

## [Pa. Supreme Ct. Clarifies Unnecessary Hardship Standard for Use Variances; Land Use and Planning](#)

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### **Body**

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On July 21, the Pennsylvania Supreme Court rendered a decision in [Marshall v. City of Philadelphia, 2014 Pa. LEXIS 1785 \(Pa. 2014\)](#), that clarified the unnecessary hardship standard applicable to the granting of a use variance. Most notably, the court ruled that a use variance applicant is not required to prove that an existing building is "functionally obsolete" for any use permitted on the property in order to establish the requisite unnecessary hardship.

In *Marshall*, upon receipt of a nearly \$10 million grant from the U.S. Department of Housing and Urban Development, the Archdiocese of Philadelphia sought a zoning/use registration permit from the Philadelphia Department of Licenses and Inspections to convert an old, vacant, nonconforming school building located in a residential zoning district into a 63-unit one-bedroom apartment complex for low-income senior citizens. Concluding that the proposed apartment complex failed to comply with several provisions of the Philadelphia Zoning Code, the department denied the archdiocese's permit request. Specifically, the department found that, in addition to failing to meet certain parking, landscaping and setback requirements under the Zoning Code, the proposed housing project was not a permitted use in the subject residential zoning district.

The archdiocese appealed to the city of Philadelphia Zoning Board of Adjustment, seeking a number of use and dimensional variances. The requirements for the granting of a variance under the Zoning Code in large part track the variance standards applicable to most Pennsylvania municipalities pursuant to Section 910.2(a) of the Pennsylvania Municipalities Planning Code, [53 P.S. Section 10910.2\(a\)](#).

The Pennsylvania Supreme Court previously has "boiled down" the variance criteria of the Zoning Code into three key requirements: "(1) unique hardship to the property; (2) no adverse effect on the public health, safety or general welfare; and (3) the minimum variance that will afford relief at the least modification possible."

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Voting unanimously to grant the requested variances, the board found, in pertinent part, that the archdiocese had established: (1) overwhelming support of the surrounding community for the housing project; (2) the unique nature of the property, such as its legally nonconforming character; and (3) the building was currently vacant, in need of repair, and providing no benefit to the community. Furthermore, the board concluded that the conditions forming the basis for the archdiocese's requested variances "were not the result of the archdiocese's actions, but rather were unique to the [subject] property and related to its legally nonconforming character."

Contending that the archdiocese had not met its burden of proving a hardship unique to the subject property/school building, an objector appealed the board's decision to the trial court, which affirmed the decision granting the variances.

However, the Commonwealth Court reversed, finding that the archdiocese had "completely failed to address how the physical characteristics of the property would prevent it from being utilized as one of the many other permitted uses" in the residential district.

In reaching its conclusion, the Commonwealth Court explained that to successfully meet the burden necessary to obtain a use variance, the archdiocese needed to "demonstrate that the entire [school] building is functionally obsolete for any purposes other than one not permitted under the relevant zoning ordinance."

The Supreme Court granted the archdiocese's petition for allowance of appeal, and proceeded to reverse the Commonwealth Court's decision, ruling that the Commonwealth Court applied the wrong standard for determining unnecessary hardship in the context of a use variance and erred by substituting its judgment for that of the board. The Supreme Court found that the board acted well "within its discretion ... in concluding that the archdiocese had established an unnecessary hardship" by proving that the subject property could be conformed for a permitted use only at a prohibitive expense.

Clarifying the appropriate standard for determining unnecessary hardship in the context of a use variance, the Supreme Court stated that an applicant seeking a use variance must establish 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." The Supreme Court further declared that "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," noting that a "showing that [a] property ... is 'valueless' unless the requested variances is granted 'is but [only] one way to reach a finding of unnecessary hardship.'" Although the Supreme Court reiterated the long-standing principle that "mere economic hardship will not of itself justify the grant of a variance," it pointed out that the "functionally obsolete" standard for unnecessary hardship applied by the Commonwealth Court is merely a reiteration of the "practically valueless" standard, which it "has repeatedly and explicitly rejected."

Throughout the state, property owners are faced with a multitude of challenges in connection with attempts to repurpose long vacant structures or properties for viable new uses. This is particularly the case with regard to vacant school and other large institutional buildings, which often are located in residential zoning districts. The number and types of uses permitted in those districts are typically very limited, and the costs associated with either renovating the building or demolishing and rebuilding a new structure can make redevelopment for a permitted use prohibitive. The Marshall decision gives zoning boards more

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discretion to take these economic challenges into account when considering whether an applicant has met its burden of establishing the requisite unnecessary hardship for a use variance.

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