WESTTOWN TOWNSHIP
PLANNING COMMISSION MEETING AGENDA
Wednesday, March 20, 2024 – 7:00 pm

Stokes Assembly Hall – Township Administration Building
1039 Wilmington Pike, West Chester, PA

For general inquiries or questions about any of the items on this agenda, please contact the Township office either by phone (610) 692-1930 or via e-mail at administration@westtown.org.

Call to Order and Pledge of Allegiance

Adoption of Agenda

Approval of Minutes
Planning Commission Meeting March 6, 2024

Announcements

Public Comment – Non-Agenda Items

New Business

1. **Chester County Planning Commission – Inventory of Open Space**
   The Chester County Planning Commission prepared a summary of each municipality's open space programs, including existing parks and open space land, as well as the policies, plans and programs each municipality has in place to further their preservation and park/trail development efforts. The report for Westtown is enclosed for discussion.

2. **Recent Zoning/Land Development Court Cases**
   Overview of the most recent zoning and land development cases handed down by Pennsylvania Supreme Court and Pennsylvania Commonwealth Court and their potential impacts on Westtown.

Old Business

1. **ZHB Application – 1115 S Concord Road**
   The applicant, David Brown, owner and resident of 1115 S Concord Road, has submitted a ZHB application to request special exception for construction of an accessory dwelling unit and a variance to encroach 10 feet into the mandated side yard setback. Section 170-1603 of the Township Zoning Code permits creation of accessory dwelling units. The ZHB hearing date is March 28, 2024.

Public Comment

Reports

1. Board of Supervisors Meeting March 18, 2024 – Kevin Flynn/Brian Knaub

Adjournment

Next PC Meeting:

- **April 3, 2024, 7:00 PM**

PC Representative at next Board of Supervisors Meeting:

- **Monday April 1, 2024, 7:30 PM** – Tom Sennett/Jim Lees

WESTTOWN TOWNSHIP PLANNING COMMISSION
MEETING MINUTES

Stokes Assembly Hall, 1039 Wilmington Pike
Wednesday, March 7, 2024 – 7:00 PM

Present

Commissioners – Russ Hatton (RH), Jack Embick (JE), Jim Lees (JL), Tom Sennett (TS) and Joseph Frisco (JF) were present. Brian Knaub (BK) and Kevin Flynn (KF) were absent. Also present was Director of Planning & Zoning Mila Carter.

Call to Order and Pledge of Allegiance

Mr. Embick called the meeting to order at 7:03 PM.

Adoption of Agenda (TS/JL) 5-0

Mr. Sennett made a motion to adopt the agenda. Mr. Lees seconded. Mr. Hatton suggested to change the order of items under New Business and add the BOS report for the March 4 meeting. All were in favor of the motion as amended.

Approval of Minutes (RH/JL) 5-0

Mr. Hatton made a motion to adopt the meeting minutes from February 21, 2024. Mr. Lees seconded. All were in favor of the motion.

Announcements

1. Ms. Carter announced that the Zoning Hearing Board (ZHB) request for 1001 S. Walnut Street for special exception to permit major home occupation for a deck building business has been granted with conditions.
2. Ms. Carter further announced that the ZHB request for 109 Piper Lane for a variance to permit proposed swimming pool to encroach 9 feet into the mandated setback has been granted. Mr. Embick asked whether the findings of fact and order has been provided. Ms. Carter explained that the approval was granted at the hearing and that the ZHB solicitor is working on drafting a written decision.

Public Comment – Non Agenda Items

None

New Business

1. **Ordinance Amendments – Flexible Development Procedure**

   Mr. Embick directed the Commission's attention to the draft document of the proposed amendments that were discussed in 2021, and wanted the Commission's feedback on whether they are still relevant. He asked Ms. Carter to provide some background. Ms. Carter pointed out that majority of present members were involved in drafting these amendments. She summarized that the changes to the flexible development procedure were proposed to address several issues raised during the land development proposal for the Crebilly Farm. The Commission and Township staff has worked with John Snook, Township consultant, on an effort to provide more clarity in the provisions, including revising and adding definitions pertaining to scenic views and historic resources, and other relevant requirements.

   Mr. Embick added that one of the central elements of the flexible development procedure is to allow additional density for units to be yielded on a particular property where these requirements apply in return for preservation of additional open space. He raised a question whether these provisions should remain or be removed from the Code. Mr. Sennett asked

whether there is a subdivision that could be considered a success that was built using flexible development procedure. Ms. Carter believed that despite many zoning related issues, the Rustin Walk community could be considered as such, due to the amount of open space preserved and areas designated for recreation. She pointed out that the Chester County Planning Commission (CCPC) maintains an inventory of subdivisions developed using some form of cluster, conservation design, or flexible development procedure that might be helpful for further discussions. Ms. Carter also thought that Wild Goose Farm can be considered a success due to proportions of the single family houses to the size of the lot, which is able to accommodate decks and patios. Mr. Hatton did not believe that Rustin Walk was a successful development due to many concerns with the usability of open space and recreational areas.

Mr. Sennett pointed out that if the intent of flexible development procedure is open space preservation, it should be noted in the ordinance language. Mr. Embick agreed that it was not explicitly stated. Mr. Lees questioned the reasons to provide for flexible development if there is no more vacant land in the Township that could accommodate that. The PC agreed. Mr. Lees stated that the idea of cluster development back in the day was to keep and maintain open space large enough to use together with woods and ponds, and in return give the developers the incentive of smaller lots and fewer roads to build. He thought that those days were now gone, and it was an appropriate time to rethink whether this type of zoning was suitable for Westtown. There was a discussion on the disconnect between the intent of encouraging the usable open space in addition to naturally sensitive features and what has been developed in the Township. Mr. Hatton pointed out that anything can happen with other unprotected parcels, and thought it would be wise to plan for that now. Ms. Carter referred to the map of protected and unprotected lands that showed large parcels that could be developed. The PC discussed the map, which needs to be updated to include Sawmill Court development, and discussed other parcels and associated zoning that might be suitable for potential residential development.

Mr. Embick raised a question whether the PC shall recommend to the Board of Supervisors to rescind the flexible development procedure ordinance, considering that the PC cannot point to a successful residential development built using those provisions, and there are not many parcels left of appropriate size to accommodate such type of development. Mr. Lees suggested an alternative to tighten some of those requirements to make it more reasonable for developers. Mr. Embick asked what these developments would look like if they were developed under R-1 zoning district regulations. Ms. Carter noted that they would be single-family homes on one acre lots, with area and bulk requirements traditionally seen in such neighborhoods. She also added that it might be challenging in some areas to yield large number of lots due to reliance on on-lot sewage disposal systems, which require suitable soils and space for secondary systems.

Mr. Hatton suggested to seek assistance of the CCPC. Ms. Carter recommended adding this discussion to the ongoing efforts of exploring the subject of attainable housing. She explained that the CCPC is interested in meeting with the PC to provide an overview of the County-wide efforts, examples of successes, and recommendations for Westtown. Mr. Hatton wondered whether any other townships have or have considered abandoning the idea of cluster or flexible developments. He also wanted to know examples of most successful developments. Mr. Embick also noted that the enforcement of conservation design provisions need to be reconsidered and open space calculations that need to be made clearer. The PC compared the number of potential lots as per base zoning district versus under the flexible development procedure for the Stokes Estate. Mr. Embick reminded everyone that the most recent application for the Stokes Estate was denied and appealed, and the pending application is under litigation to gain access to Shiloh Hill Drive. He reiterated that any ordinance changes would not be applicable to these pending applications. Mr. Sennett felt that the Stokes Estate proposal does not reflect the intent of the ordinance, and questioned whether the flexile

development ordinance is useful. Ms. Carter reminded everyone that one of the main objectives of said ordinance is the preservation of contiguous open space. Mr. Embick wondered whether better cluster type provisions should be considered by the PC. Ms. Carter will organize a meeting with the CCPC to move forward with these discussions. Mr. Embick also suggested getting feedback from the Township solicitor about rescinding the ordinance.

2. Review of the Comprehensive Plan (2019)

Mr. Embick stated that under the Municipalities Planning Code (MPC), the Comprehensive Plan shall be updated once every 10 years. He noted that it's been five years since the last update of Westtown's Comp Plan, and asked for the PC's feedback on the progress on policies and recommendations that were included in the Plan and any recommendations to be made to the Board going forward. Mr. Embick offered to make an assessment of what has been accomplished so far. Mr. Sennett thought that the improvements at Oakbourne Park is one of the main accomplishments. However, he believed that improving walking and biking options in the Township recommended in the Plan had not been addressed so far. He wanted to see very specific proposals pursuing the objective of increasing walkability and bikeability in the Township, in particular to connect the neighborhoods adjacent to Oakbourne Park with the Park. Mr. Sennett referred to the map and noted that there are many residential properties within a mile of the Park with no ability to get there without driving. He suggested identifying ways to meet that Plan's objective, especially when the Park is undergoing major improvements and is an important community's resource.

Ms. Carter suggested to start with the analysis of infrastructure to determine the feasibility of making these multi use connections. Mr. Sennett suggested a focus area surrounding the Park as a start before making it Township-wide. Ms. Carter also pointed out that there are grant funding resources available. She suggested exploring the subject in more detail and drafting a proposal for the Board's feedback. Mr. Fusco raised a concern about pedestrian safety and accessibility of Cope Tract portion of the Park and wondered if something can be done to address that. Ms. Carter explained that the Master Plan completed for Oakbourne several years back recommended improvements to that portion with parking areas and walking trails. Mr. Sennett agreed with Mr. Fusco that Cope Tract was in need of improvements to make it usable for the residents. Mr. Embick pointed out that the Township spent approximately $6 million on upgrades to the athletic core and several trails on the western portion of the park, and agreed that Cope Tract needs attention. In addition to exploring ways to address the pedestrian connectivity around the park, he suggested to focus on the needs of Cope Tract, including parking, safe crossing, and trail system along the stream and along S. Concord Road.

Mr. Embick asked for additional feedback on the Plan's implementation recommendations. Mr. Hatton noted that many items were assigned to other responsible parties, such as Township staff. Mr. Lees pointed out that there has been an increase in the accessory dwelling units (ADUs) in the past 5 years, and asked whether any changes should be made to those requirements. Ms. Carter confirmed that the applications for constructing house additions with separate living quarters have increased, but some choose not to build a full kitchen to avoid going through a special exception process. She pointed out that so far, every application for special exception for an ADU has been approved by the Zoning Hearing Board and raised a question whether ADUs should be permitted by right as long as they meet a specific criteria. Ms. Carter also noted that there has not been many requests for detached ADUs. Mr. Hatton stated that the main concern with ADUs was that they would become rental units. Ms. Carter noted that conversion of ADU into a rental is permitted via the special exception process, which can be left unchanged. Mr. Lees thought that it would be a good opportunity to consider such changes. Mr. Embick asked whether Township staff have any concerns. Ms. Carter explained that secondary living quarters originally proposed with no

permanent food preparation facilities might eventually become ADUs without the Township's knowledge. She noted that it would only get on the Township's radar at resale inspection. Mr. Hatton asked what happens when the house with ADU is sold. Ms. Carter explained that when the certificate of occupancy is issued, it is noted that the ADU is to be only used as permitted by the Township Code and requests for proposals to convert to a rental shall go through a special exception process. Mr. Lees expressed that the Township will likely see more of such units in the future considering the cost of the housing. Ms. Carter suggested postponing the decision until after the meeting with the CCPC as the subject of ADUs relates to attainable housing. The PC agreed. Ms. Carter pointed out that Official Map is one of the top recommendations noted in the Plan, which is a tool that can be utilized for securing lands for public improvements, including pedestrian connections.

April Klimack, 9 Garden Circle, asked for more information about the discussion on attainable and affordable housing. She raised some concerns about crime rates that could be associated with such type of housing and potentially impact the quality of life in the community. Mr. Embick explained that the PC is only having general discussions, and there are no formal plans for that type of development at that time. Ms. Carter added that there is a difference between affordable that is associated with low income households and attainable, also known as workforce housing, which falls within higher income brackets. Mr. Embick suggested for Ms. Klimack to monitor the PC's agendas for further discussion on that subject matter.

Old Business

None.

Reports

1. Mr. Hatton made the BOS report from the March 4 meeting.
2. Mr. Hatton made the EAC report from the February 27 meeting and shared the EAC's annual report.

Adjournment (TS/JF) 5-0

The meeting was adjourned at 9:06 PM.

Respectfully submitted,
Mila Carter
Planning Commission Secretary

THE COUNTY OF CHESTER

COMMISSIONERS
Marian D. Moskowitz
Josh Maxwell
Michelle Kichline

Brian N. O'Leary, AICP
Executive Director

PLANNING COMMISSION
Government Services Center, Suite 270
601 Westtown Road
P. O. Box 2747
West Chester, PA 19380-0990
(610) 344-6285 Fax (610) 344-6515

February 9, 2024

Jon Altshul
Township Manager, Westtown Township
PO Box 79
Westtown, PA 19395

Dear Mr. Altshul,

In Chester County, our protected open space is one of our biggest assets. We have a long history of supporting open space preservation, and as a result, the Chester County Commissioners recently announced that over 30 percent of the county is now preserved forever as open space. This is a truly remarkable milestone to be reached in a suburban county, and ample opportunities still exist to expand upon our successes.

Our preservation success is due in large part to the strong partnerships that exist between the County, municipalities, land trusts, the commonwealth of Pennsylvania, conservation-minded landowners, and dedicated farmers. For our next phase of open space preservation, we have formed a collaboration among the Chester County Planning Commission, Chester County Department of Parks + Preservation, and the major land trusts and conservation organizations within the county called the Chester County Conservation Partners. We are working together to strategically expand the network of open space, fill in gaps, and enhance open space connectivity. We hope to partner with your municipality as well in this endeavor.

Recently our Partnership conducted an inventory of existing open space and potential opportunities for preservation within each municipality in Chester County. The opportunities identified include both land that could be eligible for preservation, as well as municipal policies, programs or plans that could be put in place to further enhance each municipality's ability to achieve its open space goals. ***An inventory specific to Westtown Township is attached.*** The data presented within your inventory reflects data known by us and by our land trust partners as of year-end 2021, but it could be incomplete. Please let us know if we've missed anything. We've also attached a flyer that provides context for your municipality's inventory by highlighting the county's goals for open space preservation as stated in our Comprehensive Plan, Landscapes3.

Overall, the municipal inventories revealed significant opportunities for additional open space preservation. In addition to the 149,000 acres that are currently preserved in Chester County, over 80,000 acres could be suitable for conservation or agricultural preservation, plus additional lands that could become urban parks. There are many tools available to municipalities that can aid in open space preservation efforts including municipal open space taxes, open space plans, official maps, Transfer of Development Rights ordinances, and cluster/conservation subdivision ordinances.

We would welcome the opportunity to discuss Westtown Township's inventory with you and to hear from you about the Township's conservation priorities. The County Planning Commission and partner organizations can also help with planning, projects, and grants. Please contact me or our project manager, Rachael Griffith (rgriffith@chesco.org), to discuss this further.

Thank you for all you and your municipality have done to support open space preservation throughout the years. We look forward to a continued partnership as we advance our open space preservation efforts.

Sincerely,

Brian O'Leary
Executive Director
Chester County Planning Commission
On behalf of the Chester County Conservation Partners

Westtown Township, Chester County, PA

Open Space Preservation

Inventory and Opportunities

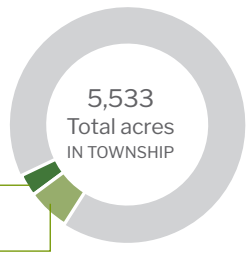
2022

Now more important than ever...

Preserving farmlands, natural areas, and cultural resources is fundamental to protecting Chester County's quality of life, enhancing its economy, and maintaining the character residents and visitors so highly value. Permanently preserved lands limit development pressure on critical resources, promote physical activity, and often provide public access to connect to nature. With the heightened use and value placed on outdoor recreation since the pandemic, increased demand for housing, and mounting pressures on farming, preserving land is now more important than ever.

Inventory

9% OF THE TOWNSHIP
501 acres
Preserved Open Space



Public parks and preserves
170 acres

Other
331 acres

41% of residents live within a **10-minute walk** of outdoor recreation.

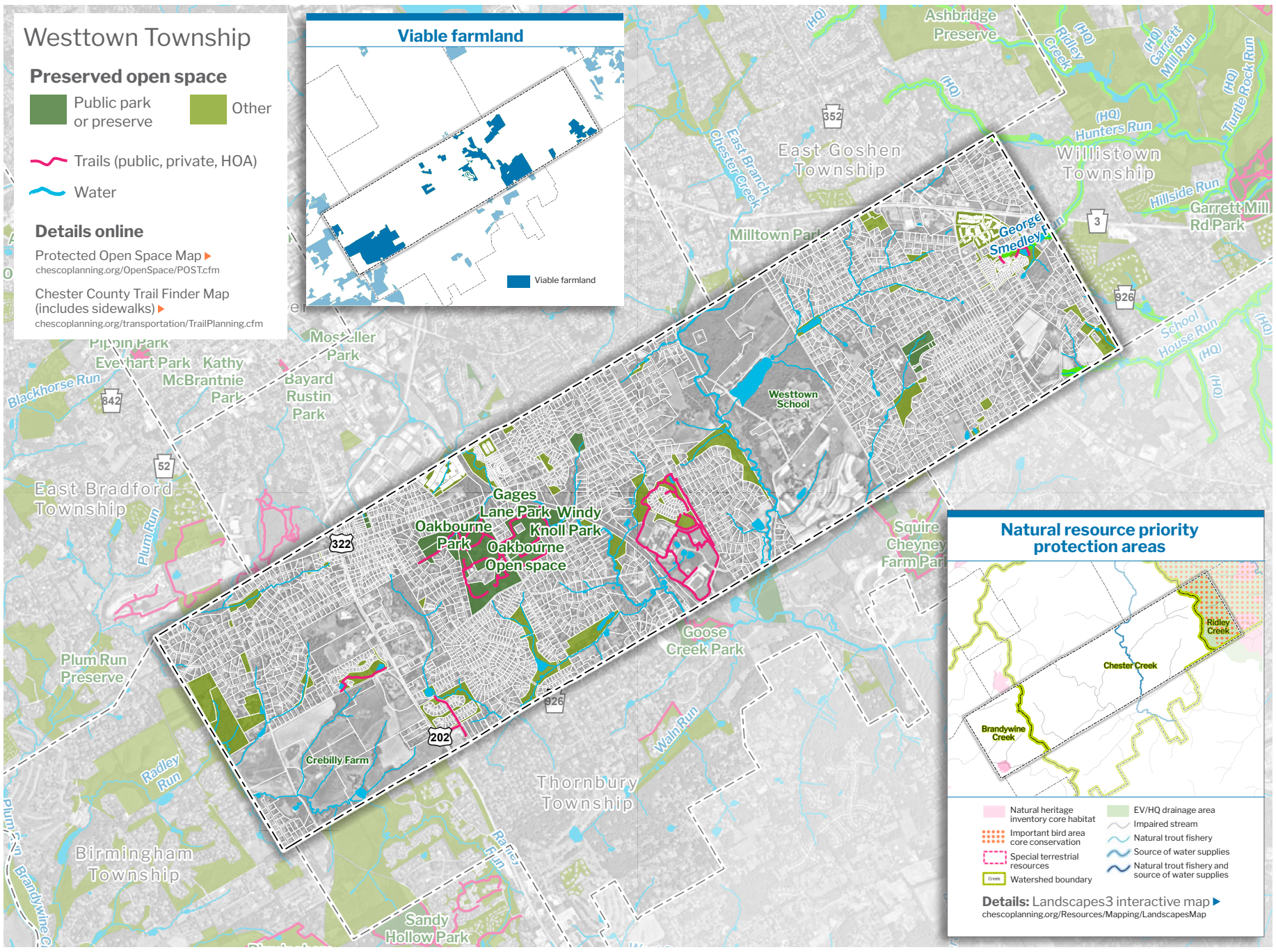
Outdoor Recreation Access in PA ▶
Partners: PA DCNR, The Trust For Public Land, WeConservePa

8 miles of public trails

Opportunities

Viable farmland
19 Percent (1,076 acres) of the township is viable farmland.

Natural resource priority protection areas
12 Percent (640 acres) of the township is within either an exceptional value or high quality drainage area or important bird area.



How to Move Forward

Recommended Open Space Preservation Tools

When preserved and opened to the public, Crebilly Farm will significantly expand the township's open space offerings and character for residents. It may make sense to undertake an Open Space, Recreation, and Environmental Resources Plan to best integrate the property into the township's existing network of open space. Any additional greenways, trails, or parks identified through such a planning process could be added to an official map.

- [x] Agricultural Security Area (ASA)
  Productive farmland with additional protections to farming operations. A farm within an ASA is eligible for an agricultural conservation easement.
- [ ] Agricultural Zoning
  A zoning tool that supports the continuation of farming and the agricultural industry.
- [x] Conservation Subdivision Ordinance
  A subdivision ordinance requiring 50 percent preserved open space.
- [ ] Official Map RECOMMENDED
  A map and ordinance designating desired future improvements, including parks, trails, and open space. Consider updating the Official Map to reflect land preserved since the Map's adoption and add additional potential preservation land.
- [ ] Parks, Recreation and Open Space Plan RECOMMENDED
  A guide for future development and management of parks and open space systems, including trail connectivity and programming. This plan should be current within a 10-year time frame.
- [x] Open Space Tax
  A dedicated funding stream to support a fund for open space preservation.
- [ ] Transfer of Development Rights (TDR) CONSIDER
  A zoning tool that protects land with conservation value by redirecting development to areas planned to accommodate growth.

Ask for Help

Many preservation-oriented organizations are active in Chester County and have resources to offer municipalities. Consider contacting a professionally staffed partner for assistance with:

- Park design and planning
- Landscaping and streetscaping design
- Land acquisition
- Ordinance writing
- Green stormwater infrastructure planning
- Conservation easements
- Conservation and open space education

Partners in your Area

Natural Lands — natlands.org

Brandywine Conservancy — brandywine.org

Chester County Planning Commission — chescoplanning.org

Chester County Parks + Preservation — chesco.org/4498/Parks-Preservation

Prepared by the Chester County Planning Commission on behalf of the Chester County Conservation Partners. **chescoplanning.org/openspace**

Landscapes3

How We PRESERVE OPEN SPACE & FARMLAND

Implementing the goals, objectives, and recommendations of *Landscapes3*—The Chester County Comprehensive Plan

Guidance for Municipalities

open space • farmland • nature preserves • parks • forests • scenic views

Goal

Advance the protection and stewardship of open space, farmland, and natural and cultural features to realize economic, ecological, and quality of life benefits.

Objectives

- **A** **Protect a significant portion of Chester County** as preserved farms, open space, forests, public parks or nature preserves.
- **B** **Prioritize preservation efforts** to reflect the critical resources of agricultural soils, wildlife habitat, water resources, and public recreation opportunities.
- **C** **Support a regional approach to preservation** that enhances the resiliency of ecosystems and provides the greatest return on investment.
- **D** **Promote stewardship** of water resources, natural habitats, woodlands, historic landscapes, scenic vistas, recreational resources, and farms.
- **E** **Promote the benefits of protecting and appropriately managing open space** by pursuing initiatives that inform and educate.

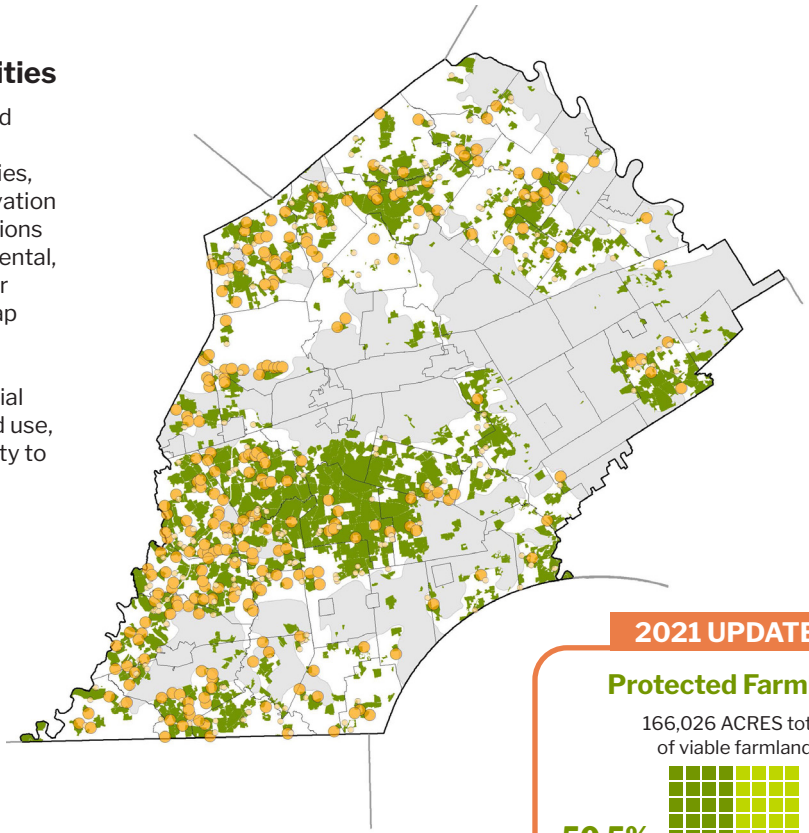
Recommendations

1. Expand open space education
2. Increase protected farmlands 2021 UPDATE
3. Expand protection of natural habitats
4. Create additional recreation properties 2021 UPDATE
5. Enhance protection of cultural resources
6. Expand the network of protected open space 2021 UPDATE
7. Encourage restoration and stewardship
8. Support open space policies and ordinances
9. Convene open space summits

Recommendation and **Implementation** details are in *Landscapes3*. chescplanning.org (see COMPREHENSIVE PLAN)

Farmland Preservation Opportunities

The continued success of farms and farmland preservation is reliant upon collaborative partnerships among landowners, municipalities, the county and other allies. Farmland preservation helps ensure that current and future generations benefit from the economic, health, environmental, and aesthetic benefits that farms bring to our communities. This *Landscapes3* planning map illustrates the general extent of agricultural conservation easements already in place, as well as future potential opportunities. Potential opportunities were identified by existing land use, prime farmland soils, parcel size, and proximity to existing easements.



2021 UPDATE

Protected Farmland

166,026 ACRES total of viable farmland

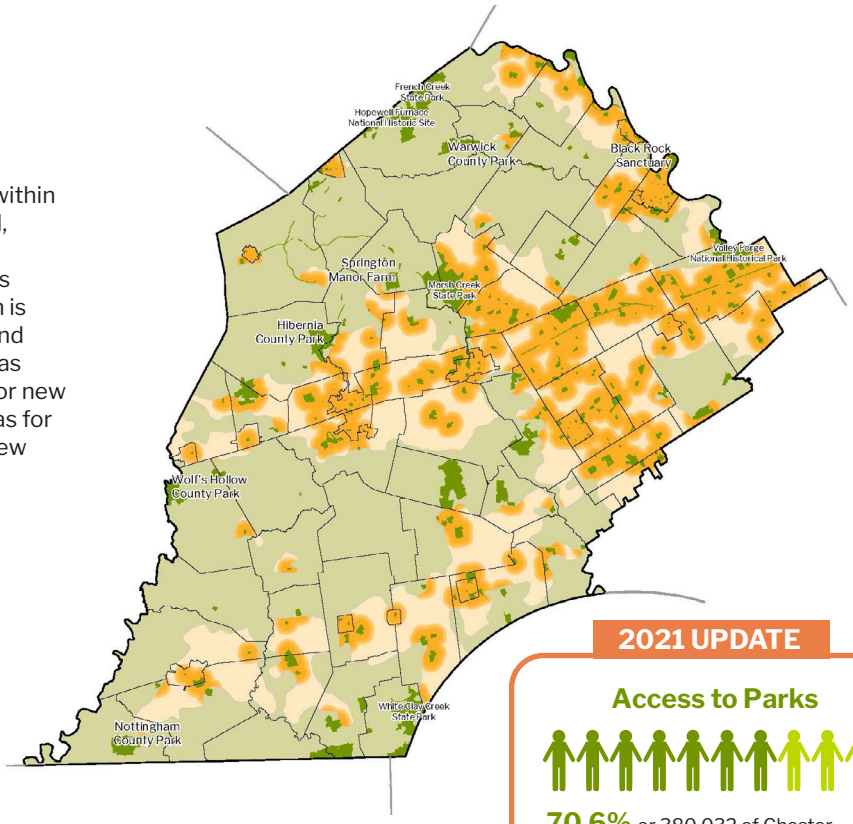
50.5%

83,845 ACRES **Protected**

82,181 ACRES Unprotected

Recreation Access

Use of recreation facilities is influenced by proximity to where people live, distribution within a community, the types of amenities offered, and overall maintenance. This *Landscapes3* planning map illustrates recreational facilities and a surrounding ½ mile service area, which is a standard measure of facility accessibility and utilization. The map is intended to depict areas within growth areas that could be targeted for new recreational facilities and amenities, as well as for improved local access to facilities (such as new sidewalks or trails).



2018

- Public recreational opportunity
  (Municipal, county, state, and national parks; publicly accessible preserves; public school lands)
- Landscapes3 growth areas located within 1/2 mile of a public recreational opportunity
- Landscapes3 growth areas located beyond 1/2 mile of a public recreational opportunity
- Landscapes3 rural resource areas

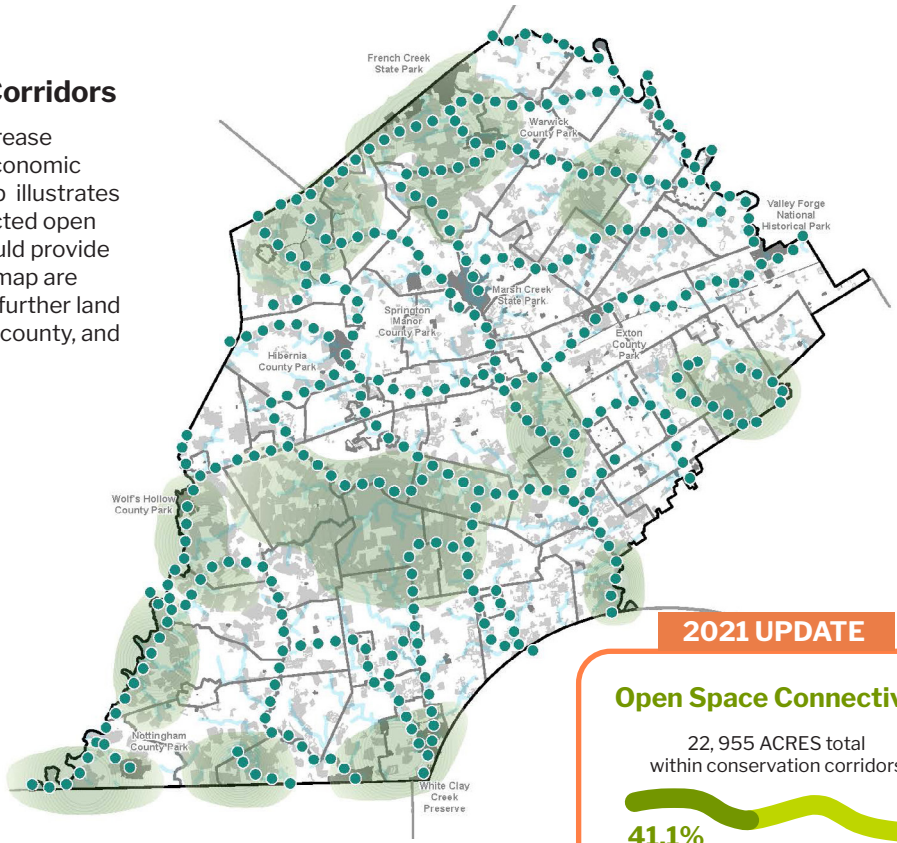
2021 UPDATE

Access to Parks

70.6% or 380,032 of Chester County's 538,649 population **live within 1/2 mile of a park.**

Conservation Clusters and Corridors

Linking protected open space can increase recreational, ecological, scenic, and economic value. This *Landscapes3* planning map illustrates generalized clusters of existing protected open space and potential corridors that would provide linkages. The corridors shown on the map are conceptual and are intended to guide further land conservation efforts at the municipal, county, and regional levels.



2018

- Conservation corridor
- Protected open space cluster
- Public park
- Other protected open space

2021 UPDATE

Open Space Connectivity

22, 955 ACRES total within conservation corridors

41.1%

9, 494 ACRES **Protected**

13,461 ACRES Unprotected

Build on Success

Municipalities can use the resources below to build on Chester County's open space preservation success.

Inventory of Open Space Plans, Programs, and Ordinances

See where Chester County municipalities are planning and funding for open space preservation with various policies and programs.

▶ chescplanning.org (see TOOLS FOR OPEN SPACE)

Planning eTools

Reference eTools that provide background information, municipal examples, and resources related to planning topics, such as Agricultural Conservation Easements and Transferable Development Rights (TDR).

▶ chescplanning.org (see MUNICIPAL CORNER)

Return on Environment

Learn from Chester County's *Return on Environment* report (2019), which quantifies the economic benefit of protected open space.

▶ chescplanning.org/OpenSpace

Cluster Subdivision Design Guide

Utilize this planning guide to preserve open space through cluster development.

▶ chescplanning.org/OpenSpace

Funding

Seek funding for open space preservation through Chester County's grants, as well as other funding sources.

▶ chescplanning.org (see MUNICIPAL CORNER)

Partners

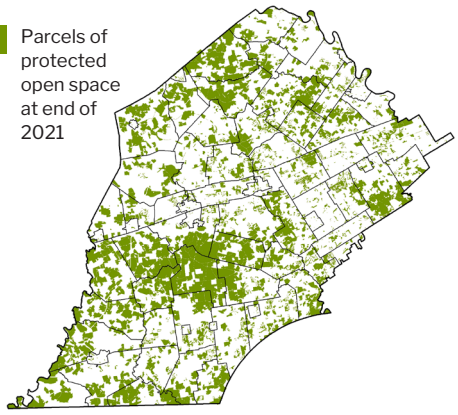
Chester County's Parks + Preservation Department ▶ manages the county's open space grant programs, including agricultural preservation. Additionally, many land trusts are active in Chester County and provide municipalities and land owners with a variety of conservation services.

▶ chescplanning.org/OpenSpace

2021 UPDATE

Protected Open Space in Chester County

Parcels of protected open space at end of 2021



30.2%
Preserved
146,964 Acres

146,964	Total acres open space
34%	Land trust easements
28%	Agriculture easements
11%	HOA Open Space
6%	Land trust owned
5%	Other
4%	State Parks
3%	County Parks
1%	Federal Parks

Landscapes

Explore all the goals. ▶
chescplanning.org (see COMPREHENSIVE PLAN)

- How We PRESERVE
- How We PROTECT
- How We APPRECIATE
- How We LIVE
- How We PROSPER
- How We CONNECT

Questions?

If you have questions or need additional information about open space preservation, please contact the Planning Commission by email at ccplanning@chesco.org or call 610-344-6285.

CHESTER COUNTY Planning COMMISSION

www.chescoplanning.org

June 2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RDM Group and Zom Construction Company, Appellants	:	No. 1081 C.D. 2021
v.	:	Submitted: September 23, 2022
Pittston Township Zoning Hearing Board and Pittston Township	:	

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION
BY JUDGE McCULLOUGH FILED: February 20, 2024

In this zoning case, Appellants RDM Group (RDM) and Zom Construction Company (Zom) (together, RDM) appeal from the September 2, 2021 order of the Court of Common Pleas of Luzerne County (trial court), which affirmed the April 10, 2020 decision and order of the Pittston Township (Township) Zoning Hearing Board (ZHB). In its decision, the ZHB denied RDM's requests for use and dimensional variances sought as part of its proposal to construct a warehouse facility in the Township.[1] After careful review, we reverse and remand for further proceedings.

[1] Zom is the current legal owner of the subject property (Property) and is under contract to sell it to RDM. (ZHB Finding of Fact (FOF) 1; Reproduced Record (R.R.) at 292a.) Zom purchased the Property from the Pennsylvania Coal Company in 1974. (R.R. at 308a.) Although both RDM and Zom are named Appellants, only RDM, as the putative purchaser and equitable owner of the subject property, applied for zoning relief below. The agreement of sale is contingent on RDM's obtaining any necessary zoning relief to construct the proposed warehouse facility. (R.R. at 305a.)

I. FACTS AND PROCEDURAL HISTORY

RDM proposes to build a 164,640-square-foot warehouse facility on a vacant, 17.9-acre[2] triangular parcel of property situated along Freeport and Langan Roads in the Township (the Property) (FOF 1, 2.) The Property is composed of vacant woodlands and is burdened by a creek running across its southern part. (Notes of Testimony (N.T.), 2/27/2020, at 60; R.R. at 108a.) The Greater Pittston Chamber of Commerce has designated a small portion of the Property (approximately 20%) to be within the Grimes Industrial Park. *Id.* at 60-61; R.R. at 108a-09a. Pursuant to the applicable provisions of the Radnor Township Zoning Ordinance (Zoning Ordinance),[3] the Property is zoned in the R-1 Single Family Residence District (R-1 District) and is bordered on the west and south by property in the Industrial District (I-1 District) and on the east by a property also in the R-1 District. *Id.* at 67-70; R.R. at 115a-18a. Pursuant to Article 5 of the Zoning Ordinance, warehousing is a permitted use in the I-1 District and Industrial Flexible District (I-2 District), but not in the R-1 District. (FOF 4; S.R. at 78b, 83b.)[4]

On December 13, 2019, RDM applied for a zoning permit to construct the warehouse facility. (R.R. at 317a.) Terrance J. Best, the Pittston Township Zoning Officer (Zoning Officer), denied the application on January 7, 2020, on the ground that

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[2] Although the ZHB found that the Property is composed of 18.5 acres based on the description contained in the deed to its current owner (Zom), RDM's engineer, Rocco Caracciolo, commissioned a new survey of the Property that indicates an area of 17.9 acres. (R.R. at 107a-08a.)

[3] Township of Pittston, Luzerne County, Pa. Zoning Ordinance, Ord. No. 2-01 (2013), *as amended.* The current version of the Zoning Ordinance is included in the Supplemental Reproduced Record (S.R.) submitted jointly by the Township and ZHB.

[4] Several uses are permitted in the R-1 District by right, by special exception, or as conditional uses. These include, *inter alia*, single-family detached and semi-attached dwellings, essential services, forestry, group homes, nurseries, greenhouses, non-profit clubs and lodges, schools, and recreation areas. (S.R. at 80b-83b.)

warehousing was not a permitted use in the R-1 District. (R.R. at 321a.) RDM appealed to the ZHB, requesting a use variance and six dimensional variances related to the layout of the proposed parking lot and lawn. (R.R. at 322a-23a.)[5]

The ZHB conducted a public hearing on the variance requests on February 27, 2020. (FOF 5, 6.) At the hearing, RDM called five witnesses. RDM first called Alan Rosen, a certified general real estate appraiser. (N.T., 2/27/20, at 13-14; R.R. at 61a-62a.) Mr. Rosen testified that he is familiar with the Property and has appraised numerous industrial buildings in the area. *Id.* at 16; R.R. at 64a. He opined that the Property, as currently zoned, is not marketable and has "extremely minimal" and "distressed" value because it is "shoehorned" between industrial properties on two sides. *Id.* at 16-19; R.R. at 64a-67a. For the same reason, Mr. Rosen explained that it would not be "advisable" to construct a single-family dwelling on the Property. *Id.* at 21; R.R. at 69a. He also testified that, given his belief that the closest residence is approximately 1,000 feet from the Property, the value of nearby residences would not be impacted if the variance was granted and the warehouse constructed. *Id.* at 28-29,

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[5] Specifically, RDM requested dimensional variances from the following sections of the Zoning Ordinance:

> (1) Section 1115 of the Zoning Ordinance, which requires that a parking lot be at least 25% of the total warehouse building area and contain one parking space for every 1,000 square feet of building area. (Zoning Ordinance § 1115; S.R. at 211b.)
>
> (2) Section 317.2(C) of the Zoning Ordinance, which requires the placement of a specified number of landscaped islands and/or strips throughout the parking lot. (Zoning Ordinance § 317.2(C)(1), (2), (4); S.R. at 66b-67b.)
>
> (3) Section 307.7(A) of the Zoning Ordinance, which requires the placement of a 100-foot yard where an industrial use meets a residential use. (Zoning Ordinance § 307.7(A); S.R. at 61b.)

(R.R. at 323a.)

36, 45; R.R. at 76a-77a, 84a, 93a. He acknowledged that, to his knowledge, nothing about the physical characteristics of the Property would preclude a person from building a single-family dwelling there. *Id.* at 22; R.R. at 70a.

RDM next called Rocco Caracciolo, a professional land development engineer. *Id.* at 56; R.R. at 104a. Mr. Caracciolo testified that he and RDM's representatives initially believed that the Property was zoned industrial, but later were advised that the Property was zoned residential. *Id.* at 67; R.R. at 115a. He further testified that, given the Property's irregular shape and the proposed location of the warehouse, RDM would not be adding an industrial use to the neighborhood any closer to residences than are the existing industrial uses adjacent to the Property, which include a large FedEx distribution warehouse,[6] a trucking company, and a TJ Maxx warehouse. *Id.* at 68-69, 81-82; R.R. at 116a-17a, 129a-30a. The closest residence from the proposed warehouse would be approximately 1,000 feet and the closest residential development approximately 2,000 feet. *Id.* at 75; R.R. at 123a. Mr. Caracciolo opined that a person could build a single-family dwelling on the Property, but it would not be practical. *Id.* at 80, 95; R.R. at 128a, 143a. He explained that the FedEx facility to the south does not comply with the Zoning Ordinance's 100-foot buffer requirement because the driveway to the facility is only 11 feet from the Property, which proximity increases noise, fumes, and traffic and frustrates a possible residential use. *Id.* at 98-102; R.R. at 146a-50a. He also opined that the construction

[6] The Township's Zoning Officer indicated that one of the parcels adjacent to the Property was re-zoned in 2016 from the R-1 District to the I-1 District to accommodate the construction of the FedEx facility. (N.T., 2/27/20, at 38-41; R.R. at 86a-89a.)

of RDM's warehouse would not adversely affect the health, welfare, and safety of the surrounding community. *Id.* at 82; R.R. at 130a.[7]

Isaac Neuman, RDM's Director of Development and Director of Management, next clarified that RDM intends to construct a large "flex space" site that can be rented by local businesses. *Id.* at 134, 137; R.R. at 182a, 185a. RDM intends to divide the building into smaller sections that each could be rented by local businesses. *Id.* at 138-39; R.R. at 186a-87a. Mr. Neuman believes that the traffic increase from the warehouse would be miniscule. *Id.* at 141; R.R. at 189a. He also explained that the Property initially was advertised as being zoned industrial and that the Township Zoning Officer told RDM that the Property was zoned industrial. *Id.* at 136, 151; R.R. at 184a, 199a. After further investigation and the expenditure of a "considerable amount" of money, RDM learned that it was zoned residential. *Id.* at 135, 155; R.R. at 183a, 203a. RDM has no interest in purchasing the Property if it cannot develop the proposed warehouse. *Id.* at 136; R.R. at 184a.

RDM next called Jeffrey Fiore, a civil engineer employed with Maser Consulting who conducted a traffic impact study of RDM's proposed development. Based on his observations, Mr. Fiore concluded that the additional site traffic generated by the project would permit the nearby intersections to continue to operate as they do currently. *Id.* at 174; R.R. at 222a. Mr. Fiore approximated that the development would add 300 additional vehicle trips, either into or out of the site, per day. *Id.* at 174-75; R.R. at 222a-23a. He opined that the current roadway system is sufficient to accommodate the additional traffic without an increase in congestion. *Id.* at 175-76;

[7] With regard to the requested dimensional variances, Mr. Caracciolo testified that RDM was "proposing a more traditional parking lot that . . . is easier to maintain, . . . limits the impervious surface, . . . [and] make[s] it more efficient [so that RDM] can put more landscaping around . . . the perimeter o[f] the [P]roperty." *Id.* at 64; R.R. at 112a. *See also id.* at 76-79; R.R. at 124a-27a.

R.R. at 223a-24a. He also opined that RDM's proposed parking design and layout could accommodate the warehouse traffic. *Id.* at 176; R.R. at 224a. He does not believe that the traffic impact from the warehouse would be contrary to the public interest or have adverse impacts on the health, safety, and welfare of the community. *Id.* at 177-78; R.R. at 225a-26a.

RDM lastly called John Varaly, a professional land use planner. Mr. Varaly opined that use of the Property for residential purposes is "impractical" and "defies conventional wisdom" because it is surrounded on two sides by industrial uses, and the entire neighborhood has been developed in an industrial character. *Id.* at 202-03; R.R. at 250a-51a. Mr. Varaly noted that the industrial uses neighboring the Property were expansive and that a person has to drive through industrial developments to get to the Property. *Id.* at 204-05; R.R. at 252a-53a. Regarding whether the character of the surrounding industrial properties causes hardship, Mr. Varaly testified:

> It does because there[is] no practical use for the [P]roperty other than . . . industrial. If you were going to develop residential on that site, I do[not] think anybody would want to invest money to build a home on that particular site as a long-term investment knowing that you have industrial on all three sides.

Id. at 205-06; R.R. at 253a-54a. He finally opined that RDM's proposed use would not adversely impact the public interest and would be the least zoning modification possible. *Id.* at 207; R.R. at 255a.

The Township then called its engineer, Michael Amato, to testify in opposition to the variance requests. *Id.* at 230; R.R. at 278a. Mr. Amato agreed that the Property is an irregularly shaped lot, but also testified that he believed that residential lots could be developed there. *Id.* at 231; R.R. at 279a. He also agreed with

Mr. Fiore's traffic study results indicating that the current roadways could accommodate the additional traffic caused by the warehouse. *Id.* at 232; R.R. at 280a.

At the conclusion of the hearing, the ZHB unanimously voted to deny RDM's variance requests. (ZHB Op. at 8-9 (unpaginated); ZHB Conclusions of Law (COL) 3-8.) In its written opinion mailed on April 10, 2020, the ZHB explained that strict application of the Zoning Ordinance's requirements would not cause RDM unnecessary hardship. (COL 3.) More specifically, the ZHB concluded as follows:

> 4. There are no unique physical circumstances or conditions peculiar to the [Property;] thus, there is no unnecessary hardship due to such conditions, nor are there any circumstances or conditions generally created by the provisions of the Zoning Ordinance.
>
> 5. Because of there being no physical circumstances and conditions, authorization of a use variance is unnecessary to enable reasonable use of the [Property] with respect to the construction of a warehouse in the R-1 [District]. Rather, **there is a possibility that the [P]roperty can be developed as a [s]ingle[-][f]amily [r]esidence.**
>
> 6. Unnecessary hardship has been created by [RDM] in that the [P]roperty **could be used for its permitted use as a [s]ingle[-][f]amily [r]esidence.**
>
> 7. The use variance will alter the essential character of the neighborhood or [R-1 District] in which the [P]roperty is located[ ] and substantially or permanently impair the appropriate use or development of adjacent properties and be detrimental to public welfare.
>
> 8. The use variance requested does not represent the minimum variance that will afford relief to [RDM].
>
> 9. There has been no showing by [RDM] that the [17.9-]acre [Property] imposes such an undue hardship [to] support the issuance of the requested variances . . . .

(COL 4-9.) Regarding the requested dimensional variances, the ZHB made no findings of fact or conclusions of law, but rather summarily denied the requests in its order. (ZHB Op. at 8-9.)

RDM appealed to the trial court, arguing that (1) it is entitled to a use variance due to the unnecessary hardship caused by the physical characteristics of the Property; (2) it is entitled to a "validity variance"; (3) it has vested rights and/or a variance by estoppel to use the Property as it proposes; and (4) it is entitled to the requested dimensional variances. (R.R. at 36a-37a.) The trial court affirmed the ZHB's decision, concluding that the ZHB's decision was supported by substantial evidence and that RDM was not entitled to a validity variance or variance by estoppel or vested rights. (Trial Court Op. at 7-12) (unpaginated). The trial court did not address the ZHB's denial of the requested dimensional variances, which it concluded were moot. *Id.* at 12.

RDM now appeals to this Court.

II. ISSUES PRESENTED

RDM presents four issues for our review, which we condense and summarize for ease of discussion as follows: (1) whether the ZHB erred or abused its discretion in denying RDM's request for a use variance; (2) whether RDM is entitled to a validity variance; (3) whether RDM is entitled to a variance by estoppel, vested rights, and/or equitable estoppel; and (4) whether RDM is entitled to the requested dimensional variances.

III. DISCUSSION

A. STANDARD OF REVIEW

Where the trial court does not take any additional evidence, appellate review of the decision of a zoning hearing board is limited to determining whether the

board abused its discretion or erred as a matter of law. *Township of Exeter v. Zoning Hearing Board of Exeter Township*, 962 A.2d 653, 659 (Pa. 2009). A zoning hearing board abuses its discretion where its findings are not supported by substantial evidence, which is such relevant evidence that a reasonable mind would accept as adequate to support the conclusions reached. *Id.* We may not substitute our interpretation of the evidence for that of the zoning hearing board, which has expertise in, and knowledge of, local conditions. *Tidd v. Lower Saucon Township Zoning Hearing Board*, 118 A.3d 1, 9, 13 (Pa. Cmwlth. 2015) (citations omitted). Even if we might come to a different conclusion, if the zoning hearing board's determination is supported by substantial evidence, we will not disturb it. *SPC Co. v. Zoning Board of Adjustment of the City of Philadelphia*, 773 A.2d 209, 214 (Pa. Cmwlth. 2001).

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. *Id.* A zoning hearing board is "free to reject even uncontroverted testimony it finds lacking in credibility, including testimony offered by an expert witness." *Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807, 811 (Pa. Cmwlth. 2005). We must view the evidence in a light most favorable to the party that prevailed before the zoning hearing board and afford that party all inferences reasonably drawn from the evidence. *Id.* Finally, because we review the zoning hearing board's decision, we do not address arguments challenging the trial court's decision. *Pham v. Upper Merion Township Zoning Hearing Board*, 113 A.3d 879, 887 (Pa. Cmwlth. 2015).

B. ANALYSIS

Section 910.2 of the Pennsylvania Municipalities Planning Code (MPC)[8] provides that a zoning hearing board may grant a variance if it finds that the applicant has met all of the following requirements:

> (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.
>
> (2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.
>
> (3) That such unnecessary hardship has not been created by the [applicant].
>
> (4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.
>
> (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

[8] Act of July 31, 1968, P.L. 805, *as amended*, added by the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10910.2.

53 P.S. § 10910.2(a).[9] "The burden on an applicant seeking a zoning variance is heavy, and variances should be granted sparingly and only under exceptional circumstances." *Pham*, 113 A.3d at 891. Essentially, an applicant seeking a variance must prove that unnecessary hardship will result if the variance is denied and that the proposed use is not contrary to the public interest. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 642 (Pa. 1983). The applicant bears the burden of proof, *Marshall v. City of Philadelphia*, 97 A.3d 323, 329 (Pa. 2014), and the reasons for granting the variance must be "substantial, serious, and compelling." *Singer v. Philadelphia Zoning Board of Adjustment*, 29 A.3d 144, 148 (Pa. Cmwlth. 2011).

Regarding a use variance specifically, the Pennsylvania Supreme Court has stated as follows:

> [U]nnecessary hardship is established by evidence that[] (1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) the property can be conformed for a permitted use only at a prohibitive expense; or (3) the property has no value for any purpose permitted by the zoning ordinance. . . .
>
> This Court has repeatedly made clear that in establishing hardship, an applicant for a variance is not required to show that the property at issue is valueless without the variance or that the property cannot be used for any permitted purpose. . . .

Marshall, 97 A.3d at 330 (quotations, citations, and emphasis omitted). "While an unnecessary hardship can be established by demonstrating that the hardship falls squarely within one of these three categories, in practice the evidence presented often

[9] Section 1503.1(B) of the Zoning Ordinance similarly authorizes the ZHB to grant variances and imposes requirements identical to those contained in Section 910.2 of the MPC. (Zoning Ordinance, § 1503.1(B); S.R. at 250b.)

does not fit neatly in one category or another but overlaps." *Nowicki v. Zoning Hearing Board of the Borough of Monaca*, 91 A.3d 287, 292 (Pa. Cmwlth. 2014).

"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 of itself justify a grant of a variance." *Id.*; *see also Pham*, 113 A.3d at 892 (citing *Marshall*). "In other words, mere hardship is not sufficient; there must be unnecessary hardship." *South Broad Street Neighborhood Association v. Zoning Board of Adjustment of Philadelphia*, 208 A.3d 539, 548 (Pa. Cmwlth. 2019) (internal quotations and bracket omitted). The fact that a property may be used more profitably through the use proposed by the applicant is not a valid ground for granting a variance. *Society Created To Reduce Urban Blight (SCRUB) v. Zoning Board of Adjustment of Philadelphia*, 814 A.2d 847, 850 (Pa. Cmwlth. 2003); *see also Marshall*, 97 A.3d at 333 ("evidence that the zoned use is less financially rewarding than the proposed use is insufficient to justify a variance"). "In evaluating hardship[,] the use of adjacent and surrounding land is unquestionably relevant." *Valley View Civil Association*, 462 A.2d at 640.

In its written decision, the ZHB concluded that the Property has no unique physical characteristics that preclude RDM from using it as zoned because it is *possible* that a single-family dwelling *could be* constructed there. (COL 4-5.) The ZHB further concluded that RDM's purported hardship was self-created because, again, it was *possible* that RDM *could* construct a single-family dwelling. (COL 6.) The ZHB then summarily concluded, without additional findings or explanation, that the requested use variance would alter the essential character of the neighborhood, would substantially or permanently impair the use or development of adjacent properties, would be detrimental to public welfare, and did not represent the minimum variance

that would afford RDM relief. RDM argues that the ZHB erred and abused its discretion in making these conclusions. For the reasons that follow, we are constrained to agree.

1. Unique Circumstances Causing Unnecessary Hardship

Preliminarily, it is clear from the record and the ZHB's written decision that the ZHB relied almost exclusively on the undisputed fact that the Property, at least theoretically, *could be* utilized as a residence to justify denying the use variance. However, as set forth above, determining what is strictly possible within the confines of the Zoning Ordinance is not the pertinent inquiry. Rather, a zoning board, in considering a use variance request, must determine whether the zoning regulations governing the subject property permit the landowner to make any *reasonable* use of the property as zoned. To the extent that the ZHB applied a simple "possibility" standard, it erred as a matter of law.

With regard to the physical characteristics unique to the Property, the ZHB summarily concluded that none existed. However, Pennsylvania zoning cases have for decades recognized that the character and use of surrounding properties can constitute unique circumstances justifying the issuance of a variance where they are sufficiently dissimilar to, and prohibitive of, the use of the subject property as zoned. In *Valley View Civic Association*, a property owner applied to the City of Philadelphia Zoning Board of Adjustment for variances to permit her to convert her recently purchased property, zoned in a single-family residential district, into a take-out steak and sandwich shop and a two-story family dwelling. 462 A.2d at 639. The property was situated between a convenience store and a gas station, and a bank and tire store were located across the street. *Id.* at 641. The building on the property had housed a nursery business with two apartments on the second floor prior to the owner's purchase. *Id.*

Various other commercial uses surrounded the property in the immediate vicinity. *Id.* The board of adjustment granted the variances, finding that the property owner established the existence of an unnecessary hardship "by showing that the subject property is virtually surrounded by dissimilar and disharmonious commercial and industrial uses which render it virtually impossible to use the site for residential purposes." *Id.* The trial court affirmed, and this Court reversed. The Pennsylvania Supreme Court reversed and reinstated the trial court's order, concluding as follows:

> We are satisfied that the [board of adjustment] could reasonably have inferred from the evidence before it that the extensive commercial and industrial uses in the immediate vicinity rendered [the owner's] property virtually unusable and of scant value for traditional residential purposes. That evidence paints a picture of a property flanked by a large convenience store and a gas station on a heavily traveled roadway, surrounded by a patchwork of commercial and industrial businesses, vacant lots and intermittent dwellings. It would not be unreasonable to infer that a property so situated would be undesirable and hence unmarketable for residential use.

Id. at 642.

Similarly, in *Taliaferro*, we concluded that a zoning hearing board properly granted a use variance for the construction of a self-storage facility on a property zoned residential where substantial evidence in the record established that the character of the area surrounding the property was inconsistent with a residential use, which would have been impractical. 873 A.2d at 812. Specifically, the landowner presented evidence that the property had remained idle for over 50 years, that attempts to develop the property as residential were never implemented, and that the area surrounding the property primarily was commercial. *Id.* The property owner further presented testimony from a real estate appraiser and a professional engineer, both of

whom testified that development as a residence would be impractical and cost-prohibitive. *Id.* at 813. *See also Borough of Ingram v. Sinicrope*, 303 A.2d 855 (Pa. Cmwlth. 1973) (use variance properly granted to owner of property zoned residential to operate a beauty and gift boutique where characteristics of surrounding properties made residential use unfeasible, working an unnecessary hardship on the owner; property was surrounded by a shopping center, recreation areas, and a chiropractic clinic causing high levels of traffic, noise, light, dust, and water runoff).

Here, the Property is composed of vacant woodlands and has not been used for residential purposes since at least 1974, when Zom purchased it from Pennsylvania Coal Company. (R.R. at 308a.) RDM presented uncontroverted testimony from its real estate, land use, and engineering experts establishing that the extensive commercial and industrial uses that "shoehorn" the Property on two sides render the Property of distressed and minimal residential value. The southern portion of the Property is located in an industrial park designated by the local chamber of commerce. The nearest residential property is located approximately 1,000 feet away, and the nearest residential development is approximately 2,000 feet away. Thus, the immediate neighborhood, in part due to the Township's rezoning an adjacent property to accommodate the FedEx facility, has become by all accounts a busy industrial thoroughfare. The experts' uncontradicted testimony that the Property has distressed, minimal value for residential use thus establishes more than a mere economic hardship that frustrates RDM's preferred use of the Property. It is a hardship peculiar to this Property that is not present in the entire zoning district or a portion of it. *See Nowicki*, 91 A.3d at 292 (citing *Pohlig Builders, LLC v. Zoning Hearing Board of Schuylkill Township*, 25 A.3d 1260, 1272 (Pa. Cmwlth. 2011)). Under our precedents, this is sufficient as a matter of law to justify the issuance of a use variance.

That does not end our inquiry, however. As we have noted, a zoning board's findings of fact are entitled to deference and they will not be disturbed on appeal if they are supported by substantial evidence. Further, the evidentiary weight and credibility determinations of a zoning board, even with regard to uncontradicted evidence, are within its exclusive purview and will not be disturbed on appeal unless they are arbitrary and capricious. *See Whitacker-Reid v. Pottsgrove School District, Board of School Directors*, 160 A.3d 905, 916 (Pa. Cmwlth. 2017) ("[A] court will overturn a credibility determination if it is arbitrary and capricious or so fundamentally dependent on a misapprehension of material facts, or so otherwise flawed, as to render it irrational.") (internal quotation marks omitted).

Other than noting the undisputed fact that constructing a single-family residence on the Property was possible, nowhere did the ZHB make any specific findings regarding any unique characteristics of the Property or any hardship that the surrounding uses impose on the Property. Nor did the ZHB make any weight-of-the-evidence or credibility determinations supporting its conclusions that RDM did not satisfy its burden of proof. This is particularly significant given the fact that the testimony from all of RDM's expert and fact witnesses was virtually uncontradicted and, in certain respects, corroborated by the Township's own engineer, Mr. Amato. *See* Section 908(9) of the MPC, 53 P.S. § 10908(9) (where an application for a variance is contested, the zoning hearing board's decision "shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefor"). Accordingly, we are constrained to conclude that the ZHB's findings regarding the unique characteristics of the Property and the hardship they impose are not supported by substantial evidence in the record. To the extent that the ZHB implicitly made credibility and evidentiary weight determinations without acknowledging or evaluating

the testimony of RDM's witnesses in its written opinion, those determinations were arbitrary and capricious and are disregarded. *Whitacker-Reid*, 160 A.3d at 916. *See also Bonatesta v. Northern Cambria School District*, 48 A.3d 552, 558 (Pa. Cmwlth. 2012) ("A capricious disregard of evidence exists only when there is a willful and deliberate disregard of competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result.")

2. Self-Imposed Hardship

The ZHB summarily concluded that RDM's hardship was self-imposed because the Property could be used to construct a single-family residence. (COL 6.) Although the ZHB did not elaborate on this conclusion, to the extent that it suggests that the hardship is self-created because it merely frustrates RDM's preferred use of the Property, we have rejected that notion above.[10] We accordingly conclude that the ZHB's finding in this regard also is not supported by substantial evidence in the record.

3. Character of the Neighborhood and Public Welfare

Regarding impact on the neighborhood, the ZHB made no specific findings or conclusions regarding *how* RDM's proposed use would change its essential character. Rather, it merely concluded that a variance would alter the essential character of the neighborhood, an R-1 District. However, and contrary to the trial

[10] To the extent that the ZHB and Township suggest that this hardship is self-created because RDM did know or should have known of the zoning of the Property before contracting to purchase it, the argument fails. "[P]re-purchase knowledge of zoning restrictions limiting development, without more, does not create a hardship." *Wilson v. Plumstead Township Zoning Hearing Board*, 936 A.2d 1061, 1069 (Pa. 2007) (quoting *Manayunk Neighborhood Council v. Zoning Board of Adjustment*, 825 A.2d 652, 657 (Pa. Cmwlth. 2003)). A hardship is deemed to be self-inflicted "only where [the purchaser] has paid an unduly high price because he assumed the anticipated variance would justify the price, or where the size and shape of the parcel was affected by the transaction itself." *Id.* Here, Mr. Neuman testified that RDM was not aware that the Property was zoned in the R-1 District when RDM contracted to purchase it. The Property was advertised for sale as being zoned industrial, and, when asked, the Township's Zoning Officer told RDM that it was zoned industrial.

court's conclusion, we do not find substantial evidence in the record to support a finding that the warehouse facility will change the essential character of the neighborhood or adversely impact the public welfare. First, regarding the neighborhood, although the Property is zoned in the R-1 District, that does not necessarily mean that its neighborhood is residential. To the contrary, the undisputed evidence of record indicates that the Property is surrounded on two of three sides with industrial uses and is partially included within the Grimes Industrial Park. The mere fact that one side of the Property is bordered by a vacant property zoned residential does not make the neighborhood "essentially" residential.[11]

Second, regarding adverse impact on the public, the real estate, land use, engineering, and traffic experts presented by RDM all testified that granting the variance would not negatively impact the public. In particular, Mr. Rosen testified that permitting construction of the proposed warehouse would not adversely affect the value of neighboring properties. (N.T., 2/27/20, at 28-29, 36, 45; R.R. at 76a-77a, 84a, 93a.) Mr. Fiore testified that, based on his traffic study of the road system surrounding the Property, it was adequate to accommodate the modest increase in traffic caused by the warehouse without any additional congestion. *Id.* at 175-78; R.R. at 223a-26a. Those opinions were not contradicted at the hearing, and the ZHB did not make any findings that they were not credible or unworthy of evidentiary weight.

[11] A significant portion of the public comment offered at the hearing on February 27, 2020, centered on complaints about the *current* perceived problems caused by the FedEx and TJ Maxx warehouse and distribution facilities already operating beside the Property. *See, e.g.*, N.T., 2/27/2020, at 216-29; R.R. at 264a-77a. The immediate neighborhood thus already contains industrial uses with traffic and noise effects greater than those posed by RDM's warehouse. RDM presented uncontradicted expert testimony that the impact of the warehouse in this regard would be minimal, and the ZHB made no findings to the contrary.

Thus, the ZHB's blanket conclusion that granting the use variance would adversely affect the character of the neighborhood and the public welfare is not supported by substantial evidence in the record.

4. Minimum Variance Necessary

Regarding the minimum variance requirement, the ZHB once again summarily concluded that the requested use variance "does not represent the minimum variance that will afford relief to [RDM]." (COL 8.) The ZHB made no additional findings or conclusions regarding *why* this was so and did not reject any of RDM's expert testimony. In this regard, Mr. Caracciolo testified that RDM's proposed warehouse would not be any closer to the neighboring residences than are the industrial uses already in place nearby, and Mr. Fiore testified that the traffic impact will be modest and fully accommodated by the existing roadway system. There is simply no evidence in the record suggesting that the proposed variance is greater in scope than is necessary to permit RDM's reasonable proposed use of the Property.

IV. CONCLUSION

The ZHB's findings and conclusions with regard to RDM's requested use variance are not supported by substantial evidence. The ZHB therefore abused its discretion in denying the use variance, and we accordingly reverse the trial court's order in that respect.[12] Further, because the ZHB made no specific findings of fact or conclusions of law regarding RDM's requested dimensional variances and the trial court declined to address them, we remand this matter to the ZHB to make findings of fact, conclusions of law, and a new decision regarding the dimensional variances.

PATRICIA A. McCULLOUGH, Judge

[12] Because we reverse on this ground, we need not consider RDM's alternative theories of validity variance, vested rights, variance by estoppel, and equitable estoppel.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RDM Group and Zom Construction Company, Appellants	:	No. 1081 C.D. 2021
v.	:	
Pittston Township Zoning Hearing Board and Pittston Township	:	

ORDER

AND NOW, this 20th day of February, 2024, the September 2, 2021 order of the Court of Common Pleas of Luzerne County (trial court) is hereby REVERSED. This matter is REMANDED to the trial court for further remand to the Pittston Township Zoning Hearing Board with instructions to (1) grant RDM Group's (RDM) requested use variance; and (2) based on the record as it currently stands, make specific findings of fact, conclusions of law, and a new decision regarding RDM's requested dimensional variances.

Jurisdiction relinquished.

PATRICIA A. McCULLOUGH, Judge

Soland v. Zoning Hearing Bd. of E. Bradford Twp.

Decided Feb 20, 2024

395 C.D. 2022 990 C.D. 2022

02-20-2024

Dorothy Soland, Daniel Soland, Mark Ouimet, and Anna Ouimet v. Zoning Hearing Board of East Bradford Township and East Bradford Township Board of Supervisors and John Marshall and Dara Gans-Marshall East Bradford Township Board of Supervisors v. East Bradford Township Zoning Hearing Board and John Marshall and Dara Gans-Marshall Appeal of: John Marshall and Dara Gans-Marshall Dorothy Soland, Daniel Soland, Mark Ouimet, and Anna Ouimet v. Zoning Hearing Board of East Bradford Township and East Bradford Township Board of Supervisors and John Marshall and Dara Gans-Marshall Appeal of: John Marshall and Dara Gans-Marshall

BONNIE BRIGANCE LEADBETTER, PRESIDENT JUDGE EMERITA

2 Argued: June 5, 2023 *2

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge, HONORABLE ELLEN CEISLER, Judge, HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION

BONNIE BRIGANCE LEADBETTER, [1] PRESIDENT JUDGE EMERITA

[1] This case was reassigned to the author on July 31, 2023.

John Marshall and Dara Gans-Marshall (Marshalls) appeal from the March 23, 2022 order of the Court of Common Pleas of Chester County, which reversed the grant of a variance by the East Bradford Township Zoning Hearing Board (ZHB). The variance relieved the Marshalls of the requirement that a bed and breakfast (B&B) estate utilize an owner-occupied building classified as a Class I historic resource for guest rooms, as provided in the East Bradford Township Zoning Ordinance.[2] The dispositive issue here is whether a use variance can ever be *de minimis*. After review, we reverse the order of the court of common pleas, which held that it cannot.

[2] East Bradford Township, Pa., Ordinance § 115-48.2(A) (Oct. 11, 2016).

The Marshalls own real property located in the Township, which consists of 10.96 acres and contains a residential home known as the Paxson House and several structures, one of which has been used as a veterinary clinic (Tenant House). As noted above, Section 115-48.2(A) of the Ordinance restricts a B&B estate to buildings that qualify as owner-occupied Class I historic resources. Although the Paxson House is a Class I
3 historic resource,[3] the Marshalls wished to *3 utilize the currently unoccupied Tenant House for the proposed B&B estate's guest rooms and use the Paxson House as their private residence. Therefore, the Marshalls sought a variance. The ZHB conducted a hearing on the matter on January 29, 2018.

[3] Class I historic resources are defined in Section 115-122(A)(1) of the Ordinance, Ordinance § 115-122(A)(1). They include

> buildings, sites, structures and objects listed in the National Register of Historic Places or documented as contributing resources in a National Register Historic District, buildings and structures classified as certified historic structures by the Secretary of the United States Department of the Interior, and resources that have received a (Footnote continued on next page...) determination of eligibility by the Pennsylvania Historical and Museum Commission or that have been deemed by the Chester County Historic Preservation Office as substantially meeting the National Register criteria. The East Bradford Township Board of Supervisors (Board) may also designate a resource of similar historical significance as a Class I historic resource.

During that hearing, the Marshalls testified that they have three children and a large extended family. The Marshalls wished to locate the proposed B&B estate's guest rooms in the Tenant House, so that their immediate family and relatives could stay overnight in the Paxson House, which would remain private. The Township zoning officer, Melissa Needles, stated that, while a B&B estate is normally located in "a historic house on the property . . . it's just a way to utilize a historic house." Reproduced Record (R.R.) at 90a. Ms. Needles indicated that the property was unusual, as it contained multiple buildings that she understood were "historic[.]" *Id.* at 89a-90a. The ZHB solicitor suggested that the existence of other buildings on the property provided "a good reason" to use the Tenant House for the guest room portion of the proposed B&B estate. *Id.* at 91a.

The ZHB granted the Marshalls' variance request in an opinion and order dated March 16, 2018. In its decision, the ZHB recognized that the reasons for granting a variance must be substantial, serious, and compelling; however, a variance may also be granted where the request is minor and not necessary to protect the Ordinance's public policy concerns. In support of its decision, the ZHB cited *Lench v. Zoning Board of Adjustment of Pittsburgh*, 13 A.3d 576 (Pa. Cmwlth. 2011), in which this Court held that a homeowner's request for a dimensional variance that would exceed the zoning code's 40-foot height restriction by 4 inches *4 was *de minimis* and appropriate. The ZHB considered the Marshalls' request to locate guest rooms in the Tenant House to be reasonable, because the proposed use as a B&B estate was in keeping with "the intent and spirit of the adaptive reuse of the historic structures upon the [p]roperty." R.R. at 20a-21a. The ZHB did not consider the general standard for the grant of variance relief, i.e., whether there existed an unnecessary hardship that prevented the property from being developed in strict conformity with the provisions of the zoning ordinance, such that a variance was necessary to permit the reasonable use of the property.[4] Thus the ZHB implicitly found that the requested variance was *de minimis* and concluded that the Marshalls demonstrated they were entitled to a variance that would permit use of the Tenant House for the proposed B&B estate.

4 *See* Section 910.2(a)(1)-(5) of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, added by the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10910.2(a)(1)-(5).

Following various appeals and remand orders, the trial court entered an order reversing the ZHB's decision and granting the Solands' appeal.[5] The trial court held that the Marshalls failed to meet the general requirements stated above. The trial court deemed the Marshalls' desire to utilize the Tenant House for the proposed B&B estate's guest rooms and reserve the Paxson House for their private use was a self-created hardship that could be avoided through a reallocation of living space. The trial court rejected the ZHB's finding that the variance request was *de minimis*, *5 holding that

such variances were exclusively permitted with respect to the *dimensional* requirements of a zoning ordinance. These appeals followed.[6]

[5] Daniel and Dorothy Soland, as well as Mark and Anna Ouimet, are neighboring property owners. The Ouimets also appealed from the ZHB's decision but were precluded from filing briefs or participating in oral argument due to their failure to file an appellate brief as directed.

[6] The Marshalls filed separate notices of appeal with this Court to reflect each land use appeal filed by the Solands and the Board. This Court consolidated the Marshalls' appeals by *per curiam* order dated October 28, 2022.

In this appeal, the Marshalls argue that the Solands had notice of the January 29, 2018 ZHB meeting but failed to appear and challenge the variance request; therefore, the Solands waived their right to appeal the ZHB's decision. They also argue that the Board appealed only the issue of notice and, thus, the Board has waived any remaining issues. Finally, the Marshalls argue that the ZHB properly granted their variance request. We need not address the relatively convoluted and non-jurisdictional issues of waiver and standing that attend the procedural history in this litigation in light of our decision regarding the dispositive final issue and, at all events, they are not properly before us.[7]

[7] This appeal arises from a trial court decision on remand from a prior appeal in this case, *Soland v. Zoning Hearing Bd. of East Bradford Twp.* (Pa. Cmwlth., No. 825 C.D. 2019, filed July 15, 2020) (*Soland I*). The scope of this Court's remand order did not encompass the issue of whether the Solands or the Board had standing to appeal the ZHB's decision, but rather was limited to determining whether the ZHB erred in granting the Marshalls a variance. Where a case is remanded for a specific and limited purpose, any issues that are not encompassed within the remand order may not be decided on remand. *In re Indep. Sch. Dist. Consisting of the Borough of Wheatland*, 912 A.2d 903, 908 (Pa. Cmwlth. 2006). Therefore, the trial court did not have such issues properly before it, nor do we.

At the outset, the Marshalls suggest that a variance is not required, as they now maintain that the Tenant House is an owner-occupied structure. In support of this argument the Marshalls cite *John Marshall and Dara Gans-Marshall v. East Bradford Township Board of Supervisors and Daniel Soland and Dorothy Soland* (Pa. Cmwlth., No. 102 C.D. 2020, filed Feb. 17, 2021) (*Marshall I*), an earlier related appeal in which this Court reviewed whether the East Bradford Township
6 Board of *6 Supervisors (Board) erred in denying the Marshalls' conditional use application after concluding that a barn located on the property (Barn), which the Marshalls intended to use for events held at the proposed B&B estate, was not owner-occupied.[8]

[8] As the Barn was already designated a Class I historic resource, if it also qualified as an owner-occupied structure, the Marshalls could include the Barn as part of the proposed B&B estate and utilize its square footage to calculate the proposed B&B estate's maximum occupancy, which the Marshalls indicated would not exceed 100 guests. After finding that the Barn was not owner-occupied, the Board concluded that the Marshalls could not meet the conditional use requirements for a B&B estate, including the requisite common area necessary for 100 guests. The Board also denied the Marshalls' conditional use application on the grounds that the proposed B&B estate would not comply with the Township's noise ordinance, and that issues remained concerning the proposed B&B estate's septic system, landscaping, parking, and structural capacity. The Marshalls appealed to the trial court, which affirmed the Board and

held that the Barn was not owner-occupied. The trial court did not address the remaining issues.

We reversed the trial court's order affirming the Board, noting that the Marshalls utilized the Barn for storage and to hold events. As a result, we concluded that the Barn was owner-occupied. We reject the Marshalls reasoning that, based on *Marshall I*, the Tenant House is owner-occupied. Unlike the Barn, there is no evidence to suggest that the Marshalls have utilized the Tenant House in any way, whether for storage, entertaining, or any other purpose. Therefore, the Marshalls have not established that the Tenant House is owner-occupied.

The Marshalls have also advanced the argument that locating the guest rooms in the Tenant House is appropriate because the structure is located on a "Class I historic [p]roperty[.]" Marshalls' Br. at 30. By their reasoning, utilizing the Tenant House, a Class II historic property,[9] for the proposed B&B estate's guest rooms serves the same purpose of preserving historic structures as would their use of a Class I historic resource. The Marshalls' argument ignores our explicit conclusions *7 in *Marshall I* that the entire property was not a Class I historic resource as Class I historic resources require a specific designation, per Section 115-122.A(1)(a)(4) of the Ordinance, Ordinance § 115-122.A(1)(a)(4), and the Ordinance limits the buildings eligible for a B&B estate to owner-occupied Class I historic resources. Ordinance § 115-48.2(A). As the Tenant House is not an owner-occupied Class I historic resource, as required by Section 115-48.2(A), the Marshalls were obligated to seek a variance if they wish to utilize that structure for the proposed B&B estate's guest rooms.

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[9] Class II historic resources are defined in Section 115-122(A)(3) of the Ordinance as buildings, sites, structures, objects, and districts that do not meet the criteria of a Class I historic resource but are determined to be of historical or architectural significance to the Township. Ordinance § 115-122(A)(3).

In seeking a variance, the Marshalls have not sought relief from any dimensional requirements in the Ordinance. A dimensional variance involves a request to adjust a zoning ordinance for purposes of using the property in a manner consistent with the applicable regulations, whereas a use variance involves a proposal "to use property in a manner that is wholly outside zoning regulations." *Hertzberg v. Zoning Bd. of Adjustment of Pittsburgh*, 721 A.2d 43, 47 (Pa. 1998). The Marshalls' proposed use is clearly in the nature of a use variance, which the ZHB granted finding the deviation from the ordinance requirements to be *de minimis*. *Id*. Accordingly, the question presented here is whether the trial court erred as a matter of law in holding that a use variance could never be *de minimis*.

Contrary to the trial court, we hold that a use variance can be *de minimis*. Zoning hearing boards have discretion to grant or deny a *de minimis* variance where the variation requested is "minor and rigid compliance with the zoning ordinance is not necessary to protect public policy concerns." *Hawk v. City of Pittsburgh Zoning Bd. of Adjustment,* 38 A.3d 1061, 1066 (Pa. Cmwlth. 2012). De minimis variance relief has no set criteria and the grant of a de *minimis* variance depends upon the circumstances of each case. *Id.* Historically, application of the *de* *8 *minimis* variance doctrine has been exclusively applied in cases where "only minor deviations from dimensional zoning ordinances have been the basis for the variance sought." *Coyle v. City of Lebanon Zoning Hearing Bd.*, 135 A.3d 240, 245 (Pa. Cmwlth 2016). While the doctrine has been repeatedly rejected in use variance cases, *Coyle* and the cases cited therein do not create a rigid rule against applying the *de minimis* doctrine to use variances. Rather, they say only that such a variance has never been approved in the past, i.e.,

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that there is no precedent for doing so, or that the court cannot conceive of a situation in which it would be appropriate.

The theory underlying the skepticism in applying the *de minimis* doctrine to use variances is that "the effect of a use variance on the public interest is greater than the effect of a minor deviation from a dimensional requirement." *Coyle,* 135 A.3d at 245.[10] However, this is not necessarily always the case, and we believe the present case proves the point. *9

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[10] Another reason our Court may have hesitated to delve into the issue of *de minimis* use variances may be the difficulty in measuring degrees of difference, a problem not attendant to dimensional variances. As we noted with regard to use variances and the minimum variance criterion:

> As a practical matter, the minimum variance criterion applies to use variances despite the fact that, generally, "a use variance marks a qualitative rather than a quantitative departure from an existing ordinance" and ″a minimum variance is [more] difficult to assess in use variance cases [than in] dimensional variance cases[.]" In other words, the minimum variance criterion is more readily and practically applicable to quantifiable restrictions, such as dimensional requirements (*i.e.*, distance or size), rather than those that are not quantifiable, as are most use restrictions . . . .

In re Appeal of Ridge Park Civic Ass'n, 240 A.3d 1029, 1033 (Pa. Cmwlth. 2020) [quoting *Paganico v. Zoning Hearing Bd. of the Mun. of Penn Hills*, 227 A.3d 949, 954-55 (Pa. Cmwlth. 2020)].

In support of its determination that the Marshalls were entitled to a variance, the ZHB noted that their request to locate guest rooms in the Tenant House was reasonable because the property's proposed use as a B&B estate was in keeping with the intent and spirit of the Ordinance. According to Ms. Needles, the Township zoning officer, a B&B estate is generally located in "a historic house" as a means of utilizing that structure. January 29, 2018 Hearing, Notes of Testimony (N.T.) at 11; R.R. at 90a. The ZHB solicitor considered the presence of additional structures on the property as "a good reason to" locate guest rooms in the Tenant House. Although the Tenant House itself is not classified as a Class I historic resource, the entire 10-acre property is listed as a Class I historic property on the Township's Historic Resources map and besides the Paxson House there is at least one other Class I historic resource structure on the property (the Barn, which the Marshalls planned to use for events). The Tenant House cannot be seen from the road. Further, the proposed B&B estate would be permitted under the Ordinance as a conditional use if the Marshalls would utilize Paxson House to lodge guests rather than the Tenant House. Thus, the variance requested is more technical than substantial. Indeed, in finding the variance to be essentially *de minimis*, the ZHB found that the proposed use fell within the intent of the Ordinance even though it was technically barred. It stated that "[t]he request to utilize the tenant dwelling for the guest rooms, as opposed to the main dwelling is a reasonable request and *in keeping with the proposed B*[*&B*] [*e*]*state use*. . . . The use of the tenant dwelling for guest rooms, while not owner-occupied, is certainly in keeping with the *intent and spirit* of the adaptive reuse of the historic structures upon the property." March 16, 2018 ZHB Decision at 5-6; R.R. at 20a-21a (emphasis added). Thus the variance approved by the ZHB poses no adverse effect on the public interest. *10

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Application of the *de minimis* doctrine to use variance requests would, and should, be rare and limited to extraordinary situations like the one at bar. As discussed above, this case presents such circumstances. Accordingly, we reverse the decision of the trial court and reinstate that of the ZHB with respect to the *de minimis* use variance. Accordingly, we reverse the order of the trial court.

Judge Fizzano Cannon did not participate in the decision of this case. *11

ORDER

AND NOW, this 20th day of February, 2024, the March 23, 2022 order of the Court of Common Pleas of Chester County is hereby REVERSED. *12

DISSENTING OPINION

ELLEN CEISLER, Judge

While I agree with the majority that the *de minimis* variance doctrine may extend to include a use variance, I disagree with its application in the instant appeal. As a result, I respectfully dissent with the majority's conclusion that locating guest rooms for the proposed bed and breakfast estate (B&B) in the Tenant House, a non-owner-occupied building, is a minor deviation from the requirement in Section 115-48.2(A) of the East Bradford Township (Township) Zoning Ordinance (Ordinance)[1] that the B&B utilize an owner-occupied structure.

[1] East Bradford Township, Pa., Ordinance § 115-48.2(A) (October 11, 2016).

As the majority notes, a *de minimis* variance is appropriate where the variation requested is "minor and rigid compliance with the zoning ordinance is not necessary to protect public policy concerns." *Hawk v. City of Pittsburgh Zoning Bd. of Adjustment,* 38 A.3d 1061, 1066 (Pa. Cmwlth. 2012). While a dimensional variance involves a request to adjust a zoning ordinance for purposes of using the property in a manner consistent with the applicable regulations, a use variance involves a proposal "to use property in a manner that is wholly outside zoning regulations." Ordinance § 115-48.2(J). *Hertzberg v. Zoning Bd. of Adjustment of Pittsburgh*, 721 A.2d 43, 47 (Pa. 1998). Pennsylvania courts have regularly rejected application of the *de minimis* variance doctrine because the effect of a use variance on the public interest is greater than the effect of a minor deviation from a dimensional requirement. *Coyle v. City of Lebanon Zoning Hearing Bd.*, 135 A.3d 240, 246 (Pa. Cmwlth 2016). *13

The Tenant House is not owner-occupied, as John Marshall and Dara Gans-Marshall (Marshalls) have not used that structure for any purpose, and they do not intend to reside in that building. Additionally, the Tenant House is not a Class I historic resource, which is also a requirement of Section 115-48.2(A) of the Ordinance. Rather, the Tenant House has been designated a Class II historic resource. Therefore, to locate guest rooms for their B&B in the Tenant House, the Marshalls are obligated to get variance relief from the Class I historic resource requirement in Section 115-48.2(A). Utilizing a Class II historic resource, instead of a Class I historic resource, would be an appropriate use of the *de minimis* variance doctrine because Section 115-120(A) of the Ordinance expresses a public policy determination that the public interest is served through preservation of Class II historic resources. Including the Tenant House as part of the proposed B&B would presumably lead to its preservation, which furthers the public policy determination identified in Section 115-120(A).

It is unclear, however, what public policy interest is furthered by granting the Marshalls relief from the owner-occupied requirements of Section 115-48.2(A). Indeed, Section 115-48.2(J) of the Ordinance emphasizes the owner-occupied requirement by mandating the submission of "scaled drawings of the floors of the dwelling [that] indicate the owner's living areas, overnight guest rooms/suites[,] and common area[.]" Quite

simply, I am hard pressed to differentiate a B&B that utilizes a non-owner-occupied structure for its
14 guest rooms from a motel. *14

For these reasons, I would affirm the March 23, 2022 order of the Court of Common Pleas of Chester County (trial court), which reversed the *de minimis* variance relief granted by the Township Zoning Hearing Board (ZHB).[2]

[2] Because the majority reverses the trial court, it does not address the issue of standing raised by the Marshalls. I would reject the Marshalls' standing arguments, as their failure to comply with the notice provisions in the Ordinance directly led to the Solands' failure to challenge the Marshalls' variance request before the ZHB. Thus, the Solands had standing to appeal the ZHB's decision granting variance relief to the trial court. The Board, having intervened in the Solands' land use appeal, likewise had standing to contest the ZHB's decision.

1198 C.D. 2022
Commonwealth Court of Pennsylvania

Borough v. Zoning Hearing Bd. of the Borough of Plum

Decided Jan 29, 2024

1198 C.D. 2022

01-29-2024

Plum Borough, Appellant v. Zoning Hearing Board of the Borough of Plum, Penneco Environmental Solutions, LLC and Protect PT

COHN JUBELIRER, PRESIDENT JUDGE

Argued: October 10, 2023

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge HONORABLE PATRICIA A. McCULLOUGH, Judge HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION

COHN JUBELIRER, PRESIDENT JUDGE

Appellant Plum Borough (Borough) and Intervenor Protect PT (together, Objectors) appeal from the Order of the Court of Common Pleas of Allegheny County (common pleas) affirming the decision of the Zoning Hearing Board of the Borough of Plum (ZHB), which granted Intervenor Penneco Environmental Solutions, LLC's (Penneco) application for a special exception to expand a preexisting nonconforming use (Application). After careful review, we vacate common pleas' Order and remand with instructions to further remand to the ZHB to make findings of fact and conclusions of law sufficient to grant or deny the Application and enable
2 appellate review. *2

I. BACKGROUND

At issue in this appeal is Penneco's 69-acre property located at 1815 Old Leechburg Road within Plum Borough (property) and zoned as Rural Residential (RR) per the Plum Borough Zoning Ordinance, Ordinance No. 916-17 (2017), as amended (Ordinance). (ZHB Decision, Findings of Fact (FOF) ¶¶ 1-4.) Penneco (or predecessor-in-interest Sedat, Inc.) has operated a production gas well on the property since 1989. (*Id.* ¶ 5.) In 2016, Penneco sought permission from the United States Environmental Protection Agency (EPA) to operate an underground injection well (also known as an Underground Injection Control well, or UIC well) on the property, the subject of this Court's decision in *In re Penneco Environmental Solutions, LLC*, 205 A.3d 401, 402 (Pa. Cmwlth. 2019). (*See also* FOF ¶ 6.) There, we explained that "[a]n underground injection well serves to dispose of exploration and production fluids from oil and gas operations by placing the fluids into porous geologic formations[,] . . . [which] is subject to the oversight of the [EPA]." *Penneco*, 205 A.3d at 402. (*See also* FOF ¶¶ 7-8.) Those fluids are also referred to as brine. (Reproduced Record (R.R.) at 14a.) Common pleas granted site-specific relief to Penneco as to the first proposed injection well, which was
3 affirmed. *Penneco*, 205 A.3d at 410.[1] *3

[1] *Penneco* involved a substantive validity challenge to the Ordinance, which Penneco alleged at the time excluded injection wells and was preempted by state and federal law. *Penneco*, 205 A.3d at 402-03. However, before this Court, the only issue was whether the ZHB erred in finding the challenge not ripe for review, Penneco

> having not secured the approval of the EPA and Pennsylvania Department of Environmental Protection (DEP). *Id.* at 403. Our decision was limited to ripeness. *Id.* at 410. Because the only issue raised on appeal was ripeness, and there was no appeal of common pleas' merits determination that the then-current zoning ordinance was exclusionary, the effect of our decision was to affirm common pleas' order granting site-specific relief as to the well at issue in that litigation. (*See* FOF ¶ 18.).

After securing the necessary approval from the EPA and the Pennsylvania Department of Environmental Protection (DEP), Penneco began operating a UIC well on the property. (FOF ¶¶ 18-19.) Specifically, it converted a well it refers to as "Sedat 3A" from a natural gas production well to an injection well. (R.R. at 17a, 164a.) In November 2021, Penneco submitted its Application, styled as a "Special Exception Application . . . for the expansion of a non[]conforming use," seeking to "add another [UIC well] and observation well to be serviced by the already[ ]existing . . . [f]acilit[ies]." (*Id.* at 155a; FOF ¶¶ 22-23.) The Application refers to the proposed injection well as "Sedat 4A." (R.R. at 17a, 164a.)

The ZHB held a hearing on the Application in January 2022. Penneco called its Chief Operating Officer Ben Wallace (Wallace), who testified that "much of the brine in Pennsylvania is exported to Ohio. So, there is [sic] millions of gallons of brine moving around the state, and there are only a few injection wells in Pennsylvania that accept these brines." (*Id.* at 15a.) Wallace further explained that Penneco's "customers could easily deliver us more fluid. We are constrained by our ability to receive fluid" and "have our customers currently rationed on the amount of fluid that they can bring us on a daily basis." (*Id.* at 22a.) He also testified that Penneco would benefit from having both wells be UIC wells. (*Id.* at 25a.) That is because, in part, Penneco could service customers more effectively if it could "operate either well in the event that either well is being serviced," which he referred to as creating an important "redundancy" in its UIC well operations. (*Id.*) Wallace also indicated no new roads would be required, but the pipeline would have to be replaced with a new injection pipeline. (*Id.* at 18a.) He further testified that the EPA application for the proposed injection well was administratively complete, and he expected the EPA to schedule hearings on that application within six months. (*Id.* *4 at 26a.) He explained that bringing the proposed injection well online would increase its capacity by 50%, from the then-30 loads to 45 loads per day. (*Id.*) Wallace also confirmed there would be no additional noise from the injection well itself, but an increase in truck traffic could increase the noise level. (*Id.* at 27a-28a.)

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Protect PT called witnesses to testify about their concerns regarding Penneco's current operations and the contemplated expansion thereof. One community member testified that she has had issues with air quality and water quality since July 2021, for which she requested a report from Duquesne University and filed a complaint with DEP. (*Id.* at 62a.) She indicated she filed a complaint with the Borough related to water, air quality control, and truck traffic, with Allegheny County related to air quality, and with the state police related to truck traffic. (*Id.* at 62a-63a.) She testified further that since the injection well began operating, truck traffic has increased, sometimes a truck every 30 minutes in the middle of the night. (*Id.* at 63a.) Moreover, she testified to "a chemical odor in the air that has caused headaches." (*Id.*) Generally, she indicated that she is "just concerned for [her] health, for [her] family's health, [and] for the community's health." (*Id.* at 64a.)

Two other residents who live on the same road as the property testified. One indicated concerns about his property becoming "swampy," and truck traffic "com[ing] up and down that road 24 hours a day." (*Id.* at 110a-11a.) Another community member indicated that "we have had some very

bad acid odors that will make your eyes water, [create a] bad taste in your mouth. We actually had to leave at times[] because it is so bad." (*Id.* at 111a.) He also testified about his concerns regarding light and noise from the property, as well as truck traffic. (*Id.* at 111a-12a.) *5

Another resident testified as to his concerns with residential properties being within 500 feet of the property. (*Id.* at 114a.) Yet another resident testified to the "mental anguish" resulting from the increased truck traffic and lost sleep. (*Id.* at 115a.) Another community member testified that, at one point, his water began tasting like mold. (*Id.* at 67a.) He explained that he called Penneco's president for help, who brought water and ultimately made arrangements for "water buffaloes" to supply water. (*Id.* at 67a-68a.) He said that in "40 years of drinking water from that spigot, [he] never had an issue prior to them working across the street." (*Id.* at 69a.) He also expressed a concern about the increased truck traffic. (*Id.*)

Finally, Protect PT called registered nurse Laura Dagley who serves as "medical advocacy coordinator for Physicians for Social Responsibility."[2] (*Id.* at 77a.) She testified that she had "reviewed dozens of studies, health studies, as well as EPA and DEP documents and studies, just over the course of [her] working years and in preparation for this." (*Id.* at 78a.) She testified about the relationship between air quality and health, (*id.* at 84a), and chemicals from fracking and their negative health impacts, (*id.* at 85a), as well as chemicals present in fracking wastewater that might cause health problems, (*id.* at 87a-92a).

[2] Penneco objected to qualifying Dagley as an expert after a brief voir dire as to her qualifications. (R.R. at 80a-83a.) The ZHB took the objection under advisement, permitted her to testify, and did not ultimately rule on the objection. (*Id.* at 83a.).

The Borough called Tysen Miller, who had served as Borough engineer for the past 30 years. (*Id.* at 116a.) He testified that the proposed UIC well is approximately 325 feet away from the nearest property line, and approximately 430 feet from the nearest existing structure. (*Id.* at 117a.)

At the end of the hearing, Timothy Joyce, a member of the ZHB, commented that *6

> no matter what we rule tonight as a local [ZHB], it doesn't matter. This was a formality. . . . So, I am going to make a motion to vote yes on the motion [to approve the Application], because to do otherwise would be a waste of money to the taxpayers of Plum Borough and to the manpower of Plum Borough, because we would be turned over in court anyway.

(*Id.* at 120a-21a.)

Another ZHB member, Andy Zarroli, stated, "we can't stop this, we can't regulate it, and we can't prevent this expansion," echoing Joyce's characterization of the proceeding as "a formality that Penneco has to go through." (*Id.* at 122a.)

Finally, Michelle Chapkis, chairperson of the ZHB, explained to those in attendance that "we have been informed that this is not a special exception . . . [so] all the various elements in the [O]rdinance, and in Section 403 [of the Ordinance, Ordinance, § 403,] under special exception, that, indeed, is not applicable this evening." (*Id.* at 124a.) The ZHB then voted to approve Penneco's Application. (*Id.* at 126a-27a.)

The ZHB issued a written decision. In its findings of fact, the ZHB found that Penneco presented evidence that the new injection point and observation well would require no new roads and no new construction, as the footprint of its operation would not change, and the necessary changes would occur underground. (FOF ¶¶ 25-26, 29.) Further, it found that Penneco predicted that truck traffic to its property would increase from 30 to 45 loads per day, and that its product

capacity would increase by 50% as a result of the proposed expansion. (*Id.* ¶¶ 27-28.) The ZHB explained that such use qualifies as "a preexisting nonconforming use because . . . [it] commenced prior to the adoption of the current Ordinance." (*Id.* ¶ 20.)[3] *7

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[3] The Borough adopted its current Ordinance regulating injection wells on December 11, 2017. (Original Record (O.R.) Item 10.) Penneco applied to convert the first injection in March 2016, well prior to the Ordinance's adoption. *Penneco*, 205 A.3d at 403.

The ZHB observed that the Ordinance, consistent with Pennsylvania law, gives landowners the right to apply to expand preexisting nonconforming uses made "necessary by the natural expansion and growth of trade." (*Id.* ¶¶ 32-33 (quoting Section 1002(C) of the Ordinance, Ordinance, § 1002(C)).) Subsection C of Section 1002 of the Ordinance is entitled "Expansion or extension of nonconforming use," and provides in relevant part:

> No . . . nonconforming use shall be enlarged or increased or extended to occupy a greater lot area than was occupied at the effective date of adoption or amendment of this Ordinance, unless the ZHB shall interpret that the enlargement or extension is necessary by the natural expansion and growth of trade of the nonconforming use. For the purposes of determining if an enlargement or expansion . . . meets this requirement, the applicant shall file an application for Special Exception pursuant to the requirements of Article IV of this Ordinance. The applicant must meet all the applicable requirements and criteria of Article IV in addition to providing evidence that the enlargement or extension is necessitated by the natural expansion and growth of trade of the nonconforming use.

Ordinance, § 1002(C)(2).[4]

[4] (O.R. Item 10.).

The ZHB's Decision, which was captioned as addressing Penneco's "Application for Variance," described the Application as a "request to permit the expansion of a nonconforming use." (ZHB Decision at 5.) The ZHB summarily determined that Penneco met its burden of proving that adding another UIC well was "a natural expansion of [Penneco's] current existing non[]conforming use and is necessary for the growth of its trade." (FOF ¶ 37.) However, the ZHB also stated that its members, as "residents of the Borough [were] gravely concerned with [Penneco's] use of the property" but felt "constrained under the law to allow" the *8 new injection well. (*Id.* ¶ 39.) The Borough appealed the ZHB's decision to common pleas.

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Taking no new evidence, and relying substantially on the logic of the ZHB's decision, common pleas affirmed. (Common Pleas' Opinion at 4.) Notably, common pleas did not analyze the extent to which the special exception requirements applied. (*Id.*) The Borough then filed the instant appeal to this Court.

II. PARTIES' ARGUMENTS

A. The Borough

The Borough begins by noting that applicants must satisfy a zoning ordinance's specific requirements for a special exception. The Borough points out that Section 1002(C)(2) of the Ordinance cross references the requirements of Article IV for special exceptions, concluding that "all of the requirements contained in Article IV . . . [are] applicable to Special Exceptions filed for the expansion of a nonconforming use before the ZHB." (Borough's Brief (Br.) at 29.) It argues that if all of the requirements are applicable, Article IV's special exception requirements for injection wells, (Section 434(A)-(N) of the Ordinance, Ordinance, § 434(A)-(N)), apply, requiring a "traffic study, noise management plan,

environmental impact analysis, air quality study, hydrological study, geological study, and Pre-Development and Post-Development Soil Testing." (Borough's Br. at 31). It also submits that Penneco failed to prove that its growth of trade required expansion of its nonconforming use. (*Id.* at 32-33.) Accordingly, in the Borough's view, the ZHB erred in not "properly analyz[ing] or consider[ing] in [its] Findings of Fact and Conclusions of Law" the above requirements. (*Id.* at 33.) *9

Second, the Borough argues that Section 1002(C)(1) of the Ordinance, which prohibits, generally, the extension, expansion, or moving of any nonconforming use, bars Penneco from "moving" a nonconforming use, though the Borough does acknowledge that subsection (C)(2) is an exception to that general rule. (*Id.* at 36.) It nonetheless argues that because "an injection well does not currently exist at the proposed location . . . the [Ordinance] estops Penneco's proposed expansion into a new area of the subject property." (*Id.*)

It then turns to the specific setback requirements in Section 434 of the Ordinance, which require well operations to be located no fewer than 500 feet from the nearest property line. (*Id.* at 37.) The Borough argues that because the proposed location for the new injection well is less than 500 feet from property lines, the expansion violates Section 434's setback requirements. (*Id.*)

B. Protect PT

Protect PT's arguments largely track those of the Borough. It emphasizes that Section 405 of the Ordinance, Ordinance, § 405, which applies to all special exceptions, requires traffic studies and a showing that the proposed use will not cause a public health or safety hazard. (Protect PT's Br. at 9-10.) Protect PT reasons that the Ordinance required Penneco to submit a conditional use application by way of Section 434(C)(8), which provides that "[c]hanges in the site plan, including . . . any expansion of the ground surface area used and/or devoted towards drilling operations, requires a new conditional use approval. . . ." (Ordinance, § 434(C)(8).)

Protect PT also believes that the natural expansion doctrine does not apply to Penneco, setting forth three distinct reasons. First, "[i]f Penneco is considered to be changing the use of its current production well on the property into an injection well, *10 then that change is not sufficiently similar to invoke the doctrine of natural expansion." (Protect PT's Br. at 16.) Protect PT appears to characterize the nonconforming use in general as the operation of production wells, as it states "[i]f Penneco is arguing that [it is] expanding [its] non[]conforming use to the existing production well, then [it is] impermissibly changing the use of that well, because an injection well is not 'sufficiently similar' to the current production well." (*Id.* at 20.) Protect PT also asserts that expansion of nonconforming uses is subject to setback requirements, and that applicants must seek a variance where the nonconforming use would violate a dimensional requirement of an ordinance. (*Id.* at 21.) It argues that "Penneco could potentially be considered to be moving the location of the current injection well to a new location on the same property," which in Protect PT's view, is not permissible. (*Id.* at 22.)

Finally, Protect PT asserts that the natural expansion doctrine does not permit uses that "would have an adverse impact on the public's health, safety, or welfare." (*Id.* at 24.) It argues that record evidence from the hearing shows that the expansion is injurious to public health and safety, and that Penneco failed to prove otherwise. (*Id.*)

C. Penneco

Penneco argues that the ZHB correctly interpreted the Ordinance to not require the Article IV requirements to which Objectors point, and that the ZHB's interpretation is entitled to deference. (Penneco's Br. at 17.) In its view, because Penneco

seeks expansion of a preexisting, nonconforming use and not a new special exception or conditional use, Article IV of the Ordinance does not apply. (*Id.* at 18.) Penneco roundly rejects the Borough
11 and Protect PT's argument that Section *11 1002(C)(1) of the Ordinance applies, noting that it is "simply incorrect" that Penneco is moving a nonconforming use-it is expanding one. (*Id.* at 19.) It asserts that the only applicable provision of Article IV is strictly procedural, namely Section 404 of the Ordinance, Ordinance, § 404 ("Special Exception Procedure for Approval"). (*Id.* at 20.) It is entitled, Penneco argues, to expansion of its nonconforming use under Pennsylvania law. (*Id.* at 21.) It asserts that the ZHB's interpretation of the Ordinance is the only correct one because application of the irrelevant provisions of Article IV would render Penneco's right to natural expansion "meaningless." (*Id.* at 22.) Penneco also urges this Court to disregard "[a]ny attempt to misconstrue Penneco's [A]pplication before the ZHB as seeking a change in use . . . because Penneco made no such application." (*Id.* at 23.)

Penneco argues that the ZHB correctly concluded that the nonconforming use here will not be detrimental to public health, safety, or welfare. (*Id.* at 25, 29-31.) In its view, the Borough and Protect PT had the opportunity to cross-examine Penneco's witness and put forth their own evidence. Penneco asserts that "[a]fter consideration of the substantial evidence presented, the ZHB appropriately weighed it and reached a conclusion." (*Id.* at 25.) Penneco also argues that sufficient evidence supports the ZHB's finding that expansion is necessary for Penneco's business based on increase in customer demands and inability to meet customers' needs without expansion. (*Id.* at 26-28.)

III. DISCUSSION

A. Standard of Review

When common pleas takes no additional evidence, we must limit our review to whether the ZHB "committed an abuse of discretion or an error of
12 law." *12 *Harrisburg Gardens, Inc. v. Susquehanna Twp. Zoning Hearing Bd.*, 981 A.2d 405, 410 (Pa. Cmwlth. 2009). We will find that a ZHB has abused its discretion where it has made factual findings that are not supported by substantial evidence. *Bene v. Zoning Hearing Bd. of Windsor Twp.*, 550 A.2d 876, 879 (Pa. Cmwlth. 1988). We apply this deferential standard of review because we do not sit as "a super [zoning hearing board]" and thus "[t]he necessity must be clear before there is justification for judicial interference with the municipality's exercise of its zoning power." *Robert Louis Corp. v. Bd. of Adjustment of Radnor Twp.*, 274 A.2d 551, 555 (Pa. Cmwlth. 1971).

Where a zoning hearing board's interpretation of its ordinance is at issue, we must "begin[] with examination of the text itself." *Gouwens v. Indiana Twp. Bd. of Supervisors*, 260 A.3d 1029, 1037-38 (Pa. Cmwlth. 2021). As a general rule, "a zoning board's interpretation of its zoning ordinance is to be given great weight as representing the construction of a statute by the agency charged with its execution and application." *In re Brickstone Realty Corp.*, 789 A.2d 333, 339 (Pa. Cmwlth. 2001). However, we will not defer to a zoning hearing board's interpretation where such interpretation is "clearly erroneous," and generally, a board's failure to heed the plain text of the ordinance amounts to legal error which this Court will not ignore. *Gouwens*, 260 A.3d at 1037-38.

B. Applicability of the Doctrine of Natural Expansion

A threshold issue is whether the doctrine of natural expansion applies in the first instance.[5] In its supplemental brief, the Borough largely
13 reiterates the *13 arguments it advanced in its opening brief. Protect PT argues in its supplemental brief that *Pennridge Development Enterprises, Inc. v. Volovnik,* 624 A.2d 674 (Pa. Cmwlth. 1993), and *Smith v. Zoning Hearing Board of Conewago Township*, 713 A.2d 1210 (Pa. Cmwlth. 1998), are not applicable to the

resolution of this case. First, it points out that the UIC use is not permitted by conditional use in the RR district, so the ZHB did not err in concluding the doctrine of natural expansion applied in the first instance. However, it emphasizes that "a nonconforming use is not entitled to greater rights tha[n] those afforded a conforming use." (Protect PT's Supplemental Br. at 9 (quoting *Pennridge*, 624 A.2d at 677).) It flows from that proposition, it argues, that not requiring Penneco to comply with all conditional use criteria would amount to "afford[ing Penneco] greater rights than those afforded to a conforming use." (*Id.*) In its supplemental brief, Penneco points out that UIC wells are only allowed by conditional use in the Heavy Industrial (HI) zoning district. Because the UIC use on the property remains a preexisting, nonconforming use, and it remains prohibited in the RR district, it argues *Pennridge* and *Smith* do not apply.[6]

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> [5] On November 14, 2023, the Court requested supplemental briefing on the applicability of two cases: *Pennridge Development Enterprises, Inc. v. Volovnik*, 624 A.2d 674 (Pa. Cmwlth. 1993), and *Smith v. Zoning Hearing Board of Conewago Township*, 713 A.2d 1210 (Pa. Cmwlth. 1998). (Order 11/14/23.).
>
> [6] Penneco's supplemental reply brief largely reiterates points it made in its initial brief.

With these arguments in mind, we turn to the relevant law. The doctrine of natural expansion is as old as Euclidean zoning itself.[7] Almost a century ago, our Supreme Court explained that where a given use of property predates a zoning ordinance purporting to restrict that use,

> [7] 1927 is the year the Pennsylvania Supreme Court, citing *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), upheld a zoning ordinance in *Appeal of Ward*, 137 A. 630 (Pa. 1927), ushering in zoning regulation in the Commonwealth as we know it today.

> the [municipality is] without power to compel a change in the nature of the use, or prevent the owner from making such necessary additions to the existing structure as were needed to provide for its natural

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> expansion and the accommodation of increased trade, so long as such additions would not be detrimental to the public welfare, safety[,] and health.

In re Gilfillan's Permit, 140 A. 136, 138 (Pa. 1927).

In the leading case on this issue, *Silver v. Zoning Board of Adjustment*, 255 A.2d 506 (Pa. 1969), our Supreme Court struck down as unconstitutional a zoning ordinance which prevented the expansion of nonconforming apartment buildings. In *Silver*, the owner of an apartment building desired to increase the number of units in the building from 46 to 50, which "would be accomplished . . . by subdividing larger apartments[,]" and the zoning board there denied a permit to do so, looking to the zoning ordinance. *Id.* at 507. In holding for the apartment building owner, the Supreme Court concluded that "the tenor of [its prior] decisions [is] that the right of natural expansion is a constitutional right protected by the due process clause." *Id.*

Of course, to trigger the right recognized in *Silver*, the property owner must be able to demonstrate the use in question amounts to a preexisting, nonconforming use in the first instance. A nonconforming use is one that "does not comply with present zoning provisions but which existed lawfully and was created in good faith prior to the enactment of the zoning provision." *Pennridge*, 624 A.2d at 675.[8] We have explained, "[a] lawful nonconforming use is a vested property right which cannot be abrogated or destroyed unless it is a nuisance, or it is abandoned by the owner, or it is extinguished by eminent domain." *Id.* That said, "[t]here is no constitutional right to require that a

municipality maintain a use as nonconforming." Robert S. Ryan, Pa. Zoning Law & Prac. § 7.4.6 (2022). Therefore, if a municipality changes a zoning ordinance to allow a given use by
15 conditional use *15 where it was once not allowed, the property can no longer be characterized as a nonconforming use to which the doctrine of natural expansion is applicable. *Smith*, 713 A.2d at 1213; *Pennridge*, 624 A.2d at 676.

> 8 The Ordinance tracks this definition: a "use . . . that does not comply with the applicable provisions in this Ordinance . . ., where such use was lawfully in existence prior to the enactment of this Ordinance[.]" Section 202 of the Ordinance, Ordinance, § 202.

Here, the Ordinance, enacted in 2017, does allow UIC wells as a conditional use in the Borough. Section 318 of the Ordinance, Ordinance, § 318; Table of Authorized Uses (Table 11).[9] However, it only allows them as a conditional use in the HI zoning district, not in the RR district at issue in this Application. Section 315 of the Ordinance, Ordinance, § 315; Table 11. The UIC well currently in existence at the property was not permitted by the zoning ordinance in effect when common pleas granted site-specific relief. *Penneco*, 205 A.3d at 402-04. And because the Ordinance still does not permit UIC wells in the RR district, the UIC well use on the property remains a preexisting, nonconforming use. As such, the doctrine of natural expansion does apply in this instance. *Cf.* Ryan, Pa. Zoning Law & Prac. § 7.4.6.

> 9 Notably, while UIC wells are permitted as a conditional use only in the HI district, Oil and Gas Compressor Stations, Oil and Gas Processing Plans, and Oil and Gas Wells/Pads are permitted as conditional uses in the RR zoning district, as well as the Light Industrial and HI zoning districts. Table 11.

C. Necessity of the Expansion

Having concluded this case implicates the natural expansion doctrine, we next address the Borough's argument that the ZHB erred in concluding Penneco's proposed expansion is necessary to support the expansion of its growth or trade where, in the Borough's view, substantial evidence did not support that finding.

The right to natural expansion of an existing nonconforming use "must be shown to be needed to provide for natural expansion and the accommodation of increased trade." *Harrisburg Gardens, Inc.*, 981 A.2d at 411-12 (declining to
16 invoke *16 the doctrine of natural expansion where record was "bereft of any evidence . . . as to the necessity of the activity at issue as an element of the purported expansion") (emphasis in original) (internal quotation marks and citation omitted). We have explained that "the expansion or modernization [must be] a matter of necessity for the business rather than merely to take advantage of an increase in business" for the doctrine to be triggered. *Richards v. Borough of Coudersport Zoning Hearing Bd.*, 979 A.2d 957, 967 (Pa. Cmwlth. 2009) (citation omitted). The prerequisite that the expansion be a matter of necessity derives from the *Silver* Court's explanation that "it is inequitable to prevent [a landowner] from expanding [an existing nonconforming use] as the dictates of business or modernization require." *Silver*, 255 A.2d at 507 (emphasis added).

Accordingly, for a zoning hearing board to find the doctrine of natural expansion applicable in a given scenario, it must make sufficient findings of fact to support a conclusion that the expansion is necessary. Section 908 of the Pennsylvania Municipalities Planning Code[10] (MPC) requires that "each decision [of a zoning hearing board] shall be accompanied by findings of fact and conclusions based thereon with the reasons therefor." 53 P.S. § 10908(9) (emphasis added). We have explained that zoning hearing boards must present "essential findings of fact, conclusions of law, and sufficient rationale to

demonstrate that its action was reasoned and not arbitrary." *Taliaferro v. Darby Twp. Zoning Hearing Bd.*, 873 A.2d 807, 816 (Pa. Cmwlth. 2005) (emphasis added).

10 Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10908(9).

We find ourselves in a similar position to that of the Court in *Mill-Bridge Realty, Inc. v. Manchester Township Zoning Board of Adjustment*, 286 A.2d 17 483 (Pa. *17 Cmwlth. 1972). There, in the context of a zoning hearing board's grant of special exceptions, President Judge Bowman observed that

> on the present state of the record, we cannot properly exercise even our limited function of review, for while we have an ample record before us containing the complete testimony presented to the [zoning hearing board] as well as the exhibits . . . we are unable to determine on what basis the [zoning hearing board] made its decision. Were we to make an independent review of the record and to make a decision . . . we would be assuming the role assigned to the [zoning hearing board].

Id. at 485 (emphasis added). Notably, the *Mill-Bridge* Court explained that even though the appellant there had not specifically based its argument on Section 908(9) of the MPC,[11] the Court could "[]not ignore this failure[,] as compliance by the [zoning hearing board] is essential to our reviewing responsibility[,]" reasoning that the Court could not "assess the substantive merits of the appeal absent such findings." *Id.* at 486. Therefore, it remanded the matter to the court of common pleas with instructions for that court to remand to the zoning hearing board to comply with Section 908(9) and make the required findings.

11 The relevant text of Section 908(9) has remained unchanged since the Court's decision in *Mill-Bridge*. *See Mill-Bridge*, 286 A.2d at 485.

Here, the ZHB, in a conclusory fashion, stated that Penneco "met its burden when it provided competent evidence that the addition of another injection point . . . is a natural expansion of the current existing non[]conforming use and is necessary for the growth of its trade." (FOF ¶ 37.)[12] However, the ZHB made no factual findings, nor did it explain its reasoning, to support that conclusion. The ZHB did not specify which "competent evidence" it credited with 18 respect to this issue. And *18 while Penneco points to evidence in the record that might elucidate the ZHB's conclusion, the bottom line is that the ZHB has not made sufficient findings of fact for us to engage in meaningful appellate review as to this conclusion. For us to comb through the record for evidence on which the ZHB made no findings or credibility determinations would require us to act as fact finder and abandon our proper, limited role as an appellate tribunal. We decline to do so.

12 Although the ZHB does not distinguish between findings of fact and conclusions of law in its Decision, it is clear that paragraph 37 is a conclusion of law, as it applies a legal principle to a particular set of facts.

In sum, just like the *Mill-Bridge* Court, we have a record before us, but we are unable to meaningfully review the ZHB's legal conclusion as to necessity of the expansion because the ZHB made no specific findings to support that conclusion, nor did it spell out its reasons for arriving at it. Accordingly, we must remand to common pleas with instructions to remand to the ZHB to make adequate findings of fact, and in its discretion, to take additional evidence, to support a conclusion as to the necessity of the expansion of the nonconforming use, *Harrisburg Gardens, Inc.*, 981 A.2d at 411-12, and to fully explain its

reasoning, 53 P.S. § 10908(9). Put simply, in the absence of factual findings and reasoning, we are unable to determine whether the ZHB's conclusion is the product of principled reasoning or mere arbitrariness. *Taliaferro*, 873 A.2d at 816.

D. Applicability of Article IV's Special Exception Requirements

We next consider the extent to which, under the natural expansion doctrine, Article IV's special exception requirements apply in the instant matter. The *Silver* Court was careful to reiterate, consistent with *Gilfillan's Permit*, that the right to natural expansion "is not unlimited . . . [; t]he contemplated expansion must not be detrimental to the public health, welfare, and safety. We have never questioned the right of a municipality to impose reasonable restrictions on the expansion of
19 a *19 non[]conforming use." *Silver*, 255 A.2d at 507 (footnotes omitted) (emphasis added). It made clear that a "municipality certainly can condition such expansion on certain prerequisites and standards necessary for the preservation of the health, safety[,] and welfare of the community." *Id.* at 508 (emphasis added). *See also Tuckfelt v. Zoning Bd. of Adjustment of City of Pittsburgh*, 471 A.2d 1311, 1314-15 (Pa. Cmwlth. 1984) (affirming denial of special exception for expansion of nonconforming use where substantial evidence supported conclusion that such expansion would be "detrimental to the public health, morals, safety, and general welfare of the neighborhood"). In addition, "nonconforming use[s are] not entitled to greater rights tha[n] those afforded a conforming use[.]" *Pennridge*, 624 A.2d at 677.

Special exceptions, we have said, are neither special, nor are they exceptions; rather they are "conditionally permitted use[s], legislatively allowed if the standards are met." *Siya Real Est. LLC v. Allentown City Zoning Hearing Bd.*, 210 A.3d 1152, 1157 (Pa. Cmwlth. 2019) (quoting *Bray v. Zoning Bd. of Adjustment*, 410 A.2d 909, 911 (Pa. Cmwlth. 1980)). Section 912.1 of the MPC states that where a zoning ordinance provides that special exceptions "be granted or denied by the board pursuant to express standards and criteria, the board shall hear and decide requests for such special exceptions in accordance with such standards and criteria." 53 P.S. § 10912.1.[13] It follows, then, that a prerequisite to meaningful appellate review in the special exception context is that "there must be findings and conclusions . . . concerning[, *inter alia*,] . . . . whether all [] objective requirements of the [o]rdinance for a special exception have been or will be met[] and whether the proposed use would be against the best interests and welfare of the
20 community." *Allied Servs. for* *20 *the Handicapped, Inc. v. Zoning & Hearing Bd. of City of Scranton*, 459 A.2d 60, 62 (Pa. Cmwlth. 1983). Remand is appropriate for a zoning hearing board to make the appropriate findings of fact and conclusions of law where they are absent. *Id.*

[13] Section 912.1 was added by Section 91 of the Act of December 21, 1988, P.L. 1329.

We note that municipalities often require applicants to proceed via special exception to expand a nonconforming use. *See, e.g.*, *Bernotas v. Zoning Hearing Bd. of City of Bethlehem*, 68 A.3d 1042, 1046 (Pa. Cmwlth. 2013) (relevant ordinance provided for nonconforming use expansion to proceed under special exception though applicant there ultimately needed to seek variance); *Domeisen v. Zoning Hearing Bd. of O'Hara Twp.*, 814 A.2d 851, 855 (Pa. Cmwlth 2003) (applicant seeking expansion of nonconforming use proceeded under special exception and variances); *Tuckfelt*, 471 A.2d at 1314 (applicant seeking expansion of nonconforming use proceeded under special exception and was required to comply with requirements applicable to all special exceptions). A municipality's choice to require applicants to proceed under a special exception to expand a nonconforming use is consistent with the *Silver* Court's observation that municipalities may require that applicants satisfy certain conditions as

prescribed in an ordinance as a condition to expansion. *See Silver*, 255 A.2d at 507 ("We have never questioned the right of a municipality to impose reasonable restrictions on the expansion of a non[]conforming use.") (emphasis added).

We now turn to the Ordinance itself. The logical place to start is Article X of the Ordinance, which pertains to "Nonconforming Uses, Structures, and Lots." Section 1002(C)(1) provides, in general that

> no nonconforming use may be extended or expanded in any building or structure, or in or on the lot on which it is located, nor may any nonconforming use be moved to a different location upon the lot on which it is located, so as to alter the use or location which existed at the time the use became nonconforming.

21 *21 Ordinance, § 1002(C)(1).

However, Section 1002(C)(2) provides the exception to that general rule and explains, consistent with *Silver*, that "no such nonconforming use shall be enlarged or increased or extended to occupy a greater lot area . . . unless the ZHB shall interpret that the enlargement of or extension is necessary by the natural expansion and growth of trade of the nonconforming use." *Id.*, § 1002(C)(2) (emphasis added). The Ordinance then directs those seeking to invoke the "expansion and growth of trade" exception to file

> an application for Special Exception pursuant to the requirements of Article IV. . . . The applicant must meet all the applicable requirements and criteria of Article IV in addition to providing evidence that the enlargement or extension is necessitated by the natural expansion and growth of trade of the nonconforming use.

Id. (emphasis added).

Thus, at the outset, we note that Penneco began by proceeding under Article IV, as it styled its Application as a request for a special exception, as directed by the Ordinance. (R.R. at 155a.)[14]

> 14 Despite the plain text of the Ordinance and the language on the face of the Application, the ZHB came to believe that the Application was not for a special exception, but rather a variance. (ZHB Decision at 5 n.1.).

Consistent with the requirements under Section 1002(C)(2), we must turn to Article IV of the Ordinance titled "Express Standards and Criteria for Special Exceptions and Conditional Uses," to determine specifically which requirements from Article IV apply here. Section 404 sets forth procedural requirements for applicants seeking a special exception, and relevant here, it also explains that the applicant has the burden of proving "that the proposed use is authorized as a use by Special Exception and satisfies the specific
22 or objective requirements for the grant *22 of a use by Special Exception as set forth in this Ordinance." Ordinance, § 404(A)(6).[15] It also purports to require the applicant to "demonstrate that the request is not detrimental to the health, safety, and welfare of the neighborhood." *Id.* Section 405 sets forth "General Standards for all Conditional Uses and Special Exceptions." *Id.*, § 405 (emphasis added). It requires, *inter alia*, that the applicant "establish by credible evidence that the application complies with all applicable requirements of this Ordinance." *Id.*, § 405(A)(2). It also requires the applicant to show "that the traffic from the proposed use will be accommodated in a safe and efficient manner . . . ." *Id.*, § 405(A)(5). It states that "[t]he proposed use shall not create a significant hazard to the public health[,] safety, and welfare." *Id.*, § 405(A)(7).

> 15 In *Bray*, Judge Craig explained in detail how the burdens of proof and persuasion operate and shift in the special exception context. There, we explained that as to

> specific requirements and objective criteria for a special exception, applicants bear both the burden of production and the burden of persuasion. 410 A.2d at 913. In general, objectors bear both burdens with respect to "general detrimental effect" (including health, safety, and welfare considerations), and while a given ordinance might purport to shift both burdens to the applicant, it can only validly shift the burden of persuasion to the applicant, not the burden of production. *Id.* Finally, with respect to general policy concerns (like harmony with the spirit of an ordinance), objectors, invariably and without exception, bear both burdens. *Id.* We more recently summarized:
>
> > [I]f a requirement is interpreted as one upon which the burden is placed on an applicant, but the requirement is nonobjective or too vague to afford the applicant knowledge of the means by which to comply, the requirement is either one that is not enforceable . . ., or, if it relates to public detriment, the burden shifts to an objector, who must demonstrate that the applicant's proposed use would constitute such a detriment.
>
> *Williams Holding Grp., LLC v. Bd. of Supervisors of W. Hanover Twp.*, 101 A.3d 1202, 1213 (Pa. Cmwlth. 2014).

Pausing here, we observe that the ZHB made no findings with respect to traffic beyond its saying that Penneco's representative testified that no new
23 road *23 would be necessary and that "truck traffic is estimated to increase from 30 to 45 loads per day." (FOF ¶¶ 26-27.) It made no specific finding with respect to health, safety, and general welfare.[16] Without any findings as to several requirements for a special exception, we are unable to determine whether Penneco and Objectors met their respective burdens. Indeed, Penneco urges us to essentially infer from the ZHB's lack of finding on the issue that the ZHB made an implicit conclusion with regard to health, safety, and general welfare, having heard, *inter alia*, testimony put forth by Protect PT on that issue. However, as an appellate tribunal, we are not the finder of fact, and it would be inappropriate for us to make such an inference. Moreover, the record belies the suggestion we should accept the ZHB's lack of finding as a positive finding about health, safety, and welfare, as the ZHB indicated it was "gravely concerned with [Penneco's] use of the property." (*Id.* ¶ 39.) Therefore, on remand, the ZHB must carefully consider each of the requirements under Section 405, including health, safety, and general welfare, and make the appropriate findings to support a conclusion as to whether to grant the Application. *City of Scranton*, 459 A.2d at 62.

> 16 Even if we were to accept Penneco's argument that its right to natural expansion is rendered meaningless by imposition of reasonable zoning requirements, *Silver* itself, and its progeny, still requires a showing that expansion of the use would not impinge on health, safety, and general welfare. *Jenkintown Towing Serv. v. Zoning Hearing Bd. of Upper Moreland Twp.*, 446 A.2d 716, 718 (Pa. Cmwlth. 1982). Thus, even relying purely on the caselaw and ignoring the Ordinance, we would still have to remand for the ZHB to make a specific finding as to that important fact.

In sum, consistent with *Silver*, the Borough has placed reasonable restrictions on the expansion of a nonconforming use by requiring applicants to satisfy the requirements applicable to all special exceptions. Thus, the foregoing analysis requires us to reject Penneco's suggestion that application of special exception requirements beyond purely
24 procedural ones renders its right to expand its *24 nonconforming use meaningless.[17] The doctrine of natural expansion does not provide landowners

carte blanche to expand in violation of reasonable and duly enacted requirements of zoning ordinances.

[17] In support of the notion that any restrictions beyond Article IV's procedural requirements renders its right to natural expansion meaningless, Penneco cites to, *inter alia*, *Chartiers Township v. William H. Martin, Inc.*, 542 A.2d 985 (Pa. 1988). However, *Chartiers*' unique procedural posture and factual distinguishability bear mention here. The land at issue in *Chartiers* was a tract with two valleys. Until the litigation, the landfill operator that owned the tract had only used the west valley for landfill operations, though the entire tract was already licensed by the Department of Environmental Resources, predecessor of the DEP, for that use, and "operation and maintenance of a landfill . . . exist[ed] as a legal nonconforming use" under the ordinance. *Id.* at 986. Notably, the *Chartiers* litigation did not involve the request on the part of an applicant to expand its operations, but rather a municipality seeking to stop a landowner from engaging in a use by seeking injunctive relief. There, the trial court granted an injunction requested by the township to stop landfill operators from operating in the western valley of the tract. The trial court granted the injunction, and we lifted the injunction against the landfill operators, granting a stay. *Id.* at 987. Thus, the issue before the Supreme Court was whether we had properly granted the stay pending appeal, and in so analyzing, it turned to factors enunciated in *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983), one of which is the likelihood of success on the merits. *Chartiers*, 542 A.2d at 987. Given the fact that the use in question on the entire tract in *Chartiers* was already permitted, and that litigation only involved expansion of the business on that tract, the Court found the landfill operator likely to succeed on the merits. Thus, both as a matter of procedure*Chartiers* involving analysis of likelihood of success on the merits, not a special exception application-and factually*Chartiers* involving a tract on which the use was already entirely permitted by the state-we decline to view *Chartiers* as persuasive here.

Section 405(A) of the Ordinance contains relevant requirements for the Application at issue here. We cannot engage in meaningful appellate review of whether Penneco met its burden as to any of those requirements because the ZHB did not make findings of fact with respect to them. Therefore, upon remand, the ZHB is to consider those requirements and make findings of fact necessary to reach a conclusion, taking additional evidence as it deems necessary in its discretion, as to *25 whether Penneco has met the general requirements for a special exception under Section 405(A) of the Ordinance.[18]

[25]

[18] Because the first issue raised by the Borough is dispositive and requires vacatur and remand, we need not reach the remaining issue.

IV. CONCLUSION

On remand from common pleas, the ZHB must consider and make findings of fact as to the requirements for the grant of a special exception for the expansion of a preexisting nonconforming use (Section 1002 of the Ordinance) and the standards applicable to the grant of all special exceptions (Section 405 of the Ordinance). Further, based on our clarification of the findings it must make, the ZHB, in its discretion, may take additional evidence to the extent it believes such additional evidence is necessary. Once it has made the necessary findings of fact, it may then appropriately consider whether to grant or deny the Application.

Despite its perception to the contrary, the ZHB was not powerless-consistent with *Silver* and the Ordinance-to apply the requirements of the natural expansion doctrine and the plain terms of the Ordinance to regulate the location of the proposed expansion of the nonconforming use at issue here. It erred in believing otherwise.

To sum up, the ZHB did not support its conclusion that Penneco's proposed expansion was necessary for the expansion of its trade, as required by our caselaw, with adequate findings of fact and reasoning. Moreover, the Ordinance here requires applicants seeking to expand a nonconforming use due to an increase or growth in trade to proceed via a special exception. Consistent with a municipality's right to condition such right to expansion on compliance with reasonable restrictions, the Ordinance's plain text requires compliance with those requirements applicable to all special exceptions. It was an error of law for
26 the ZHB not to consider those relevant *26 requirements in Article IV and to proceed as if Penneco had not applied for a special exception. Because the ZHB erred in not making specific findings of fact to support its conclusion as to the necessity of the expansion, and as to each of the Ordinance's special exception requirements contained in Section 405, we vacate common pleas' order with instructions to remand to the ZHB to make findings of fact and conclusions of law, and, if the ZHB deems additional evidence necessary, to take such additional evidence, sufficient to determine whether to grant or deny
27 the Application. *27

ORDER

NOW, January 29, 2024, the Order of the Court of Common Pleas of Allegheny County in the above-captioned matter is VACATED, and this matter is REMANDED with instructions to remand to the Zoning Hearing Board of the Borough of Plum to make findings of fact and conclusions of law consistent with the foregoing opinion, taking additional evidence if it deems necessary to enable such factfinding.

Jurisdiction relinquished.