings on the [] Property.**
>
> 21. The [ZHB] specifically finds that the sole purpose of the 500' buffer requirement contained within §593(c)(l) is to protect the residents of the Township from the negative impacts associated with warehouse development.

> 22. The Warehouse and specifically the location of Road A, will place hundreds of tractor trailers and other vehicles onto Kutztown Road and directly into an area that is largely residential in nature.
>
> 23. Kutztown Road is heavily traversed by the residents in the surrounding community traveling to and from their homes as well as Kutztown University Students traveling and walking to and from Campus. There have been a number of accidents on Kutztown Road in the general area in the past involving Kutztown University students who were struck by passing vehicles.
>
> 24. The placement of Road A will make the Kutztown Road and the surrounding community less safe and will negatively impact the surrounding residents within the community.
>
> 25. Accordingly, the requested variance would alter the essential character of the neighborhood or district in which the [] Property is located, and will substantially or permanently impair the appropriate use or development of adjacent property, and be detrimental to public welfare.

(ZHB Findings of Fact, Conclusions of Law and Order, 1/15/2024, at 4) (emphasis added). Based on these findings, the ZHB concluded that

> the [] Property, and the uses of the zoning districts that the [] Property are within, would allow for a number of permitted uses that would not require the 500' buffer area provided for in §593(c)(l). See §406 and §407 of the Ordinance. Moreover, there is presently a functioning diner located on a portion of the [] Property which has been so located for a number of years. Accordingly, [Landowner] has not met its burden of showing that the [] Property is deprived of the reasonable use thereof if the variance were not granted.

Id. at 7-8.

In denying Landowner's land use appeal, the trial court found insufficient grounds to disturb the ZHB's decision. In its Pa.R.A.P. 1925(a) opinion, the trial court

upheld the ZHB's conclusion that Landowner failed to establish unnecessary hardship, noting that "there are upwards of 25 discrete uses permitted in L[-]I District by the Township's zoning regulations." (Trial ct. op., 10/5/2024, at 9.) We agree with the trial court that the ZHB did not err in denying the dimensional variance.

First, the ZHB did not, as Landowner claims, require Landowner to establish "no possible uses" for the Property absent a variance. Rather, tracking practically verbatim the Zoning Ordinance's required elements for a variance, the ZHB found that Landowner failed to meet its burden of showing that **there is no possibility that the Property can be developed in strict conformity with the provisions of the Zoning Ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of such land**, because Landowner is still able to develop the L-I lot in **multiple** other ways which do not require a larger setback area. In fact, Landowner admits in its brief on appeal it is entirely feasible to use the L-I zoned lot for other uses besides a warehouse. (Landowner's Brief, at 25.) Landowner's "hardship" (inability to build a warehouse and Road A within the Zoning Ordinance's setback requirements) is, therefore, self-imposed, and not a function **of the Property**, as it desires to use the Property as it wishes rather than in conformity with the applicable ordinances. As the ZHB determined, and the trial court affirmed, the zoning district that the Property is within allows for a number of permitted uses that do not require the 500-foot buffer area provided for in Section 593(c). Landowner presented no evidence before the ZHB that the hardship it asserts is a function of the Property, as opposed to its own self-interests. Therefore, the ZHB did not err when it determined that Landowner failed to prove the unnecessary hardship required for dimensional variance relief.

Landowner also disputes the ZHB's analysis of whether granting the variance will alter the character of the neighborhood or district, impair the use or development of adjacent property, or be detrimental to public welfare. It argues that the ZHB failed to recognize the "mandatory inference" that a permitted use "would not have an adverse impact on the public interests in normal circumstances." (Landowner's Br. at 33.) As explained above, Landowner is incorrect in asserting that a warehouse is a permitted use **by right** in the L-I zoning district. According to the 2022 amendments, warehousing is a permitted use pursuant only to a **conditional use application**, which Landowner submitted in July 2023. Moreover, Landowner has cited no authority that requires a zoning hearing board to apply any such "mandatory" inference. Simply because a use may be permitted in a zoning district does not alleviate a party from its burden of showing that the variance will not alter the character of the neighborhood or district, impair the use or development of adjacent property, or be detrimental to public welfare. *Nowicki v. Zoning Hearing Board of Borough of Monaca*, 91 A.3d 287, 292 (Pa. Cmwlth. 2014) ("Whether an applicant is seeking a use or a dimensional variance, the applicant must, at a minimum, demonstrate that an unnecessary hardship will result if a variance is denied and that the proposed use will not be contrary to the public interest."). As Landowner was not entitled to this inference, nor has it presented any citations to the record demonstrating it presented the appropriate evidence to justify the variance, Landowner's argument that the ZHB and trial court erred in their determinations must fail.

IV. Conclusion

For the forgoing reasons the order of the trial court is affirmed.

_____

PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C&B Development, LLC, Appellant	:	
v.	:	No. 982 C.D. 2025
Maxatawny Township Zoning Hearing Board, Maxatawny Township Board of Supervisors, State System of Higher Education and Kutztown University, Steve D. Wilson, Nicholas Prikis, and Sophie Pittas	:	

ORDER

AND NOW, this 14th day of October, 2026, the July 14, 2025 Order of the Court of Common Pleas of Berks County is hereby AFFIRMED.

_____
PATRICIA A. McCULLOUGH, Judge