[J-57-2021] [OAJC: Todd, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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

DISSENTING OPINION

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

It appears that a majority of Justices agree that Act 135 blighted status is an appropriate consideration in tandem with the minimum variance factor that Philadelphia's Zoning Ordinance prescribes for determining whether the Zoning Board may grant a variance. I agree with this principle fully. The Court chooses nonetheless to grant the Board a second chance in this case. With this disposition I part ways. While deference must remain a reviewing court's touchstone when it evaluates the decision of a zoning board, the court must not so defer that our stated concern for arbitrary and capricious administrative decision-making serves only as window dressing. Without the prospect of appellate reversal when an administrative body categorically neglects its duty to explain itself, we invite *pro forma* unprincipled revisions on remand to ensure the same result,

rendering judicial review little more than a bump in the road that briefly delays a *fait accompli*. I would hold that, when a zoning board's ruling comes to a reviewing court without a reasoned basis and it manifestly runs counter to the weight of the evidence before it, the court should not grant the board a second chance. Parties seeking variances are entitled to timely and rigorous consideration of their applications and thorough explanations as to their disposition, as a courtesy, as a statutory imperative,[1] and to ensure the losing party has access to meaningful judicial review. Nothing but the specter of reversal will adequately serve those critical considerations. In my view, this case presents the rare circumstance where such an extreme remedy is warranted. So while I appreciate the Opinion Announcing the Judgment of the Court's thoroughness and inclination toward restraint in this case, I respectfully dissent.

The first issue under consideration concerns whether a property's designation of blight under the Abandoned and Blighted Conservatorship Act ("Act 135")[2] calls for a more permissive application of the Philadelphia Zoning Code's ("the Code") "minimization" requirement, which prescribes that an applicant for a variance demonstrate that the variance sought "represent[s] the minimum variance that will afford relief and will represent the least modification possible of the use or dimensional regulation in issue."[3]

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[1] "All adjudications of a local agency shall be in writing, shall contain findings and the reasons for the adjudication, and shall be served upon all parties or their counsel personally, or by mail." 2 Pa.C.S. § 555.

[2] Act of Nov. 26, 2008, P.L. 1672, No. 135, *codified as amended at* 68 P.S. §§ 1101, *et seq*.

[3] *See* Op. Announcing the Judgment of the Court at 6 ("OAJC") (quoting Philadelphia Zoning Code § 14-303(8)(e)(.1)(b)). The OAJC refers to this as the

The property in this case is so designated, but the designating court declined to order remediation or demolition while the variance application at issue remained pending.[4] The court presumably declared the property blighted because, as Act 135 explains, "[s]ubstandard, deteriorating and abandoned residential, commercial and industrial structures are a public safety threat and nuisance and their blighting effect diminishes property values in the communities in which these properties are located."[5] And the court ostensibly deferred acting upon that determination because the outcome of the zoning proceedings might lead to rehabilitation and reuse rather than demolition.[6]

We have never confronted precisely this question, but we have found that a building's deterioration or blight is relevant to variance determinations, holding specifically that it may warrant somewhat relaxing the unnecessary hardship requirement.[7] The OAJC finds that this relaxation may extend no farther than the unnecessary hardship

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"minimum variance requirement." *See id*. at 6 n.7. I prefer "minimization" or "the minimization requirement," and use those alternatives throughout this Opinion.

4 *See id.* at 2.

5 68 P.S. § 1102(3) ("Legislative findings and purpose").

6 *Id.* § 1102(5) ("Providing a mechanism to transform abandoned and blighted buildings into productive reuse is an opportunity for communities to modernize, revitalize and grow, and to improve the quality of life for neighbors who are already there.").

7 This Court previously has explained that "unnecessary 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." *Marshall v. City of Phila.*, 97 A.3d 323, 329 (Pa. 2014) (quoting *Hertzberg v. Zoning Bd. of Adj. of the City of Pittsburgh*, 721 A.2d 43, 47 (Pa. 1998)) (emphasis in *Marshall*).

determination, and thus does not bear upon the Code's minimization requirement.[8] I agree as a strict jurisprudential matter that the distinction between the two separate variance requirements renders our prior decisions non-controlling on this question.[9] But I disagree that the broader principle animating those decisions has no relevance to the case before us. Not all principles are amenable to definitions as narrow as the narrowest account of the factual circumstances in the cases in which they are given life. Neither of the cases in question couched their rulings in so limited a fashion. They merely applied a general principle to particular facts.

In *Hertzberg*, we reached two conclusions that seem to me especially relevant to this case.[10] First, acknowledging that the traditional hardship test required, *inter alia*, the applicant to establish "that the property has no value for any purpose permitted by the zoning ordinance," this Court reaffirmed its prior rejection of the strict, "practically valueless" version of that test that emerged in earlier cases, despite its facial consistency with the foregoing language.[11] In *Allegheny West*, this Court had held that the applicant

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8 *See* OAJC at 23 ("Both of these considerations support our conclusion that the unnecessary hardship requirement is independent of the minimum variance requirement and that the minimum variance requirement should not be relaxed for blighted or abandoned buildings.").

9 *See Stilp v. Commonwealth*, 905 A.2d 918, 966-67 (Pa. 2006) ("The doctrine of *stare decisis* maintains that for purposes of certainty and stability in the law, a conclusion reached in one case should be applied to those which follow, *if the facts are substantially the same* . . . ." (cleaned up; emphasis added)).

10 The *Hertzberg* Court cited the five-part rubric provided by the Municipal Planning Code, which is in relevant part identical to the requirements of Philadelphia's Zoning Code. *See* 721 A.2d at 46-47 (citing 53 P.S. § 10910.2).

11 *Id*. at 47, 48 (citing *Allegheny West Civic Council, Inc. v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 689 A.2d 225, 227 (Pa. 1997)).

had made an adequate showing despite the fact that a third party had offered to buy the applicant's property for roughly half what the applicant had paid[12]—and it so held after assessing numerous extrinsic factors that established the full context that led the owner to seek a variance. The Court concluded that "the 'valueless' factor is but one way to reach a finding of unnecessary hardship; it is not the only factor nor the conclusive factor in resolving a variance request."[13]

The Court then embarked on consideration of additional cases, including *Vitti v. Zoning Board of Adjustment of the City of Pittsburgh*, in which the Commonwealth Court observed that, "where the applicant for a variance has undertaken efforts to remediate or renovate those areas for a salutary, productive purpose, *a slight relaxation, or less stringent application of the variance* ***criteria*** *may be the only way the subject property will be put to any beneficial use*."[14] In embracing the *Vitti* court's language, we opened the door to its suggestion that blight is relevant to variance applications generally, not just the unnecessary hardship criterion. That the adequacy of the applicant's showing of hardship was the particular criterion there at issue does not, *per se*, signal that the principles cited apply to that factor and nothing more.

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[12] In *Marshall*, this Court observed that it previously had held that "it is 'unreasonable to force a property owner to try to sell his property as a prerequisite to receive a variance.'" 97 A.3d at 330 (quoting *Allegheny West*, 689 A.2d at 228),

[13] *Hertzberg*, 721 A.2d at 48 (discussing *Allegheny West*, *supra*); *see id.* at 47 (setting forth the disjunctive test highlighted above, in which valuelessness was merely one possible avenue to establish unnecessary hardship).

[14] *Id*. at 49 (quoting *Vitti v. Zoning Bd. of Adj. of the City of Pittsburgh*, 710 A.2d 653, 658 (Pa. Cmwlth. 1998)) (italics added in *Hertzberg*, boldface my emphasis).

In *Marshall*, we ruled similarly, setting forth additional germane observations. Cautioning that a variance should not be granted *merely* because the applicant expected *greater* profitability with the variance than without, we added countervailingly:

> [A] zoning board's discretion is not so circumscribed as to require a property owner to reconstruct a building to a conforming use regardless of the financial burden that would be incident thereto. *Especially is this true where the change sought is from one nonconforming use to another more desirable nonconforming use that will not adversely affect but better the neighborhood*.[15]

And in *Wagner v. City of Erie Zoning Board*, the Commonwealth Court held that, "[w]here the use of property for any [permissible] purpose is possible only through reconstruction or demolition of the building, it has been held sufficient to establish an unnecessary hardship."[16]

The latter two observations are relevant to the instant case, where (a) the prior industrial use of the property at issue predated, and was nonconforming with, the modern residential zoning district's requirements, and indisputably was less consistent with the neighborhood's residential character than Metal Green's proposed residential use, and (b) strict conformity with the Code undisputedly would require Metal Green to demolish its building and erect one or two single-family or duplex residential units, an alternative that undisputed testimony established as financially infeasible.[17]

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15 *Marshall*, 97 A.3d at 330 (cleaned up; emphasis added).

16 *Wagner v. City of Erie Zoning Bd.*, 675 A.2d 791, 799 (Pa. Cmwlth. 1996) (citing *Logan Sq. Neighborhood Ass'n v. Zoning Bd. of Adj.*, 379 A.2d 632 (Pa. Cmwlth. 1977)).

17 *See Metal Green, Inc. v. City of Phila*., 237 A.3d 604, 606-08 (Pa. Cmwlth. 2020).

Interestingly, on the question of Act 135, neither *Hertzberg* nor *Marshall* spoke directly. The decisions preceded Act 135's enactment, and the word "blight" appeared only in *Hertzberg*.[18] In both cases, the issue of the condition of the building was stated generally, and did not depend on the judicial imprimatur of blight that is present in the instant case. The point in both cases was that, where the building was in poor shape and would cost a great deal to rehabilitate, its condition was relevant to the strictness of the court's approach to the variance test.

Here, we have no dispute as to hardship, only as to minimization. But to cogently assess the instant case against the backdrop of the foregoing cases, I believe we must step back from the specific and inquire as to the general. What seems most important is why blight is germane to the determination of *any* aspect of the variance inquiry. Does it matter *only* to hardship because its relevance is restricted to the expense or difficulty of converting to a productive use? That doesn't seem right. Its relevance more sensibly relates to how divergent the property is and has been from the neighborhood's character, what an eyesore or hazard the property is, how dire the building's physical state has become, and just how important it therefore is that the building be gainfully reused—even if to render that feasible requires a limited, case-specific relaxation of the variance test, including not only all three *formal* factors of the inquiry under the Philadelphia Code, but also such secondary but relevant considerations as the prior nonconforming status of the property and the proximity of the proposed use to the zoning district's requirements. Deterioration generally, but especially when severe enough to incur an Act 135

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[18] *Hertzberg*, 721 A.2d at 50 ("an applicant who wishes to renovate a building in a blighted area").

designation, should loom large in the overarching inquiry if Act 135's goals and dictates are to be honored in the breach. And it goes without saying that Act 135's animating concerns should prevail when in tension with the strictures of Philadelphia's Zoning Code.[19]

In this case, the prior nonconforming industrial use of the building as well as the proposed residential use in a residential zoning district strike me as important considerations. As part and parcel of that, additional case-specific considerations should come to the fore, including, for example, the fact that the proposed use entails a less dense use in residents per acre than the neighborhood status quo as well as Metal Green's incorporation of off-street parking.[20] Indeed, based upon the testimony and evidence, it appears that little more could be done in this case to ameliorate concerns regarding what manifestly amounts to a modest departure from the district's zoning requirements, and the alternative was judicial action on the Act 135 designation—either forced remediation in furtherance of no profitable use or abandonment and demolition denying Metal Green any productive use and enjoyment of its property. The suggestion of certain objectors that Metal Green modestly reduce the number of units, or prepare them as condominiums rather than rental units, betrays how little daylight there is

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[19] *Cf. Hoffman Mining Co. v. Zoning Bd. of Adams Twp., Cambria Cty.*, 32 A.3d 587, 610 (Pa. 2011) ("Conflict preemption is a formalization of the self-evident principle that a municipal ordinance cannot be sustained to the extent that it is contradictory to, or inconsistent with, a state statute." (internal quotation marks omitted)). While neither the parties nor the lower tribunals have addressed conflict preemption in this case, as we noted in *Hoffman Mining Co.*, the principle is "self-evident."

[20] *See* OAJC at 3, 5, 12. *But see id*. at 5 (noting Objectors' concerns about an increase in on-street parking).

between Metal Green's proposal and what certain objectors indicated would alleviate their concerns while satisfying their avowed interest in seeing the property productively used.[21]

If we endorse the view that minimization requires literal proofs as to the infeasibility of even the most trivial or incremental adjustments in this or that aspect of a given use, where will that microscopic focus end? If a Zoning Board can require a developer to parse its choices down to the question whether fifteen or sixteen rather than the eighteen proposed units is feasible,[22] then what stops it from scrutinizing every cost-benefit decision the developer makes, questioning, for instance, the necessity of using premium building materials if the use of cheaper materials will increase the per-unit profit margin perhaps enabling an incremental adjustment in the most granular aspect of a given proposed variance? Moreover, if we view minimization so strictly, why haven't we adopted a similarly literal approach to the unnecessary hardship requirement? How unstintingly may a board assess, for example, what comprises a "prohibitive expense" of converting a property to a permitted use such that it constitutes unnecessary hardship?[23]

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[21] *See id.* at 5-6.

[22] By contrast, the Board in *Marshall* approved a nonconforming multi-unit residential facility with many more units than are at issue here, and expressly found that the proposal satisfied the minimization requirement, despite the fact that it might have asked whether slightly fewer units were feasible on the record before it. *Marshall*, 97 A.3d at 328.

[23] The Philadelphia Zoning Code itself resists such a result, providing as an overarching principle:

> § 14-801. Jurisdiction and Powers.
>
> (1) The Zoning Board of Adjustment may, after public notice and public hearing:
>
> * * *

Why, for that matter, have we rejected the "practically valueless" test? As noted above, our case law seems to anticipate and seek to preclude applying such a formidable standard as to that element. I would endeavor to do the same with respect to minimization, but the OAJC foregoes the opportunity to do so.

Everything the OAJC says about the importance of honoring zoning codes and granting great latitude to a local zoning board's evaluation of conformity to those codes' variance requirements is true up to the point at which it invites absurdity. Particularly salient are the OAJC's observations that zoning restrictions must be understood to reflect the will of the community as enacted by its chosen representatives. But the same observation holds equally true regarding the variance provisions. Surely the community did not make allowances for departures from zoning restrictions only to see them nullified by an overly strict application of their requirements. As well, we may assume that Act 135 reflects the will of the people, specifically their desire to see properties that have lapsed into desuetude and dilapidation rehabilitated for the betterment of their communities.[24]

> (c) authorize, upon appeal, in specific cases, such variance from the terms of this Title as will not be contrary to the public interest, where, owing to special conditions, *a literal enforcement of the provisions of this Title would result in unnecessary hardship*, and so that the spirit of this Title shall be observed and substantial justice done, subject to such terms and conditions as the Board may decide . . . .

Phila. Zoning Code § 14-801(1)(c) (emphasis added). While it is true, as we emphasized in *Marshall*, that the wording of this provision speaks specifically to "unnecessary hardship," it nonetheless provides for divergence from a literal enforcement of *"the provisions of this Title*," which encompasses by its terms the minimization requirement.

[24] *See* OAJC at 16. For this reason, it seems incongruous that the OAJC treats variances as "an overriding of legislative judgment concerning the will of the citizens of the community." *Id*.

Against these local prerogatives we must measure the impracticability of requiring developers to prove a negative, a notoriously quixotic requirement in any context, and especially so on matters so fine-grained. We may assume that the legislating body did not intend such an absurd result. And our decisions in *Hertzberg* and *Marshall*, as well as a number of undisturbed Commonwealth Court decisions alluded to above, suggest that we neither must nor should be so exacting.

The fact remains, though, that we long have directed appellate courts to review zoning decisions most deferentially on appeal,[25] and I would not hold otherwise. I do not lightly suggest that this Court should overturn the Zoning Board's decision in this case. But there's a distinction between deferential review and no review at all.[26]

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[25] *See id*. at 26-27.

[26] The OAJC criticizes my derivation of a broader principle from cases in which the factual context was limited to the hardship requirement. OAJC at 24-25 n.14. In effect, the OAJC premises its analysis on the proposition that this run of cases cannot suggest a broader rule, an overly formal approach at odds with this Court's function of advancing the law by applying old principles to new cases. It is also belied by the OAJC's emphasis on broader considerations like the *in pari materia* principle—a principle it discusses nowhere but in its response to this Dissent, and without explanation as to its relevance. *See DeForte v. Borough of Worthington*, 212 A.3d 1018, 1022 (Pa. 2019) ("Laws which apply to the same persons or things or the same class of persons or things are *in pari materia* and, as such, should be read together where reasonably possible."). In any event, the OAJC's ruling is at odds with that principle (even if the Zoning Code were on equal footing with a state statute, which it certainly isn't) when it downplays Act 135's relevance, despite the fact that that Act, like the Zoning Code, concerns itself with productive use of properties, deteriorated or not. Act 135 prescribes one set of methods—remediation, conservatorship, demolition—while the Zoning Code allows for variances where it is impracticable to use a property consistently with local zoning requirements.

Similarly, the OAJC emphasizes the secondary concern of dimensional vs. use variances (one that is immaterial to this case, because the Code treats them identically), *see* OAJC at 24-25 n.14, while ignoring that we also have suggested relaxing variance analysis where, as here, the proposed change is from one non-conforming use to another. *See Marshall*, 97 A.3d at 330 (holding that a zoning board not require a financially

This brings me to the second question presented: Whether, in addition to considering whether a zoning board's decision is supported by substantial evidence of record, a reviewing court may also evaluate the board's decision-making for caprice or arbitrariness, and if so, what that entails. I embrace wholesale the OAJC's detailed and nuanced account of the evolution and application of the arbitrary and capricious standard of review, and join the OAJC in concluding that this Court's reasoning in *Wintermyer v. WCAB*, 812 A.2d 478 (Pa. 2002), should extend to zoning decisions.[27] I further agree that, "where substantial evidence of record supports a zoning board's findings, and the findings in turn support the board's conclusions, it should remain a *rare* instance where a reviewing court disturbs an adjudication based on a capricious disregard of the evidence standard."[28] I agree, too, with the OAJC's ultimate conclusion that, in this case, "the Zoning Board's decision is substantially deficient, precluding an appellate court from reviewing the minimum variance requirement. . . . [T]he Zoning Board failed to make

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burdensome conforming use, "[e]specially . . . where the change sought is from one nonconforming use to another more desirable conforming use that will not adversely affect but better the neighborhood"). The dimensional/use variance distinction rests on the theory that, when the use itself is conforming, a relaxation on the precise arrangement of the property or the restrictions imposed on the building by the letter of the Code is warranted where the effect on the neighborhood would be minimal. *See Hertzberg*, 721 A.2d at 47 ("[T]he grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation."). That is arguably the case here, where it is proposed that a blighted industrial property located in a residential district be converted to residential use less dense than the neighborhood *status quo*, and where the only expert evidence offered indicated that there would be no detrimental effect on neighborhood.

27 *See id*. at 26-30.

28 *Id*. at 30 (emphasis added). The "rare" caveat is critically important to me.

specific findings of fact, engage in credibility determinations, or offer sufficient rationale as to why the criteria for a use variance were not satisfied."[29]

I also agree with the OAJC that, because Metal Green bore the burden of establishing that its variance satisfied the minimization requirement, the distinction between whether the Board found that Metal Green failed to satisfy its burden of production or its burden of persuasion is critical to a substantial evidence assessment.[30] Consideration of that distinction is entirely absent, expressly or by implication, from the Zoning Board's decision. The Commonwealth Court nonetheless imputed to the Board the finding that the burden of persuasion was not satisfied,[31] which the court concluded immunized the Board's decision from reversal. In my view, the lower court could not credibly have concluded otherwise in light of the manifest sufficiency of Metal Green's evidence on each factor of the test. But that is beside the point. It is not a reviewing court's job to impute reasoning in this context, where the statutory onus lies with the Board to explain itself.

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29 *Id*.

30 In conventional terms, the difference is the same as that between the sufficiency of the evidence (production) and the weight of the evidence (persuasion), a category distinction of great consequence to a reviewing court's approach to a case. Evidentiary sufficiency more closely approaches an objective inquiry, while the weight of the evidence, in effect, asks a reviewing court to make a subjective determination about a lower-tribunal fact-finder's subjective determination, an enterprise courts should be especially reluctant to undertake.

31 *Metal Green*, 237 A.3d at 614 ("Based upon the nature of the testimony before the Board, it appears that, although that testimony might have been sufficient to *allow* the Board to rule in [Metal Green's] favor, the Board chose not to credit and/or weigh that evidence in Owner's favor." (emphasis in original)).

As for its burden of persuasion, Metal Green introduced multiple experts whose testimony was consistent with the view that fewer than eighteen units would not be practicable given the building's dimensions and market conditions—whether or not assessed under a reasonably construed (even if not relaxed) minimization test.[32] Against this testimony, Objectors' lay testimony on the subject was hardly substantive or convincing. As well, their testimony was non-trivially undermined by some Objectors' concessions that, provided relatively minor adjustments, a multi-unit residential development somewhat like Metal Green proposed might be acceptable to them.[33]

The OAJC's account leads to a vexing tension within the applicable standards. First, the OAJC is at pains to preserve in literal terms the generally salutary principle that a reviewing court may not disturb agency decision-making when its findings and conclusions are supported by substantial evidence of record. But if courts are to review for arbitrariness or caprice, that cannot end the matter. As the OAJC observes, review for arbitrariness and caprice traditionally has been embedded in the deferential abuse of discretion standard.[34] The OAJC balances these competing concerns by suggesting that where the record supports the findings, instances where a reviewing court overturns the adjudication for caprice should be "rare."[35] I do not disagree. But I underscore the critical implication that such instances will *sometimes* occur, even given substantial evidence. This is especially tricky where, as here and in most legal contexts, the fact-finder is

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32 *Id*. at 606-08, 614.

33 *Id*. at 608-10.

34 *See* OAJC at 27-28.

35 *See id*. at 30.

entitled to credit all, some, or none of the evidence presented, authorizing it to reject wholesale the presentation of the party who bears the burden of proof.[36]

Still, assuming some instances occur, the question of remedy emerges. Evidently agreeing that this case *may* constitute one such rare instance,[37] the OAJC directs the lower court to determine on remand whether the Board's rote conclusion that Metal Green failed to establish (separately) that the variance "would not be detrimental to the public welfare" does not reflect an abuse of discretion and is supported by substantial evidence. Those two conclusions would moot the minimization question by providing an independently sufficient basis for the Board's denial of the variance.[38] Conversely, if the lower court finds the Board's decision deficient on that point, it will remand for a more detailed assessment by the Board on both points. But the Board's conclusion on public welfare is as perfunctory and unreasoned as its equally curt conclusion regarding minimization. So, if the paucity of explanation as to minimization warrants remand directly to the Board, then the same deficiency should compel the same recourse as to the public

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[36] *See Marshall*, 97 A.3d at 331; *Hawk v. City of Pittsburgh Zoning Bd. of Adj.*, 38 A.3d 1061, 1065 (Pa. Cmwlth. 2012).

[37] It is not clear to me whether the OAJC deems the Board's treatment of the minimization requirement arbitrary or capricious, or merely would have the Board prepare a more thorough explanation to enable us to assess whether its decision was one of those things.

[38] *See* OAJC at 34-35. This is drawn from a separate factor of the variance test under the Philadelphia Code, which in full requires the applicant to establish that "the use variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of the adjacent property, *nor be detrimental to the public welfare*." *Metal Green*, 237 A.3d at 611 (emphasis added). The Board summarily concluded: "Applicant additionally failed to establish that the proposed use would not negatively impact the public health, safety or welfare." Zoning Bd. of Adj. Findings of Fact and Conclusions of Law at 9.

welfare factor. That is to say, even if I fully embraced the OAJC's analysis, I would remand to the Board to reconsider both issues.

That the OAJC is so solicitous of the Board as to necessitate this consideration, though, hints at why I would not grant the Board the benefit of that much deference under these circumstances, where it so utterly phoned in its explanation of a ruling that foreseeably would be appealed, given the stakes for Metal Green as the losing party holding a property encumbered by the threat of the wrecking ball. To be clear, remand is the proportionate remedy when what is at issue are blameless errors or oversights, or when the record requires further development on one or another point that the reviewing court has deemed relevant—and this will be, as it long has been, the predominant scenario in which reviewing courts find flaws in reasoning or important deficiencies in the proofs or findings. But it is unclear what purpose remand serves where a board's decision is so poorly explained and the record so strongly supports the contrary outcome.

To ensure that arbitrary and capricious review serves as more than a matter of form, I would reserve the remedy of reversal for appropriately egregious cases.[39] The

[39] Notably the Administrative Agency Law, itself, anticipates reversal as an available remedy. As noted, *supra*, 2 Pa.C.S. § 555 directs a local body to provide written findings of fact and conclusions of law to support its decision. Section 754, in turn, provides: "In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, *or that the provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency*. . . . If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa.C.S. § 706," among which is reversal. 2 Pa.C.S. § 754; *see* 42 Pa.C.S. § 706 ("Disposition of appeals") ("An appellate court may affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter and direct the entry of such

evidence to support denial in this case was surpassingly thin and the evidence to sustain a variance so strong that I discern no benefit to remanding directly to the Board for reconsideration, let alone to the Commonwealth Court to search for a basis for the unreviewed factor where one so clearly is lacking. If the Board's decision in this case doesn't reflect arbitrariness or caprice then nothing does. And if an arbitrary exercise of authority warrants a remedy no more meaningful than "try again," then arbitrary and capricious review is a hollow exercise and, as such, a waste of time and judicial resources.[40]

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appropriate order, or require such further proceedings as may be just under the circumstances.").

I acknowledge that my suggestion that our deference must be qualified to account for and meaningfully rectify arbitrary and capricious decision-making presents the risk of a slippery slope toward judicial usurpation of executive discretion. But there is a countervailing risk that our deference leads us tumbling down the other side of the same hill, at the bottom of which sits a judge rubber-stamping administrative acts as a matter of course, no matter how inscrutable or inconsistent with the evidence they are. The solution is not to jettison recourse to reversal, but a principled disinclination on the part of reviewing courts to reverse any but the most problematic of cases.

[40] The OAJC suggests I would go too far. *See* OAJC at 35-36 n.18. As my discussion concedes, this is a colorable argument in what I take to be a close case. But the OAJC provides no account of how arbitrary and capricious review will ever cause anything but delay if remand is the only available remedy for even the most flagrant disregard of a zoning board's statutory obligation to explain its decision. Surely the legislature would not have intended that zoning boards can abdicate their obligation confident that their worst case entails nothing more than a do-over. Then the OAJC insists upon yet more delay by remanding to the Commonwealth Court to ask whether the public safety requirement was properly decided, despite the fact that it rested on *precisely* the same reasoning as the minimization question—which is to say, no reasoning at all. We have rejected what the Board offered with respect to minimization, which is, to the word, all it offers to explain its conclusion on public safety as well. I fail to see how the outcome on the public safety question can differ on remand to the Commonwealth Court from our ruling on minimization, so I see no benefit of inviting a hollow exercise that arrives at an answer that flows *of* necessity from our minimization ruling.

I would reverse outright the Commonwealth's affirmance of the Board's decision and remand with direction that Metal Green's variance be granted, subject to any reasonable conditions the Board sees fit to impose pursuant to its authority under the Zoning Code to impose such conditions.[41]

[41] *See* Phila. Zoning Code § 14-801(1)(c).