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THE POWER OF THE ZONING BOARD OF ADJUSTMENT TO GRANT VARIANCES FROM THE ZONING ORDINANCE

PHILLIP P. GREEN, JR.*

In an era of ever-increasing numbers of boards, commissions, and similar administrative agencies at the state and federal levels of government, surprisingly few such bodies have appeared at the municipal level. Of these few, one of the most important is the Zoning Board of Adjustment. Although this board operates only in a limited field, it encounters many of the problems faced by its larger brothers and possesses many of the same characteristics.

The Zoning Board of Adjustment first made its appearance in New York City's pioneer zoning ordinance in 1916, as the Board of Appeals.¹ As zoning spread over the country in the years that followed, other communities recognized the desirability of such a board, until today virtually every zoning ordinance makes provision for one.² This board is a "quasi-judicial" administrative agency,³ operating on a level between the enforcement officers and either the courts or the local legislative body (depending upon the type of relief requested). Its major functions might be broken down into three categories: (1) reviewing the decisions of the zoning enforcement officer (commonly the local building inspector) for errors in his interpretation and application of the ordinance;⁴ (2) granting so-called "exceptions" permitting special types of

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¹ For an account of its development, see BASSETT, ZONING 133-141 (2d ed. 1940).

² A few states, notably California, Oregon, and Washington, do not provide for such a board in their zoning enabling acts. In these states the variance-granting function of the board is commonly exercised by the local legislative body by means of amendments to the ordinance.

³ See: *Harden v. Raleigh*, 192 N. C. 395, 397, 135 S. E. 151 (1926); *In re Pine Hill Cemeteries, Inc.*, 219 N. C. 735, 738, 15 S. E. 2d 1 (1941). In carrying out its function of granting variances, the board also comes very close to exercising legislative power.

⁴ N. C. GEN. STAT. §160-178 (1943): ". . . Such board of adjustment shall hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this article. . . ." A typical case involving exercise of this power is *Harden v. Raleigh*, *supra*, where the North Carolina Supreme Court upheld a board's determination that a filling station would be "noxious or offensive" within the meaning of a general clause forbidding such uses within a neighborhood business district. In *James v. Sutton*, 229 N. C. 515, 50 S. E. 2d 300 (1948), the court disagreed with a board's interpretation of the Charlotte ordinance.

property uses, when it finds that the conditions spelled out in the ordinance have been fulfilled;⁵ and (3) granting "variances" from the ordinance, when it finds that there are "practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance."⁶

The last-named function is the most important of the three, since it might be regarded as the major *raison d'être* of the board. As is the case with many other administrative agencies, the board's creation resulted from legislative recognition that it is almost impossible to draft an ordinance of this type which will deal fairly and equitably with all situations. The board's function is to handle "hard cases" in such a way as to minimize the possibility of their reaching the courts (and endangering the ordinance as a whole) or being turned into requests for amendment of the ordinance.

⁵ N. C. GEN. STAT. §160-178 (1943): ". . . It shall also hear and decide all matters referred to it or upon which it is required to pass under any such ordinance. . . ." A typical set of ordinance provisions authorizing the granting of exceptions (sometimes known as "special exceptions") is as follows:

"The Board of Adjustment may, in a specific case, after public notice and hearing, and subject to appropriate conditions and safeguards, determine and vary the application of the regulations herein established in harmony with their general purpose and intent, without changing the boundaries of the respective zones, as follows:

"1. Where a zone boundary line divides a lot in single ownership at the time of passage of this ordinance, permit a use authorized on either portion of such lot to extend to the entire lot, but not more than 25 feet beyond the boundary line of the zone in which such use is authorized.

"2. Grant in undeveloped sections of the city temporary and conditional permits for not more than two years, for structures and uses in contravention of the use regulations controlling residence zones; provided, that such uses are important to the development of such undeveloped sections, and also provided that such uses are not prejudicial to adjoining and neighboring sections already developed.

"3. Permit in a business zone the construction, extension, alteration or conversion of a building intended for the storage or repair of motor vehicles or for a motor vehicle service station; provided, however, that no motor vehicle shall be repaired within 25 feet of any street line.

"4. Permit the storage of not more than one commercial truck in an accessory garage located in a residence zone.

"5. If recommended by the State Utilities Commission of North Carolina, permit in appropriate cases a building or premises to be erected or used by a public service corporation or for public utility purposes in any location and for any purpose which is reasonably necessary for public convenience and welfare.

"6. [Etc.]"

⁶ N. C. GEN. STAT. §160-172 (1943): ". . . Such regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained."

N. C. GEN. STAT. §160-178 (1943): ". . . Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such ordinance, the board of adjustment shall have the power, in passing upon appeals, to vary or modify any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or uses of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done."

At the same time, this function is of the most interest from an administrative law standpoint. It involves the greatest delegation of quasi-legislative power, and the statutory standards governing the exercise of that power are the least precise. Confronted with such vague guideposts as the phrase "practical difficulties or unnecessary hardships," or references to the "spirit" or "general purpose and intent" of the ordinance, or to "public welfare" and "substantial justice," some boards have believed there were no limits on their power to set aside the provisions of the ordinance in every case where they perceived real or fancied injustice.⁷

To meet the challenge posed by such boards, courts all over the country have been busily engaged for the past quarter of a century in defining and giving content to the statutory provisions governing issuance of variances. The cumulative effect of their decisions has been to furnish a fairly definite set of rules to guide the Board of Adjustment as it performs this function. It is the purpose of this article to bring together and examine these rules laid down by the courts, in the hope of providing a more precise chart by which the Board of Adjustment in North Carolina and similar boards elsewhere may steer.

Before beginning this consideration, however, mention should be made of two general principles frequently adverted to by the courts. The first is that the Board of Adjustment is not a legislative body. It has no power to rewrite the ordinance. Instead, it may vary the application of the ordinance in a particular case. When it discovers that a particular provision of the ordinance is causing hardship throughout the city, it should recommend to the City Council that the ordinance be amended. When it discovers that changed conditions have made an entire neighborhood unsuitable for the purposes for which it is zoned, the board should recommend to the City Council that the neighborhood be rezoned. It is improper to attempt to right these wrongs by a series of variances.⁸ The board may not even enact general rules authorizing the granting of variance permits by the zoning enforcement officer in

⁷ The Supreme Courts of Maryland and Illinois have held these statutory standards to be so vague as to render the entire grant of variance-issuing power to the Board of Adjustment invalid. *Sugar v. North Baltimore Methodist Episcopal Church*, 164 Md. 487, 165 Atl. 703 (1933); *Welton v. Hamilton*, 344 Ill. 82, 176 N. E. 333 (1931). Courts elsewhere have agreed, however, that the terms are capable of definition and are as precise as possible in the situation. In North Carolina's leading case dealing with variances, *Lee v. Board of Adjustment*, 226 N. C. 107, 37 S. E. 2d 128 (1946), the court does not seem to have been troubled by this question.

⁸ See the many cases cited by RATHKOFF, *THE LAW OF ZONING AND PLANNING* 154 (2d ed. 1949). The court in *Lee v. Board of Adjustment*, *supra*, stressed the fact that the board did not have legislative power and could not "amend" the ordinance with a variance.

specified situations.⁹ It must itself consider and decide each individual case.

The second general principle is that variances are not to be dispensed too freely. The statement of the Massachusetts court in the case of *Real Properties v. Board of Appeals of Boston*¹⁰ that

"The power of variances is to be sparingly exercised and only in rare instances and under exceptional circumstances peculiar in their nature and with due regard to the main purpose of a zoning ordinance to preserve the property rights of others,"

has been echoed in hundreds of judicial decisions across the country.¹¹ Boards can do irreparable harm to the whole concept of zoning by over-liberality in this regard. At least one commentator feels that the Illinois Supreme Court has been prejudiced against all zoning regulations by the fact that boards have been so ready to vary them in individual instances.¹² When the board makes a practice of granting variances too freely, it lays itself open to a charge of discrimination whenever it denies one. And it bares the zoning ordinance to the more serious attack that it is no longer "comprehensive" and uniform, since so many cases of special treatment exist. The board is not merely a court, judging issues raised by two parties, but rather a representative of the community as a whole, whose interests it must protect by preserving the effectiveness of the zoning ordinance, insofar as possible.¹³

FINDINGS REQUIRED IN ORDER TO ISSUE A VARIANCE

Before a Board of Adjustment can issue a variance, the courts require that it make certain findings.¹⁴ These findings must be included in the record of the case (ordinarily the board's minutes) and must be broad enough to indicate not only the conclusions which the board draws

⁹ See *Stein v. Flanagan*, 228 App. Div. 668, 239 N. Y. Supp. 753 (2d Dep't 1929).

¹⁰ 319 Mass. 180, 65 N. E. 2d 199 (1946), quoting *Hammond v. Board of Appeal of Springfield*, 257 Mass. 446, 448, 154 N. E. 82, 83 (1926).

¹¹ See, for example, the cases cited in YOKLEY, *ZONING LAW AND PRACTICE* 240, n. 45 (1948).

¹² Note, *Amortization of Property Uses Not Conforming to Zoning Regulations*, 9 U. CHI. L. REV. 477 (1942).

¹³ *Fandel v. Board of Zoning Adjustment of Boston*, 280 Mass. 195, 182 N. E. 343 (1932).

¹⁴ In *National Lumber Products Co. v. Ponzio*, 133 N. J. L. 95, 42 A. 2d 753 (Sup. Ct. 1945), the court held that it was not a denial of due process for the board to fail to give its reasons for *refusing* a variance, but pointed out that, "A different principle applies where the Board of Adjustment exercises its power and grants a variance. In such a situation the *jurisdictional requirement* for the exercise of its power is a finding by the Board of Adjustment, based upon legal evidence tending to establish the statutory provisions which bring such power into play." [Emphasis supplied.]

but also the factual reasons on which they are based.¹⁵ Essentially, these findings must be such as to indicate to the courts that the board has complied with the requirements and applied the standards set forth in the state enabling act and the city zoning ordinance.¹⁶ It is impossible to discuss all the requirements which might be included in any local ordinance. North Carolina's state enabling act, however, calls for three main findings: (1) that there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance, (2) that the variance is in harmony with the general purpose and intent of the ordinance and preserves its spirit, and (3) that in the granting of the variance the public safety and welfare have been assured and substantial justice has been done. These findings, and cases illustrating the facts necessary to support them, will be discussed in turn.

(1) *"There are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance."*

Since the inclusion of the phrase, "practical difficulties or unnecessary hardships," in New York City's original zoning ordinance, it has constituted the chief standard against which zoning boards of adjustment must measure particular fact situations to determine whether to grant or deny variances. The phrase has been repeated in state enabling acts from coast to coast, and because of this wide currency, an impressive body of case law has arisen to define it.

Five general rules have been developed to show whether there are "practical difficulties or unnecessary hardships" within the meaning of the statute. Courts have required the applicant for a variance to show (a) that if he complies with the provisions of the ordinance, he can secure no reasonable return from, or make no reasonable use of, his property; (b) that the hardship results from the application of the ordinance to his property; (c) that the hardship of which he complains is

¹⁵ In *Prusik v. Board of Appeal of Boston*, 262 Mass. 451, 457-8, 160 N. E. 312, 314 (1928), the court said, ". . . there must be set forth in the record substantial facts which rightly can move an impartial mind, acting judicially, to the definite conclusion reached. They are not satisfied by a mere repetition of the statutory words. Minute recitals may not be necessary, but there must be a definite statement of rational causes and motives, founded upon adequate findings." In that case there was a statutory requirement that the board make "a detailed record of all its proceedings, which record shall set forth the reasons for its decisions." Even in the absence of such a statutory requirement, however, courts have been prone to ask for such a record.

¹⁶ In *Lee v. Board of Adjustment*, 226 N. C. 107, 37 S. E. 2d 128 (1946), the North Carolina Supreme Court stated that the board's "main function is to grant variance permits in exceptional cases, subject to court review. G. S. 160-178. In the exercise of this discretion, however, it is not left free to make any determination whatever that appeals to its sense of justice. It must abide by and comply with the rules of conduct provided by its charter—the local ordinance enacted in accord with and by permission of the State zoning law. Indeed the power of the Board is expressly limited by the statute."

suffered by his property directly, and not merely by others; (d) that the hardship is not the result of his own actions, and (e) that the hardship is peculiar to the property of the applicant. The burden of proving that these conditions exist is on the applicant.¹⁷

(a) *"If he complies with the provisions of the ordinance, the property-owner can secure no reasonable return from, or make no reasonable use of, his property."*

The courts have been very insistent, in their statements, that the property-owner make a showing that he is prevented from making *any* reasonable use of his property. It is not sufficient, they declare, for him to prove merely that he could make more of a profit from his land if he were granted the variance.¹⁸ It is obvious that every time a business is permitted to enter a district which is otherwise restricted to residential uses, the owner will find it profitable, because in effect he is being granted a monopoly in that area. Consequently, any individual property-owner could make the plea that he could sell his residential property for more if the board would permit its development for business purposes. Any profit secured by this one landowner will be directly reflected, however, in the losses sustained by his neighbors. As the North Carolina Supreme Court has vividly described the situation,¹⁹

"In the absence of a zoning ordinance a mill or junk yard, a butcher shop or factory, a paint establishment, a grocery, bakery, repair or tin shop owner may locate his business in a residential section even while that district is in its prime, and, overnight, by such intrusion, drain away a considerable portion of the value of neighboring parcels. Every residential section is open to garages and filling stations, and sometimes an entire block of houses is reduced in value and made less desirable as residence property by the advent of one of them."

Since one of the prime purposes of the zoning ordinance is to prevent such disruption of property values, it would be anomalous to permit variances from the ordinance based upon this argument.

¹⁷ *Heffernan v. Zoning Board of Review*, 50 R. I. 26, 144 Atl. 674 (1929).

¹⁸ The North Carolina Supreme Court made this point in *Lee v. Board of Adjustment*, 226 N. C. 107, 37 S. E. 2d 128 (1946) at p. 110: "The courts have . . . gradually concluded that the deprivation of better earning by means of a nonconforming use is not an unnecessary hardship within the meaning of the law. Value is not a proper criterion." *Bassett, Zoning*, 127; *Elizabeth City v. Aydlett*, 201 N. C. 602, 161 S. E. 78. It is erroneous to base a conclusion that the denial of an application would work an unnecessary hardship because the applicant could earn a better income from the type of building proposed. *Bassett, Zoning*, 143.

"The financial situation or pecuniary hardship of a single owner affords no adequate grounds for putting forth this extraordinary power affecting other property owners as well as the public."

¹⁹ *Lee v. Board of Adjustment*, 226 N. C. 107, 112, 37 S. E. 2d 128 (1946).

It will be seen, however, that the difference between a situation in which an applicant urges that he could make more money from his property if he were granted the variance (in which case the courts tell the board to refuse the variance) and a situation in which he complains that he can under the ordinance make "no reasonable use" of his land or secure "no reasonable return" therefrom (in which case the courts allow—and may require—the board to grant the variance, when other conditions are met) is one of degree rather than kind. What one board or court might feel was mere deprivation of a greater profit, another might consider to be denial of the right to a reasonable return—the difference lying in their conception of "reasonableness." This raises one of the most perplexing questions which the board must answer in individual cases.

On the whole, court decisions have not been very helpful to the board in the solution of this question. Although faithfully stating the "rules" which happen to support their decisions, courts over the country, and even in the same state, have reached varying results in dealing with similar fact situations. The Rhode Island Supreme Court seems to be one of the few courts to state expressly that these rules present a question of the degree of hardship. In *Heffernan v. Zoning Board of Review*²⁰ it stated,

"As to the words 'unnecessary hardship,' it may be said that each of the restrictions of the ordinance upon what might otherwise be a lawful use of one's property might be termed a 'hardship' to the owner. We regard the term 'hardship,' as used in the ordinance, to have some reference to the degree of interference with ordinary legal property rights, and to the loss or hardship which would arise therefrom. We think the expression should be interpreted to refer to a 'hardship' peculiar to the situation of the applicant, which is of such a degree of severity that its imposition is not necessary to carry out the spirit of the ordinance, and amounts to a substantial and unnecessary injustice to the applicant."

Though the court recognizes the difficulties, most boards would agree that it has hardly provided a more definite standard against which to make decisions.

Examination of fact situations in decided cases is hardly more illuminating, but it may yield some indices on which the board may act.

Cases in which variance was granted. At the one extreme are cases such as *Nagaven Realities v. Banzhaf*.²¹ There the property under consideration consisted of two lots with a combined street frontage of 100

²⁰ 50 R. I. 26, 144 Atl. 674 (1929).

²¹ 149 N. Y. Misc. 361, 267 N. Y. Supp. 729 (Sup. Ct. 1933).

feet and a usable depth of 65 feet. They fronted on a highway recently widened and improved to serve as an alternative route to relieve congestion on the Boston Post Road out of New York City. To the rear was a cliff 30 feet high. The northerly boundary abutted on the right of way of a railway. The nearest business building was 800 feet to the east. To the west, an industrial zone began 100 feet from the lots and extended for 650 feet, occupied by building supply businesses selling coal, lumber, trap rock, cement, and similar items. Across the highway was a residential zone, which was almost entirely vacant because of a high embankment and consequent difficulty of access. The property itself was located in a business district, from which filling stations were excluded. On appeal from the board's decision denying a variance permit for erection of such a station, the court found that there was no present demand for mercantile buildings in the area and that the expense of building an apartment house on the lots would be so great as to prevent any possibility of profit. In the light of these facts, it reversed the board's decision and ordered the granting of a permit "until such time as business development of the village makes it reasonably possible to use the property for some business use allowed by the ordinance."

In *People ex rel. St. Albans-Springfield Corp. v. Connell*²² another fairly clear case of hardship was made out. Petitioner's lot was located on a major boulevard in a rural community on the outskirts of New York City. Some of the land in the vicinity was being farmed; 87 per cent of it was vacant, although some of this had been divided into building lots. Of the six buildings located within 400 feet of petitioner's property, four were stores with overhead apartments, none of which could be rented for enough to yield a reasonable return. Transit facilities had not yet reached the area. There was not enough residential development in the neighborhood to support a business establishment, and because of parking restrictions, the through traffic along the highway gave little trade to the area. Banks refused to make loans to businesses in the neighborhood. Yet the area was zoned for business. Petitioner applied for a variance permit to erect a filling station on his property. On appeal, after denial by the board, the New York Court of Appeals declared that these facts showed that no reasonable return could be secured from the property when used for purposes allowed by the ordinance, and it ordered that a permit be issued until such time as circumstances should change so that the property could reasonably be applied to business uses.²³

²² 257 N. Y. 73, 177 N. E. 313 (1931).

²³ It might be questioned whether most of the hardship here was not neighborhood-wide in character, rather than peculiar to applicant's property, so that proper procedure would have been to apply for an amendment to the ordinance.

In *Schaible v. Board of Adjustment*²⁴ one side of petitioner's large tract of land was bounded by railroad tracks carrying 115 trains per day; a second side by an elevated highway, from which there was no access to the tract; a third side by the rear yards of business properties facing on an avenue parallel to the railroad; and a fourth side by a dead-end lane giving access to the tract from the avenue on which the business properties faced. Petitioner owned a warehouse for a wholesale lubricants business (which consisted of receiving and selling lubricants in sealed cans, with no machinery other than a mechanical lift) which was situated across this dead-end lane from the property in question. He wished to move his warehouse onto the tract, a distance of some 200 feet. Under the original zoning of the land this would have been permissible, but in 1936 an amendment to the zoning ordinance included the tract in a business zone and forbade any wholesale businesses or storage of goods other than those intended to be sold at retail on the premises. In arguing that the board's refusal to grant a variance should be sustained by the courts, the city attorney declared that the tract could be used as a site for a fire or police station or other public building, that it could be consolidated with other land and used for some purposes, or that it might be developed as a site for garden apartments. The court brushed aside these arguments as factually incorrect and said, "Prosecutors are deprived of any practical use of their property—an unnecessary hardship because the deprivation does not bring to other properties a commensurate advantage."

In a closer case²⁵ the petitioner owned a non-conforming²⁶ gasoline filling station which was equipped with only one pump. He applied for a variance permitting him to install another pump, which was granted by the board and affirmed by the courts. The findings of the board were that it was necessary, under modern conditions, to offer two grades of gasoline in order to do business; that the additional pump would not increase his business so as to disturb the neighborhood further, but that it would merely enable him to hold on to the customers which he was in danger of losing. The showing of hardship in this case seems a little feeble, particularly in view of the many cases in which courts have been very rigid in preventing any extension of non-conforming

²⁴ 134 N. J. L. 434, 49 A. 2d 50 (Sup. Ct. 1946).

²⁵ *Amero v. Board of Appeal*, 283 Mass. 45, 186 N. E. 61 (1933).

²⁶ The term "non-conforming use" is commonly applied to property uses existing at the time of enactment of the zoning ordinance which do not conform with the requirements of that ordinance. Most zoning ordinances permit non-conforming uses to continue but not to be enlarged, or rebuilt after specified amounts of damage, or resumed after discontinuance.

uses.²⁷ The board and the court both seem to have been influenced by the facts that the abutting property-owners offered no objection to the variance and that the largest landowner in the vicinity testified that it would be a convenience to his tenants if the extra pump were installed.

There is at least one case²⁸ in which the court has adopted a viewpoint in the center of the scale. Where some courts have ruled that a showing of financial hardship was of no weight at all and others have seemingly felt that this constituted proof that the ordinance deprived the owner of the opportunity to secure a reasonable return from his land, this court ruled that a showing of financial loss would be some evidence of unnecessary hardship but that it would not be sufficient in itself to support a decision granting a variance.

Cases in which variance was denied. On the other side of the line (the situations where the variance was denied because there was insufficient showing of unnecessary hardship) the cases are more numerous. In some of these cases the court merely declared, without further elucidation, that the applicant had not made the necessary showing that the property could not yield a reasonable return if used for permitted purposes.²⁹ In others, the facts indicated fairly clearly that there was no hardship beyond the loss of an expected additional profit. And in still others the hardship seems to have been so severe that different courts and boards might well have held the situation to be one where the ordinance prevented the owner from making "reasonable use" of his land or securing a "reasonable return" therefrom.

²⁷ In *Selligman v. Von Allmen Bros.*, 297 Ky. 121, 179 S. W. 2d 207 (1944) the court prevented a non-conforming dairy from replacing wooden walls with brick ones, a step which it had found necessary in order to support a new roof which the Health Department had ordered the dairy to install. Other cases are *Aberdeen Garage, Inc. v. Murdock*, 257 App. Div. 645, 15 N. Y. S. 2d 66 (1st Dep't 1939), *aff'd*, 283 N. Y. 650, 28 N. E. 2d 45 (1940); *De Felice v. Zoning Board of Appeals*, 130 Conn. 156, 32 A. 2d 635 (1943); *Piccolo v. West Haven*, 120 Conn. 449, 181 Atl. 615 (1935); *Green v. Board of Commissioners*, 131 N. J. L. 336, 36 A. 2d 610 (Sup. Ct. 1944).

²⁸ *Holy Sepulchre Cemetery v. Board of Appeals*, 271 App. Div. 33, 60 N. Y. S. 2d 750 (4th Dep't 1946).

²⁹ *Calcagno v. Town Board of Webster*, 265 App. Div. 687, 41 N. Y. S. 2d 140 (4th Dep't), *aff'd*, 291 N. Y. 701, 52 N. E. 2d 592 (1943) (applicant sought variance permitting operation of commercial gravel plant in Agricultural-Residence B district); *Heffernan v. Zoning Board of Review*, 50 R. I. 26, 144 Atl. 674 (1929) (applicant sought variance permitting him to tear down non-conforming wooden store building in a residence district and replace it with another business structure).

In *People ex rel Arseekay Syndicate v. Murdock*, 265 N. Y. 158, 191 N. E. 871 (1934) the applicant sought a variance permitting him to erect a filling station in an undeveloped area zoned for business. The board refused the variance, but was reversed by the lower courts. When an appeal was taken to the New York Court of Appeals, it sustained the board's decision, declaring, "All that appears is that property acquired for speculation is not presently adaptable to a productive conforming use. The determination of the board of standards and appeals is conclusive in the circumstances."

An example of a case where the owner seemed merely to be seeking a greater profit is *Fleming v. Board of Adjustment*.³⁰ The petitioner owned an apartment house. The regulations for the district in which it was situated provided that there should be no private garage on any one property whose capacity should exceed four cars. Petitioner sought a variance permitting her to erect two three-car garages in addition to the four-car garage which the ordinance allowed. The board refused it, and its decision was affirmed by the courts. The Pennsylvania Supreme Court declared, "The only reason for authorizing departure in this instance appears to be the added advantage and financial benefit to appellant, through increase in the rental value of her apartments. This is not sufficient to warrant interference by us in a matter which was, in any event, primarily one of discretion with the Board of Adjustment."

In *People ex rel. Stevens v. Clark*³¹ the petitioner sought a variance permitting him to erect an apartment house which would contain 92 apartments rather than the 53 allowed by the ordinance, would exceed the height limitations by 14 feet, and would occupy 37.9 per cent of the lot rather than the 35 per cent which the ordinance permitted. The board granted the variance but was reversed by the courts, which said that petitioner had submitted no figures to prove that he could not secure a reasonable return if he complied with the ordinance and that he was seemingly merely seeking to make a greater profit (charging \$40 per month per room) with the larger building.

In a third case of this variety³² the petitioner sought to erect a gasoline filling station on the boundary between a residence district and a business district. The court said, ". . . nothing more was shown than inconvenience and expense to the applicant in making a particular improvement on the premises and that a garage building would be economically advantageous over such improvement to the owner. These are not proper 'criteria' for a variation, which must be based on considerations of the public health, safety and general welfare."

A slightly more difficult situation was presented in *Joyce v. Dobson*.³³ The petitioner owned a corner lot at an intersection where the other three corner lots were zoned for business. His lot was in a residence zone.³⁴ He applied for a variance permitting him to erect a filling station, stating that he could lease his property for this purpose for \$600 a year over a 10-year period. In upholding the board's denial of

³⁰ 318 Pa. 582, 178 Atl. 813 (1935).

³¹ 216 App. Div. 351, 215 N. Y. Supp. 190 (2d Dep't 1926).

³² 4672 Broadway Corp. v. Board of Standards and Appeals, 255 App. Div. 97, 232 N. Y. Supp. 266 (1st Dep't 1928), *aff'd*, 250 N. Y. 571, 166 N. E. 328 (1929).

³³ 255 App. Div. 348, 8 N. Y. S. 2d 768 (4th Dep't 1938).

³⁴ Such a situation would not arise in North Carolina counties covered by the proviso to N. C. GEN. STAT. §160-173 (1943).

a permit, the court reiterated the principle that a variance may not be granted merely because it would be financially advantageous to the applicant or because he would suffer a financial loss if it were denied.

In other cases the hardship was more manifest. In *Hickox v. Griffin*³⁵ Long Island University entered into a contract for the purchase of a large estate on Oyster Bay, located in a Residence A district, for use as a campus (the contract being contingent upon securing a variance permitting such use). The board found that the property would not yield a reasonable return if used for residential purposes, the estate being large and having large permanent buildings thereon which could not readily be sold as residential properties. Although the lower courts upheld the grant of the variance, the New York Court of Appeals reversed the decision, declaring in the course of its opinion that, "Structures upon the property in question may be peculiarly suited to the purposes of that institution [the university], but considerations of that sort are here irrelevant, as also is the evidence that country estates cannot be managed with economy and are not very easy to sell."

In another New York case³⁶ the tract involved was large and irregularly shaped; a strip 150-feet in depth adjacent to a highway was zoned for business, while the remainder of the tract was in a residential district. The only means of access to the residential part of the tract was through the strip zoned for business. The owner wished to erect a roller skating rink on the tract, two-thirds of which would be located in the residence zone. In granting a variance (despite the protests of over 600 neighbors), the board found that if the rink were restricted to the business portion of the tract, it would impair the access to the residential part and in addition would create traffic congestion due to lack of space for off-street parking on the business strip. The owner also argued that if he were restricted to the business strip, there would be insufficient space on the unoccupied part of the strip to build an access road into the residential area of the width and grade required by law. The New York Court of Appeals reversed the decision of the board, pointing out that the owner had introduced no evidence to show that he could not secure a reasonable return from his residential property if he used it for permitted purposes; that he had merely shown that he could, if the variance were granted, make an immediate profitable use of the entire tract; and that it would seem possible to rearrange the rink on the business strip or to use the land for some other purpose which would not interfere with building the access road.

³⁵ 298 N. Y. 365, 83 N. E. 2d 836 (1949).

³⁶ *Otto v. Steinhilber*, 282 N. Y. 71, 24 N. E. 2d 851 (1939).

In another case³⁷ the property was situated in the center of a little cluster of non-conforming business uses in a residence district. A drugstore adjoined one side of the property; on the other side there was an alley, then a building the first floor of which was used for a grocery store and for a barber shop; beyond the building was a residential lot, a section of which was used for a small shoe shop. The owner made successive applications to the board to erect a bakery, a grocery store, and a business building, all of which were denied. When he took the matter to the courts, the Colorado Supreme Court declared that the evidence showed only that he was being deprived of an opportunity to make more money from his property.

The New York Court of Appeals has set a difficult requirement for a variance. In *Levy v. Board of Standards and Appeals*³⁸ a committee of the board investigated the corner lot on which the petitioner wished to erect a filling station. The board's findings were that, "After careful study of the neighborhood, the Committee is of the opinion that the petitioner has justified his basis of hardship, both [A Ave.] and [B Place] being heavily trafficked streets, with trolley tracks on each street, and that a commercial use of this corner would not be good judgment." In reversing the board's grant of a variance, the court assumed that these findings were true and correct, but held that nevertheless the facts in the record did not permit an inference that the *only* profitable use of the lot was for a filling station.

In *Young Women's Hebrew Assn. v. Board of Standards and Appeals*³⁹ the court reached a similar result. Petitioner owned a corner lot in a business district, where filling stations were prohibited. Non-conforming filling stations stood on two of the other three corners. Petitioner sought to convert his motion picture theater into such a station, showing that he was losing money. The board made findings, *inter alia*, that use of his lot for a conforming use would result in a weekly loss of from \$200 to \$300 and that the neighborhood had deteriorated to such an extent that he could not secure any return from an apartment house, and granted the variance. The New York Court of Appeals reversed the decision on the same grounds as in the *Levy* case, further declaring that the change in conditions posed a problem for the legislative body rather than for the board. In requiring a finding in these two cases that the use for which a variance was sought was the *only* profitable use of the property, this court seems to have gone beyond those of other states.

³⁷ Colorado Springs v. Miller, 95 Colo. 337, 36 P. 2d 161 (1934).

³⁸ 267 N. Y. 347, 196 N. E. 284 (1935).

³⁹ 266 N. Y. 270, 194 N. E. 751 (1935).

In *Jenney Mfg. Co. v. Zoning Board of Review*⁴⁰ the petitioner applied for a variance permitting her to erect a filling station in the center of a residence district and within 200 feet of a school. Her husband testified that he was a real estate dealer; that because the avenue on which the lot was situated was so heavily travelled, only three residences had been built upon it in the immediate vicinity of his wife's property during the past 20 years; that he had tried unsuccessfully to sell the lot; that he was financially unable to build upon the lot himself and did not consider it a good risk as a residential investment; that the land would be worth more if it were zoned for business; that there was a farm with a foundry about 450 feet from the other side of the avenue; and that a standpipe and a high tension wire were close to the lot. The board refused the variance on the ground that the property was in the center of the highest class residential district, which extended a quarter mile along the avenue in each direction from the lot. The court upheld its decision, indicating that it felt certain that the property could be used for residence purposes and declaring that, "Notwithstanding the assertion that the property cannot be sold, there is nothing in the evidence to indicate whether or not the price at which such property is being held is reasonable; and the fact that said petitioner and her husband are not able or do not care to build is not conclusive in favor of allowing the exception desired."

A similarly detailed demonstration of hardship proved insufficient in *Ricci v. Zoning Board of Review*.⁴¹ The petitioner owned land in a residence district on which he wished to erect a gasoline service station. He declared that the land was unsuitable for home sites because of the softness and dampness of the ground, the lot being situated in a "low" place. A real estate broker appeared and testified that the ground was too damp for residences, but he admitted on cross-examination that other similar land to the north had been filled in and developed into desirable residential property. The board refused the variance and was upheld by the court, which declared, "It seems to us that the real difficulty confronting the Riccis in this case is that of filling the land and perhaps of waterproofing the superstructure of any building that might be erected on the premises in accordance with the zoning ordinance. Mere inconvenience or additional expense necessary to make the land available for beneficial uses within the scope of the ordinance will not warrant us in holding that, in the circumstances of this case, the decision of the board was arbitrary or contrary to law."

Each of the above two cases may be explained, perhaps, by the fact

⁴⁰ 63 R. I. 477, 9 A. 2d 705 (1939).

⁴¹ 72 R. I. 58, 47 A. 2d 923 (1946).

that the court was upholding a decision by the board, rather than reversing it, and consequently found it somewhat easier to disagree with the evidence adduced by the property-owner.

General principle. From examination of this scale of cases one concrete principle can be extracted: the degree of financial loss and hardship must ordinarily be very high before it will be enough to support the granting of a variance. Just where it reaches the point that it becomes "deprivation of the right to secure a reasonable return from the property" is uncertain, but the board may find some guidance from the fact situations set out here.

The effect of similar uses on adjoining lots. Examination also yields a guide concerning the weight to be accorded the fact that there are on adjoining lots uses similar to that for which the variance is sought. This situation was to be found in the cases of *Joyce v. Dobson*,⁴² *Colorado Springs v. Miller*,⁴³ and *Young Women's Hebrew Ass'n v. Board of Standards and Appeals*.⁴⁴ In the *Joyce* and *Young Women's Hebrew Ass'n* cases the property for which the variance was sought was a corner lot, and two of the other three corners were occupied by uses similar to that requested. The *Colorado Springs* situation involved more direct hardship, since the petitioner's property was an interior lot almost completely surrounded by non-conforming uses of the type which he sought to erect. Yet in all three cases the courts said that the mere fact that there were similar uses on adjacent properties was insufficient to justify a variance. In the situation where the adjacent uses are pre-existing non-conforming uses, the court justified its position on the ground that the expectation of the draughtsmen of the ordinance was that such non-conforming uses would in time wither away. In the other situation where there are apt to be adjacent uses of the type for which the variance is sought, that of lots along a district boundary, the court's position is that boundaries between districts must be fixed and definite and that it is beyond the board's power to alter their position by granting of variances.

These cases all stem from an early New York case, *People ex rel. Fordham Manor Reformed Church v. Walsh*,⁴⁵ where the Board's grant of a variance permitting the erection of a garage in a residence district, on the grounds that there was already in existence on the adjoining lot a large, non-conforming garage was reversed. The court actually turned

⁴² 255 App. Div. 348, 8 N. Y. S. 2d 768 (4th Dep't 1938). The facts of this case are set forth at p. 255 *supra*.

⁴³ 95 Colo. 337, 36 P. 2d 161 (1934). The facts of this case are set forth at p. 257 *supra*.

⁴⁴ 266 N. Y. 270, 194 N. E. 751 (1935). The facts of this case are set forth at p. 257 *supra*.

⁴⁵ 244 N. Y. 280, 155 N. E. 575 (1927).

the argument against the property-owner, pointing out that if the variance were granted, the two garages together would take up 217½ feet of a 518-foot residential block. The court said that such a variance would take the block out of the district as effectively as if a new zoning map had been made and that such action was beyond the Board's powers.

Other facets of this rule are illustrated by two New Jersey cases, *Green v. Board of Commissioners*⁴⁶ and *Potts v. Board of Adjustment*.⁴⁷ In the former the petitioner sought to expand his non-conforming junk business in an industrial district (where such businesses were prohibited). In justifying his request, he pointed to the fact that there were other non-conforming uses of that type scattered through the district in which his property was located. The court held that the board had acted properly in disregarding this evidence. In the *Potts* case the petitioner wished to convert a single-family residence into a two-family apartment house, pointing to non-conforming uses of this type and to variances granted by the board previously as backing for his request. The court ruled that this board had acted properly in disregarding both arguments. With respect to the other variances, it declared that "Ill-advised or illegal variances do not furnish grounds for a repetition of the wrong," because otherwise general regulations would eventually be nullified by the board solely because it had once granted such a variance.

Although these cases indicate strongly that other property uses in the vicinity should be given no consideration by the board, it would seem desirable to make exceptions to this broad rule in some cases. As an illustration of this, in *Tau Alpha Holding Corp. v. Board of Adjustment*⁴⁸ the petitioner owned a small lot in the center of a cluster of non-conforming business buildings in a block zoned for residences. The board granted a variance permitting the petitioner to replace its wooden restaurant on the lot with a brick one. In the face of protests from neighboring property-owners, the Florida Supreme Court upheld the board's action, declaring,

"We think this is a typical case in which the Board of Adjustment may grant relief under the terms of the zoning ordinance. It is shown that the property involved was at the time the zoning ordinance was adopted and has since been in the midst of a business district, and has been in use for business purposes, that it cannot under present circumstances be valuable for any other purpose, that the public can in no way suffer by the indulgence

⁴⁶ 131 N. J. L. 336, 36 A. 2d 610 (Sup. Ct. 1944).

⁴⁷ 133 N. J. L. 230, 43 A. 2d 850 (Sup. Ct. 1945).

⁴⁸ 126 Fla. 858, 171 So. 819 (1937).

proposed to be given the owner, that it would be an undue hardship on the owner not to grant such indulgence, and that in so doing the spirit and purpose of the ordinance may still be enforced."

There is some question, of course, as to whether the proper course in a situation of this type would not be to seek an amendment to the ordinance, providing that the whole business development should be deemed a neighborhood business district.

From these cases it may be seen that ordinarily the presence on adjacent lots of the same type of property use as that which the applicant seeks to make of his land has virtually no weight. But where the petitioner's property is buried in the midst of a cluster of non-conforming uses which give every evidence of being "permanent," the board may possibly justify, by that fact, the granting of a variance.⁴⁹

(b) "*The hardship results from the application of the ordinance.*"

In deciding whether or not the facts show such hardship as would justify the issuance of a variance, the Board of Adjustment must limit itself to evidence of hardship resulting from the application of the ordinance to the property involved. Other hardship is irrelevant to this decision. As an illustration of this rule, in the case of *Hickox v. Griffin*⁵⁰ the applicant produced evidence that the property in question (a large estate) was expensive to maintain and difficult to sell. The court regarded this evidence as irrelevant, since such hardship resulted from the nature of the property, rather than from the ordinance.

In *Brackett v. Board of Appeal*⁵¹ a hotel bought a lot in a general residence district whose regulations authorized erection and use of apartment houses, professional offices, and similar uses. A restriction in the deed prevented use of the lot for any other purpose than erection of a single-family residence. In seeking a variance permitting it to use the property for a parking lot, the hotel argued that the neighborhood was no longer suitable for single-family residences. The Supreme Judicial Court of Massachusetts, in reversing the board's grant of a variance, pointed out that the hardship resulted from operation of the deed restriction rather than from the ordinance; that there was no evidence that the property could not be used for the purposes permitted by the ordinance; and that the board had no power to relieve against operation of the restrictive covenant.

⁴⁹ There is some doubt as to whether a "use variance" would be authorized even in this situation in North Carolina. See *Lee v. Board of Adjustment*, 226 N. C. 107, 37 S. E. 2d 128 (1946) and discussion at p. 250 *supra*.

⁵⁰ 298 N. Y. 365, 83 N. E. 2d 836 (1949). The facts of this case are set forth more completely at p. 256 *supra*.

⁵¹ 311 Mass. 52, 39 N. E. 2d 986 (1942).

An interesting variant of this rule is to be found in the case of *Teglund v. Dodge*.⁵² In that case the petitioner applied for a permit to erect a multiple dwelling which complied fully with the zoning ordinance. The board denied the permit, on the ground that the multiple dwelling would create "practical difficulties and unnecessary hardships" for petitioner's neighbors, who owned single-family residences. On appeal, the Michigan Supreme Court held that the board had exceeded its powers. The unnecessary hardship against which the board may give relief is only that which arises from operation of the ordinance, the court declared. A zoning ordinance protects against invasion of a district by noxious uses; in its absence there would be no protection at all. Such hardship as was demonstrated here resulted from the fact that the ordinance was not broad enough in its protection, rather than too broad—and the court said that this was the same hardship as would have existed in the absence of any ordinance. Therefore the court felt that this hardship did *not* result from the operation of the ordinance, and concluded that "No power reposes in the board to make restrictions on the use of specific property more severe than those imposed by the ordinance itself."

(c) "*The hardship is suffered by applicant's property.*"

A further qualification on the hardship which may be considered by the board is that it must be hardship affecting the applicant's property directly. Thus, the fact that there is no grocery store in a neighborhood might mean that a great many housewives suffer hardship, but their hardship is no justification for the granting of a variance permitting erection of such a store. In the case of *Brackett v. Board of Appeal*⁵³ discussed on the preceding page, the board found that the hotel had a serious parking problem which the parking lot would alleviate and that the lot would also benefit the public generally in clearing the streets for other parking. The court held that these factors could not be considered, since neither related directly to the lot in question. The hotel's parking problem resulted from the use of the lot on which the hotel was situated, rather than from the lot for which the variance was sought. And the public's hardship was irrelevant.

A similar situation was presented in *Young Women's Hebrew Ass'n v. Board of Standards and Appeals*.⁵⁴ There, in seeking a variance allowing him to erect a filling station, the petitioner argued that there was no station on that side of Fifth Avenue from Harlem to Lafayette

⁵² 316 Mich. 185, 25 N. W. 2d 161 (1946).

⁵³ 311 Mass. 52, 39 N. E. 2d 956 (1942).

⁵⁴ 266 N. Y. 270, 194 N. E. 751 (1935). The facts of this case are set forth more fully at p. 257 *supra*.

Street, and consequently southbound traffic was impeded by having to cross to the other side of the avenue for gasoline. The New York Court of Appeals dismissed this argument as irrelevant. The hardship on southbound motorists was not hardship on the possessor of the lot in question.

(d) "*The hardship is not the result of the applicant's own actions.*"

In order to make the necessary showing of hardship, the applicant for a variance may not show hardship which he inflicted upon himself or which he could have avoided. This rule results from the word "unnecessary" in the phrase "practical difficulties or unnecessary hardships." There are two different categories of cases in which courts have applied this rule. In the first are situations in which the applicant has knowingly or unknowingly violated the ordinance and then come before the board and cited his expenditures in making such violations as a loss which he will suffer if he is not permitted to continue the violation. The second category consists of cases in which property-owners have bought property with knowledge of the zoning restrictions and then complained because these restrictions have impaired the fulfillment of their plans.

In the first category are cases such as *National Lumber Products Co. v. Ponzio*.⁵⁵ There the owner of a non-conforming lumber yard tripled the horsepower of his planer without applying for a permit; then when there was a complaint, he sought a variance. The board refused to grant it, and the court affirmed its action. To the petitioner's argument that he had spent a great deal of money in installing the new machinery, the court's answer was that he had knowingly expanded in violation of the law and could not now claim benefits from his violation.

In *Selligman v. Von Allmen Bros.*⁵⁶ the owner of a non-conforming dairy was ordered by the local Health Department to replace the decaying roof of one of its buildings. The dairy company secured a permit to do this. Later it learned that the walls were so decayed that they would not support the new roof, so without a permit it started to replace them with brick. When this work was 90 per cent completed, it was halted by order of the Building Inspector. The dairy sought a variance permitting erection of the brick walls. This was refused by the Board of Adjustment, whose decision was sustained by the Kentucky Supreme Court. To the argument that the dairy had already made expenditures in erecting the new walls and that it would be unnecessary hardship if it were forced to tear them down, the court replied that this hardship

⁵⁵ 133 N. J. L. 95, 42 A. 2d 753 (Sup. Ct. 1945).

⁵⁶ 297 Ky. 121, 179 S. W. 2d 207 (1944). See n. 27, *supra*.

was self-inflicted and could not be considered by either the board or itself.

A California case⁵⁷ involved a particularly arrogant property-owner. He owned a number of lots, some of which had been zoned as a small business area in the center of a residence district and the remainder of which had been zoned for residential uses. He wished to erect several apartment buildings on the residential lots—a use which would have been permitted in the business zone but not in the residence zone. Although denied a permit, he nevertheless erected the buildings. He then brought an action for a declaratory judgment that the ordinance was harsh and invalid in its application to him.⁵⁸ In denying him such a judgment, California's highest court pointed out that he could not take advantage of self-created conditions to show hardship. If he were now forced to tear down his apartment buildings, that would be a result which he should have anticipated when he went ahead in violation of the ordinance. If he were permitted to profit from his wrongdoing, the court said, property-owners would in every case be able to create "hardship" conditions and thereby escape any attempt to enforce the ordinance. "The constitutionality of the ordinance or of its application to particular property," it concluded, "must be determined upon the basis of the facts and conditions as they existed prior to the time plaintiff proceeded in disregard of the ordinance, and the court must wholly ignore all conditions which resulted from the plaintiff's actions."

A final case of this type is *Piccolo v. West Haven*,⁵⁹ in which the petitioner owned a non-conforming business building in a Residence B zone, which was destroyed by fire. The zoning regulations permitted rebuilding of non-conforming uses within a year after such destruction. Petitioner applied for permission to build a larger building of a different shape, which would occupy the entire width of his lot instead of leaving side yards as the earlier building had. On the second hearing after this permission was denied, it appeared that the proposed building could not be erected within the year permitted (and apparently it was too late even to rebuild the earlier building in conformity with the ordinance). The Connecticut Supreme Court affirmed the board's denial of a variance permitting erection after the year had expired, pointing out that any hardship involved was of the petitioner's own creation, since he could have replaced the former building if he had proceeded promptly to do so, instead of first seeking to erect a different type of building.

⁵⁷ *Wilkins v. San Bernadino*, 29 Cal. 2d 332, 175 P. 2d 542 (1946).

⁵⁸ This procedure was necessitated by the fact that California's zoning enabling act makes no provision for a Board of Adjustment.

⁵⁹ 120 Conn. 449, 181 Atl. 615 (1935).

In the second category, as we have seen, are cases where a variance is denied because the owner bought his property after enactment of the ordinance and therefore must have known of the restrictions which it imposed on the property. In such a situation, he can hardly maintain that the hardship results from the operation of the ordinance, for he could have avoided it by not purchasing the land.

A typical situation of this sort is presented by the case of *Aberdeen Garage, Inc. v. Murdock*.⁶⁰ In that case the petitioner had erected a garage in 1930 under a permit from the Board of Standards and Appeals. In 1937 he purchased an adjoining plot of land and six months later sought a variance permitting extension of his garage onto this land by the construction of a new ramp, a service station, and minor repair facilities. The board denied the variance when the neighbors objected to the possible fire hazards, noise, fumes, and additional traffic over the sidewalk. The court affirmed the board's decision, declaring,

"We are of the opinion that the conclusion which the Board reached was correct. It would not require any great stretch of the imagination to say that the petitioner purchased the property with the thought in mind of making the present application. Consequently, it cannot well be contended that the restriction imposed by the Resolution [the zoning ordinance] caused petitioner such a peculiar hardship that entitles it to the special privilege it seeks."

A similar decision was reached by Pennsylvania's Supreme Court in *Application of Devereux Foundation*.⁶¹ In that case the plaintiff Foundation owned a school for psychiatric treatment of mentally retarded boys. The city enacted a zoning ordinance, which the court found prohibited such schools in the residence zone in which plaintiff's property was located (although the school was permitted to continue as a non-conforming use). Then the Foundation purchased an adjacent lot for the purpose of erecting a dormitory thereon, apparently being unaware of the zoning ordinance. When neighbors protested against erection of the proposed dormitory, it applied for a variance. The Board of Adjustment granted the variance but was overruled by the court, which held that there was no unnecessary hardship, since it must be presumed that the plaintiff had bought the lot with knowledge of the zoning restrictions.

A stronger holding of this type is to be found in the case of *Holy Sepulchre Cemetery v. Board of Appeals*.⁶² There a church cemetery

⁶⁰ 257 App. Div. 645, 15 N. Y. S. 2d 66 (1st Dep't 1939), *aff'd*, 283 N. Y. 650, 28 N. E. 2d 45 (1940).

⁶¹ 351 Pa. 478, 41 A. 2d 744 (1945), *appeal dismissed*, 326 U. S. 686 (1945).

⁶² 271 App. Div. 33, 60 N. Y. S. 2d 750 (4th Dep't 1946).

corporation bought land for a cemetery in a residence district where such a use was prohibited. In seeking a variance, it pointed out that its corporate powers were limited to those connected with operating a cemetery; thus it was prevented from developing the tract for residential purposes, renting dwelling-houses, or dividing the tract into lots for the purpose of sale. Since the ordinance prevented it from using its land for any purpose which its corporate charter permitted, it maintained that it was subjected to unnecessary hardship. The court, upholding the board's denial of a variance, said that these arguments were irrelevant and entitled to no consideration, since the corporation had bought the tract with knowledge of the zoning ordinance and therefore had only itself to blame for any difficulties in which it found itself.⁶³

These cases do not mean, however, that a buyer who purchases after enactment of a zoning ordinance is to be forever barred from securing a variance even though conditions later change in such a way as to justify the grant of a variance. Such a holding would unduly penalize him as compared with his neighbor who had by chance acquired his land prior to the enactment of the ordinance. Two Rhode Island cases, *Ricci v. Zoning Board of Review*⁶⁴ and *Jenney Mfg. Co. v. Zoning Board of Review*,⁶⁵ indicate judicial awareness of this possibility. In both cases the petitioner was denied the relief he sought, but in each case the court was careful to point out that there had been no substantial change in conditions since he purchased the land.

Although the cases in this category reach a result which may be desirable from the standpoint of limiting the number of variances which are granted, they create a serious practical problem for some property-owners. Who is the proper party to seek a variance when the property is being sold? If the purchaser is the proper party, the rule announced by these cases would prevent him from securing the variance, and he will not want to complete the purchase. If the vendor is the proper party, how can he argue that the ordinance works a hardship on him, when he does not want to make any use of the land himself? The potential seriousness of such a situation appears when, as in the *Jenney Mfg. Co.* case, the present owner of the property does not have enough cash to develop the land and must sell it in order to realize anything from it. If the only potential purchasers desire it solely for purposes

⁶³ The court could also have rested its decision on the fact that the hardship resulted from the corporation's charter limitations, rather than from application of the zoning ordinance to the property.

⁶⁴ 72 R. I. 58, 47 A. 2d 923 (1946). The facts of this case are set out at p. 258 *supra*.

⁶⁵ 63 R. I. 477, 9 A. 2d 705 (1939). The facts of this case are set out at p. 258 *supra*.

which are prohibited by the zoning ordinance, the owner may be reduced to letting the property go for taxes.

That such a problem is a real one appears from the devices which have been utilized in transactions of this sort. In the case of *Hickox v. Griffin*⁶⁶ Long Island University entered into a contract to purchase which was expressly conditioned on its being able to secure a variance. The New York Court of Appeals raised, but did not have to decide, the issue of whether the purchaser under such a contract was an "aggrieved party" who was entitled to take an appeal to the Board of Adjustment.

In the North Carolina case of *Lee v. Board of Adjustment*⁶⁷ the potential purchaser took an option on the property and then sought a variance. The state Supreme Court expressly ruled that he had suffered no hardship, declaring,

"An option in relation to land grants the right to elect, within a stipulated period, to buy or not to buy. The applicant optionee merely has the right of choice granted by his option. He possesses no present right to erect a building on the lot described in his contract. To withhold from him a permit to do what he has no present right to do cannot, in law, impose an 'undue and unnecessary hardship' upon him."

Neither this case nor any other in North Carolina to date, however, has ruled upon the question of whether a purchaser after enactment of the zoning ordinance is barred from securing a variance solely because of his time of purchase.

One lower court in New York has taken a more lenient attitude with regard to the right of such purchasers to appear before the Board of Adjustment. In the case of *Nagaven Realities v. Banzhaf*⁶⁸ the petitioner bid in certain property at a foreclosure sale. He never completed his purchase, postponing the closing a number of times, but he then applied for a variance. In answer to the contention that he was not an "aggrieved party" within the meaning of the ordinance, the court declared, "I find that [petitioner] is the equitable owner and as such has the right to initiate this proceeding."

Even though this peripheral issue, of whether the purchaser utilizing such a device is entitled to a hearing, should be settled satisfactorily, the central problem yet remains. It would seem that there is no satisfactory solution short of overruling those cases which hold that a purchaser after enactment of the ordinance is not entitled to a variance. These

⁶⁶ 298 N. Y. 365, 83 N. E. 2d 836 (1949). The facts of this case are set out at p. 256 *supra*.

⁶⁷ 226 N. C. 107, 37 S. E. 2d 128 (1946).

⁶⁸ 149 N. Y. Misc. 361, 267 N. Y. Supp. 729 (Sup. Ct. 1933).

cases seem to run counter to the philosophy expressed throughout the law of zoning that the Board of Adjustment (and other zoning authorities) must consider the nature of the property, rather than of its owner.⁶⁹ If the property is subjected to such hardship by operation of the ordinance as to be entitled to a variance, it would seem proper to grant the variance regardless of the identity of the owner or of the time when he purchased the property.

One fact has been made abundantly clear: the purchaser is not entitled to extra consideration where he informs the board that he purchased the property "in the hope" of securing a variance or because he "thought it was just a matter of routine." Such hopes are irrelevant, as the Supreme Judicial Court of Massachusetts pointed out in *Brackett v. Board of Appeal*.⁷⁰ Likewise, testimony by the purchaser as to what zone he "thought" the property was situated in has no relevance, as noted in *Prusik v. Board of Appeal*.⁷¹

(e) "*The hardship is peculiar to the applicant's property.*"

A final, and very important, rule concerning the types of hardship which have relevance is that the hardship of which the applicant complains must be peculiar to his property. Where it results from conditions which are neighborhood-wide, relief becomes a matter for the local legislative body rather than for the Board of Adjustment. This rule is closely allied to the next required finding to be discussed: that the variance is in harmony with the general purpose and intent of the ordinance. It is to be presumed that the local legislative body was aware of conditions at the time it adopted the ordinance. If these conditions have changed since that time, that body is the proper agency to amend the ordinance. The fact that it has not done so indicates an intent not to make any amendments. The Board of Adjustment is empowered only to carry out the intent of this body as reflected in the ordinance, although of course it may recommend changes.

One of the fullest statements concerning this principle is to be found in the case of *Levy v. Board of Standards and Appeals*.⁷² There the petitioner sought a variance permitting him to erect a filling station on a corner lot in a business district. In granting the variance, the board cited the facts that there were streetcar tracks and very heavy traffic on each of the intersecting streets, which it seemed to feel rendered the property undesirable for commercial uses. The New York Court of Appeals, in reversing the board, stated,

⁶⁹ A ready example is the courts' refusal to consider hardship other than that resulting from application of the zoning ordinance to the property involved.

⁷⁰ 311 Mass. 52, 39 N. E. 2d 956 (1942).

⁷¹ 262 Mass. 451, 160 N. E. 312 (1928).

⁷² 267 N. Y. 347, 196 N. E. 284 (1935).

"So far as appears, they [the conditions cited] apply to all pieces of property in the neighborhood which front on Atlantic Avenue and which are subject to the general rules restricting the use of premises in a business district."

The board may grant a variance, it continued, only where the individual owner shows that the restriction causes him a peculiar hardship and that such "a special privilege" may be granted for his benefit without injury or injustice to others.

"Only where the burden of a general restriction creates a special hardship upon a particular owner, can the grant of a special privilege to him, in truth, promote equal justice."

"[The Board] may not destroy the general restriction by piecemeal exemption of pieces of land equally subject to the hardship created in the restriction, nor arbitrarily grant to an individual a special privilege denied to others."

"Relief from general rules which are shown to be unwise by experience or change of conditions must be through appeal to the legislative authority, or in extreme cases, where the rule has become confiscatory, by challenge in the courts to the continued validity of the rule."

In *Young Women's Hebrew Ass'n v. Board of Standards and Appeals*⁷³ the board found that the neighborhood had deteriorated to such an extent that it was impossible to secure an adequate return from permissible uses. The court answered that while the board was probably correct in its finding, only the legislative body could provide relief for that type of neighborhood-wide hardship. The board could not, it declared, single out one lucky owner for relief from conditions which were applicable to all, for that would further depreciate the value of neighboring properties.

A similar holding is to be found in the case of *People ex rel. Arverne Bay Construction Co. v. Murdock*,⁷⁴ where the court upheld the board's refusal to grant a variance for property in a residence zone, which was sought for reasons considered to be neighborhood-wide. Discussing the issue, the court stated,

"In our opinion it was not only within the discretion of the board, but in fact incumbent upon it, to refuse to grant a variance in a zone restricted to residences, where the intention in creating the zone was manifestly to develop it along residential lines, by reason of its proximity to a boulevard and, further, where con-

⁷³ 266 N. Y. 270, 194 N. E. 751 (1935). The facts of this case are set out at p. 257 *supra*.

⁷⁴ 247 App. Div. 889, 286 N. Y. Supp. 785 (2d Dep't), *aff'd*, 271 N. Y. 631, 3 N. E. 2d 457 (1936).

ditions complained of, and particularly the presence of odors emanating from an incinerator and a creek used as an outlet for a sewer, are not peculiar to the site in question, but affect a wide area, as shown by petitioner's own witnesses. Under these circumstances, there was no showing of unnecessary hardship or practical difficulty applicable peculiarly to the site in question and relief, if any, should be achieved through the legislative authority which created the zone." [Emphasis supplied.]

Among the other cases citing this principle are *Calcagno v. Town Board of Webster*,⁷⁵ where petitioner sought a variance permitting operation of a commercial gravel pit in an Agricultural-Residence B district; *Prusik v. Board of Appeal*,⁷⁶ where petitioner wished to start a battery-charging business in the basement garage of her single-family residence in a residence zone; and *Otto v. Steinhilber*,⁷⁷ where the New York Court of Appeals refused to examine the question of how far back from a highway a business zone should extend (when petitioner sought to show that he needed more area for his skating rink), declaring that conditions were the same throughout the neighborhood and consequently it was a legislative matter to make any changes in the depth of the zone.

The rule to be extracted from these cases is that where the only facts cited to demonstrate hardship are equally applicable throughout the neighborhood, the Board of Adjustment should refuse the variance and refer the applicant to the local legislative body for relief.

(2) "*The variance is in harmony with the general purpose and intent of the ordinance and preserves its spirit.*"

The next finding required by the statute is that the variance is "in harmony with the general purpose and intent" of the ordinance and that it preserves its "spirit." As might be expected, this is a finding which is easy to state but difficult to support with facts. It is far easier for a court to give an opinion (based, perhaps, on its visceral reaction to the situation) that a variance is not in accord with the spirit of the ordinance than for the board to state facts justifying a finding that it is.

The usual cases in which courts have held that a variance is in conflict with the "spirit" of the ordinance fall into two classes: (a) those in which the applicant seeks to expand or extend a non-conforming use, and (b) those in which he seeks a "use variance," i.e., a variance permitting him to use his property for a purpose forbidden by the zoning

⁷⁵ 265 App. Div. 687, 41 N. Y. S. 2d 140 (4th Dep't), *aff'd*, 291 N. Y. 701, 52 N. E. 2d 592 (1943).

⁷⁶ 262 Mass. 451, 160 N. E. 312 (1928).

⁷⁷ 282 N. Y. 71, 24 N. E. 2d 851 (1939). The facts of this case are set out at p. 256 *supra*.

regulations, as distinguished from a variance authorizing deviations with respect to yard sizes, building heights, and similar matters. Perhaps a third class of cases in which there may be such a holding is when the board encounters the type of situation illustrated by the case of *Boyd v. Walsh*.⁷⁸ In that case the petitioner sought a variance to convert a stable, which was located across the street from a school, into a garage. An amendment to the zoning ordinance had prohibited garages within 200 feet of a school in all districts of the city. The board refused to grant a variance and was upheld by the court, which declared that the draughtsmen of the amendment seemed to have a clear intent that there should be no variances from it and that, at any rate, it seemed obvious that such a variance would conflict with the spirit of the amended ordinance.

(a) *Extension of non-conforming uses.*

*Colati v. Jirout*⁷⁹ is a typical case relating to extension of non-conforming uses. There the petitioner was granted a variance permitting him to enlarge his non-conforming restaurant in a residence district. The Maryland Supreme Court reversed the board's decision, declaring that any variance authorizing extension of a non-conforming use was contrary to the spirit of the ordinance, since the ordinance provisions concerning non-conforming uses were clearly designed to cause the eventual abandonment of all such uses rather than their perpetuation and enlargement.

Of the cases dealing with this situation, only a few have permitted the extension of non-conforming uses.⁸⁰ Most courts, like that of Maryland, have recognized the importance of eventually doing away with non-conforming uses and have invalidated all variances tending to their perpetuation. In *Selligman v. Von Allmen Bros.*,⁸¹ for instance, the Kentucky Supreme Court was very definite in declaring that replacement of the wooden walls of a non-conforming use with brick walls constituted a "structural alteration" forbidden by the ordinance. It would amount, the court said, to replacing an old with a new building and thereby defeat the ordinance's aim of eventually doing away with such uses. "This does not mean that the owner is forbidden to make reason-

⁷⁸ 217 App. Div. 461, 216 N. Y. Supp. 242 (1st Dep't), *aff'd*, 244 N. Y. 512, 155 N. E. 877 (1926).

⁷⁹ 186 Md. 652, 47 A. 2d 613 (1946).

⁸⁰ Examples are *Amero v. Board of Appeal*, 283 Mass. 45, 186 N. E. 61 (1933) (set out at pp. 253-254 *supra*) and *Tau Alpha Holding Corp. v. Board of Adjustment*, 126 Fla. 858, 171 So. 819 (1937) (set out at pp. 260-261 *supra*). The court in the *Tau Alpha* case specifically declared that the variance sought would not prevent the spirit and purpose of the ordinance from being carried out.

⁸¹ 297 Ky. 121, 179 S. W. 2d 207 (1944). The facts of this case are set out at p. 263 *supra*.

able and ordinary repairs to prevent his building from becoming unsightly, rundown or dilapidated," the court conceded.

The Connecticut Supreme Court was equally definite in the case of *Piccolo v. Town of West Haven*⁸² where petitioner proposed (a) to modify his non-conforming business building (after a fire) by increasing the width from 40 feet to 50 feet (so as to occupy the entire width of the lot), (b) to decrease the depth of the building, and (c) to make certain minor modifications inside the building. The court agreed with the Board of Adjustment's findings that increasing the width would constitute a modification of the non-conforming building which would be out of harmony with the purpose of the ordinance.

In *De Felice v. Zoning Board of Appeals*⁸³ the court applied the same principles to a different type of facts. There the petitioner owned a non-conforming commercial sandpit in an A Residence zone. Without a permit, he started to erect a wet sand classifier, until ordered to stop by the Zoning Inspector. The classifier was of steel, 106 feet long, 85 feet wide, 40 feet high, and over 44,000 pounds in weight. When operated it would create a large, water-filled hole. Its purpose was to clean and separate sand, adding 50 cents per cubic yard to its value. The board denied a variance and was upheld by the courts. The classifier, the court found, would be an extension of the non-conforming use, constituting a virtual "sand factory" which would process the sand as well as dig it. The court indicated, however, that mere substitution of more modern equipment, such as replacing hand shovels with a steam shovel, would not be an extension such as to violate the spirit of the ordinance.

(b) "Use variances."

Of the cases forbidding "use variances," the leading case in North Carolina is *Lee v. Board of Adjustment*.⁸⁴ In that case the North Carolina Supreme Court reversed a decision of a Board of Adjustment granting a variance for a filling station in a residence district. The court held that such a variance was directly contrary to the purposes of the ordinance, which it conceived to be the reservation of certain areas of the city for specified property uses and the prevention therein of uses harmful to the uses specified. In the course of its opinion, it made the following statements:

"No power to convert a residential section into a business district or to permit business establishments to invade residential sections

⁸² 120 Conn. 449, 181 Atl. 615 (1935). The facts of this case are set out at p. 264 *supra*.

⁸³ 130 Conn. 156, 32 A. 2d 635 (1943).

⁸⁴ 226 N. C. 107, 37 S. E. 2d 128 (1946).

is conferred. Therefore it [the Board] cannot permit a type of business or building prohibited by the ordinance, for to do so would be an amendment of the law and not a variance of its regulations [citing cases from New York, Rhode Island, Missouri, Indiana, and North Dakota].

"As the new building and its use must harmonize with the spirit and purpose of the ordinance, Bassett, Zoning, 128, no variance is lawful which does precisely what a change of map would accomplish. It follows that the privilege to erect a nonconforming building or a building for a nonconforming use may not be granted under the guise of a variance permit. Bassett, Zoning, 201. Action to that effect is in direct conflict with the general purpose and intent of the ordinance and does violence to its spirit.

"When such substantial changes became advisable they must be made by the legislative body of the municipality which alone can change the map and allow a business center in a residential section. It is a legislative matter and not a situation for a variance permit. Bassett, Zoning, 125."

This holding has substantial support from other courts over the country. In *Livingston v. Peterson*⁸⁵ the North Dakota Supreme Court upheld the board in its refusal to grant a variance permitting an apartment house in a single-family residence district, declaring,

"To permit a board or commission appointed by the city commission to say that a building forbidden to be erected may be erected, if this commission deem it wise, is as much a delegation of legislative power as would be permitting property owners to say that certain improvements must be made, or cannot be made. In either case the legislation would be made by those outside the legislative body. . . . The ordinance must determine this matter and not the board. For this reason it is clear that, where the board is given power to vary regulations, so as to apply them in harmony with the general purpose and intent of the ordinance and the law, it merely refers to regulations such as the distance which a church or school may be built from the rear of the lot, whether living, sleeping, or working rooms may be ventilated by an approved mechanical system, rather than by windows, whether churches or hospitals may exceed height restrictions of the district, and other provisions found in sections 9 and 10 of the ordinance. It cannot be extended to permit the building inspector or the board of adjustment to amend the ordinance, so as to authorize the erection of a building which is forbidden by the ordinance."

The Supreme Court of Arizona cited cases from Utah, Oklahoma, Texas, Missouri, North Dakota, and Iowa in support of its holding in the case of *Nicolai v. Board of Adjustment*⁸⁶ that the Board of Adjust-

⁸⁵ 59 N. D. 104, 228 N. W. 816 (1930).

⁸⁶ 55 Ariz. 283, 101 P. 2d 199 (1940).

ment is without power to grant use variances, "but merely to grant exceptions to the general rules governing the erection and maintenance of buildings which were used for an authorized purpose." In supporting this position, the court declared,

"It is true there are a few states which do permit a slight use extension [citing two cases], but they are the older cases and are in the minority. We are of the opinion that the later and better rule is that when an ordinance passed under a statute like ours expressly prohibits the use of property within certain districts for certain purposes, a board of adjustment created by authority of the statute may not change the use established by the legislative body of the city through its ordinance, and that any such change must be by the legislative body itself through a new ordinance rezoning the property involved."

It seems a little difficult to perceive wherein the Board of Adjustment is exercising a greater amount of legislative power in granting variances from the use regulations of the zoning ordinance than when it is granting variances from the height, lot area, yard size, and population density regulations. All of these are police power regulations aimed at roughly the same objectives of furthering the public health and safety. It would seem that the courts which make a distinction between use regulations and other regulations in the ordinance are regarding the primary purpose of the ordinance as the *preservation of property values* in particular neighborhoods,⁸⁷ rather than the furtherance of the public health and safety.

(3) "*In the granting of the variance the public safety and welfare have been assured and substantial justice has been done.*"

The inquiry into the question of whether or not the public safety and welfare have been assured and substantial justice done, which is the third finding required by the statute, is apt to be as slippery as the determination of whether the "spirit" of the ordinance is observed. The Rhode Island Supreme Court has attempted to state a rule to be followed by the Board of Adjustment, in the following terms:

"As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary thereto. In this connection, the words 'contrary to the public interest' should be interpreted to mean what in the judgment of a reasonable man would unduly, and in a marked degree, conflict with the ordinance provisions."⁸⁸

Once more, perhaps, better guideposts can be found by examining the facts in decided cases.

⁸⁷ This may be a valid police power objective, coming under the heading of furthering the public welfare.

⁸⁸ *Heffernan v. Zoning Board of Review*, 50 R. I. 26, 144 Atl. 674 (1929).

In *Application of Devereux Foundation*⁸⁹ the Pennsylvania Supreme Court ruled that it was not in the public interest for a Board of Adjustment to grant a variance permitting erection of a dormitory of a school for mentally retarded boys in a residence district, because it would create fear and anxiety, if not danger, for the neighbors.

In *Joyce v. Dobson*⁹⁰ a New York court ruled that it would be contrary to the public welfare for a variance to be granted permitting erection of a filling station in a residential district, since such stations are dangerous to their neighbors and the driveways of the station in question could not be removed far enough from residential property to comply with the laws for the protection of such property. In *Aberdeen Garage, Inc. v. Murdock*⁹¹ a variance permitting a filling station was denied partly on the grounds that it would create fire hazards, noise, additional traffic over the sidewalk, and fumes—all related to the public health and safety.

In *People ex rel. Stevens v. Clarke*⁹² a decision by the board permitting erection of a larger apartment house than the ordinance allowed was reversed by the court in part because of the fact that insofar as it housed additional families, the apartment house would create traffic, fire, noise, and sewerage difficulties and thereby conflict with the public welfare. The New Jersey court in the case of *National Lumber Products Co. v. Ponzio*⁹³ ruled that the noise from a large planing machine, which greatly disturbed the neighborhood, thereby affected adversely the health, safety, and welfare of the community; accordingly, the board's denial of a variance was upheld.

All of the above cases dealt with the public welfare and safety. Others have considered more narrowly the effects of a proposed variance on the neighborhood, in order to see whether "substantial justice" would be done. These cases have usually sought to discover whether the "essential character" of the neighborhood would be changed by the proposed use. Thus, in the case of *Otto v. Steinhilber*⁹⁴ the New York Court of Appeals based its reversal of the board's decision to grant a variance permitting a roller skating rink in a residence district, in part upon the fact that such a variance would alter the essential character of the neighborhood. In *Calcagno v. Town Board of Webster*⁹⁵ the

⁸⁹ 351 Pa. 478, 41 A. 2d 744 (1945), *appeal dismissed*, 326 U. S. 686 (1945).

⁹⁰ 255 App. Div. 348, 8 N. Y. S. 2d 768 (4th Dep't 1938).

⁹¹ 257 App. Div. 645, 15 N. Y. S. 2d 66 (1st Dep't 1939), *aff'd*, 283 N. Y. 650, 28 N. E. 2d 45 (1940).

⁹² 216 App. Div. 351, 215 N. Y. Supp. 190 (2d Dep't 1926).

⁹³ 133 N. J. L. 95, 42 A. 2d 753 (Sup. Ct. 1945).

⁹⁴ 282 N. Y. 71, 24 N. E. 2d 851 (1939).

⁹⁵ 265 App. Div. 687, 41 N. Y. S. 2d 140 (4th Dep't), *aff'd*, 291 N. Y. 701, 52 N. E. 2d 592 (1943).

court held that a board could properly find that a proposed commercial gravel plant in an Agricultural-Residence B district would alter the essential character of the locality, and upheld the denial of a variance.

In one case in which the court ordered the granting of a variance, *Schaible v. Board of Adjustment*,⁹⁶ the court made the affirmative statement that, "We think that the moving of prosecutors' business [a wholesale lubricants business] a distance of 200 feet to a structure built in accordance with the submitted plans and to be used as forecasted by the proofs will not be contrary to the public interest and will not seriously impair the pleasurable and profitable use of the neighborhood residential properties."

In the usual case, only the Board of Adjustment itself, with its knowledge of all the facts, will be able to determine whether a proposed variance will alter the essential character of the neighborhood or injure neighboring property-owners. If it finds that the variance will have either of these effects, or if it finds there will be injury to the public health, safety, or welfare, it should deny the variance.

Conditions of the variance permit.

Even though, on its face, a proposed variance would alter the essential character of the neighborhood, injure adjoining property owners, or otherwise injure the public health, safety, or welfare, a Board of Adjustment will quite frequently be able to frame its variance permit in such a way as to prevent such effects. This is commonly done by means of conditions on the permit. A filling station might be permitted in a residence district, for instance, on condition that its architecture conform to the architectural style of residences in the neighborhood and that it be surrounded by a tall hedge to cut off the view from neighboring lots. A building of greater height than that permitted by the regulations might be allowed on condition that it be set farther back from its lot lines, so as not to cut off the light and air of its neighbors to any greater extent than if it complied with the height regulations.⁹⁷

⁹⁶ 134 N. J. L. 434, 49 A. 2d 50 (Sup. Ct. 1946). The facts of this case are set out at p. 253 *supra*.

⁹⁷ The following are illustrative of conditions which have been placed on variances and upheld by the courts:

(a) During the war, when gas rationing interfered with travel to the downtown business district, a temporary permit was granted to operate for one year a branch real estate office in the basement of a home in a residential district, *provided* that there were no signs or other indications of the business outside the house and *provided* that the entrance to the office was from a side street and not from the avenue on which the building fronted. *Gish v. Exley*, 153 Pa. Super. 653, 34 A. 2d 925 (1943).

(b) A permit for the extension of a non-conforming business building in a residential district was granted *on condition* that it be not over one story high, so as not to cut off the light and air of its neighbors. *Smith v. Zoning Board of*

The power of the board to insert conditions on the variances it grants has been generally acknowledged by the courts. A New York court has said that, "The power to impose reasonable conditions in making exemptions under the zoning ordinance is inherent in the board, and, where warranted, it is inherent in the court upon review."⁹⁸

Although it is generally agreed that such conditions may be imposed by the board, the law is unclear as to just how far the board may go in a particular case in restricting use of property by means of such conditions. The general rule is as stated by the Kentucky Supreme Court in the case of *Selligman v. Western and Southern Life Ins. Co.*⁹⁹

"It seems to us that in departing from the strict letter of the law the Board, as a condition to granting such a variation, may also impose reasonable restrictions which are not contained in the zoning ordinance and which originally it did not have power to impose, the only qualification being that, if any unreasonable conditions or restrictions are imposed as the price of this variation on the part of the Board, the courts may set aside such unreasonable or arbitrary restrictions or conditions."

Usually the courts have felt that the board should have wide latitude in imposing conditions on variances. They agree, generally, that the board is not bound by limitations on the police power. As Edward M. Bassett, the foremost authority on the legal aspects of zoning, has stated:

"The conditions are not limited to the scope of the police power. A common condition is that the side of the building shall be constructed with face brick.

"Zoning regulations must be based on the health, safety, and general welfare of the community. But the conditions imposed on variance permits are not regulations. They express protective adaptations necessary to secure the required vote in the board of

Review, 170 Atl. 75 (R. I. 1934).

(c) A non-conforming cleaning establishment was permitted to expand, *on condition* that it use gas, rather than coal, for heating, so as not to annoy its neighbors with smoke. Appeal of Consolidated Cleaning Shops, Inc., 103 Pa. Super. 66, 157 Atl. 811 (1931). In this case the cleaning company applied for a release from the condition, because its competitors were using coal, which was cheaper. The court refused to overturn the board's denial of the release.

(d) A garage was permitted in an Apartment district, *on condition* that its design be approved in advance by the Board of Adjustment, that it conform in architectural style to the building adjoining it, and that it have no entrance on a certain busy street with whose traffic it might otherwise interfere. *Selligman v. Western and Southern Life Ins. Co.*, 277 Ky. 551, 126 S. W. 2d 419 (1948). In this case the court halted construction which was in violation of the conditions.

⁹⁸ *Hopkins v. Board of Appeals*, 179 N. Y. Misc. 325, 39 N. Y. S. 2d 167, 175 (Sup. Ct. 1942).

⁹⁹ 277 Ky. 551, 126 S. W. 2d 419 (1948).

appeals. They may therefore have an esthetic quality. For instance, a regulation that a gasoline station must be of colonial design is void because not related to health or safety. But a variance allowing a station in a prohibited district could require such design where, for instance, the surrounding houses were colonial."¹⁰⁰

However, some courts, notably in New Jersey, have stricken down conditions as "unreasonable" which courts in other states would have no trouble in accepting.¹⁰¹ The ruling by the Rhode Island Supreme Court in the case of *Olevson v. Zoning Board of Review*¹⁰² would probably be concurred in by most courts. In that case the Board of Adjustment granted a variance permitting erection of a boarding house in an A Residence zone, but conditioned it so that only one named individual (a prospective purchaser of the property) could take advantage of it and so that it would expire as soon as he ceased to own and operate the house. This type of special treatment for an individual rather than for the property involved was held by the court to be "unreasonable" and beyond the power of the board.

Within the limitations of the general rule authorizing "reasonable" conditions, the Board of Adjustment should be astute to protect the public interest by placing conditions on its variances wherever possible. The board should be prepared, however, to produce factual evidence as to their "reasonableness" in the event of a challenge. Whether a particular court will be convinced by such evidence is, of course, difficult to predict with certainty.

¹⁰⁰ BASSETT, ZONING 128-9 (2d Ed. 1940).

¹⁰¹ In a leading case, *Soho Park and Land Co. v. Board of Adjustment*, 6 N. J. Misc. 686, 142 Atl. 548 (Sup. Ct. 1928) (which involved a variance permitting erection of a wire factory in a residence zone), the New Jersey court ruled that the following conditions were "unreasonable":

(a) A condition that the building and any subsequent buildings erected on the lot should be occupied only by the X Company and used only for a wire factory (held to be an unreasonable restraint upon alienation);

(b) A condition that three façades of the building should be of face brick and that drawings should be submitted to the board for approval in advance of construction (held to be based upon esthetic reasons and beyond the board's power);

(c) A condition that large trees, of a number and type to be specified by the board, must be planted along the lot line (also held to be based upon esthetic reasons);

(d) A condition that the part of the plot within 100 feet of a railway station be kept free of factory buildings (held to be a roundabout way of creating a park at the expense of the owner and therefore unreasonable, even though this condition did not prevent development of this area with residential buildings, which were all that any other property-owner in the area could build upon his land).

Although other courts have ruled that where the condition is invalid the variance is likewise void (because presumably the board would not have granted it without such a condition), *Olevson v. Zoning Board of Review*, 71 R. I. 303, 44 A. 2d 720 (1945), the New Jersey court in this case ruled that the variance should stand without the conditions.

¹⁰² 71 R. I. 303, 44 A. 2d 720 (1945).

CONCLUSION

Like most administrative agencies, the Zoning Board of Adjustment has been given only vague statutory guides of conduct. Unlike many such agencies, however, this board may turn to a great number of judicial decisions giving substance to these guides. The courts, as a whole, have agreed that it would be difficult to frame with greater precision the "standards" limiting the delegation of legislative and judicial powers to the board without unduly restricting its field of action. But by the time-honored processes of the common law they have supplied concrete rules for the board, which it may disregard only at its peril. This article has attempted to organize these rules into such a form as to be readily usable by members of the board as they carry out their functions.