

DISCRETIONARY POWERS OF THE BOARD OF ZONING APPEALS

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The adoption of the first comprehensive zoning regulations by New York City in 1916 began a new era in public regulation of private property. It also resulted in the creation of an agency new to local government—the board of zoning appeals, an administrative tribunal with quasi-judicial and quasi-legislative powers. Under the influence of the New York experience and stimulated by the preparation in 1922 of the model *Standard State Zoning Enabling Act*¹ by the United States Department of Commerce, state legislatures throughout the country soon enacted enabling legislation for zoning. Virtually all of these statutes provided for a board of appeals with three main functions. The Standard Act, followed closely by a majority of the states, specified the powers of the board in these words:²

1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.

2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

The first of the powers—review of administrative action and interpretation of ordinance provisions—has not been the source of widespread difficulties. In an appeal of this type the board does not exercise discretionary authority; instead, the board must act as if it were the administrative official to which the original permit application was submitted.

The real problems arise from the separate but related powers of the board to grant variances and special exceptions. The differences between the two should be clear enough, but they are often confused by boards of appeals and occasionally by the courts. This confusion is compounded by the practice in some states of requesting both types of permits in a single appeal.³

Briefly, a variance is a permit granted by the board of appeals where it finds

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¹ U. S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (Preliminary ed. 1922, rev. ed. 1926).

² *Id.*, §7.

³ *Montgomery County v. Merlands Club*, 202 Md. 279, 96 A.2d 261 (1953).

the applicant suffering unnecessary hardship because of special conditions. A special exception permit is for a use identified in the ordinance but which can be authorized only by action of the board.⁴

I

THE BOARD OF APPEALS: SAFETY VALVE OR LEAK IN THE BOILER?

Probably no other figure of speech has been so overworked as the comparison of the board of appeals to a "safety valve," designed to prevent some legal explosion. In the early days of zoning this was often mentioned as the main reason for the existence of the board.⁵ If early appeals boards were not actually encouraged to grant appeals liberally, they at least were not unduly restrained from doing so in doubtful cases with this attitude as the prevailing philosophy.

It is true that the explosion has not occurred, but there is plenty of evidence also that there isn't much steam left in the boiler. As one experienced observer has commented,⁶

Every improperly granted special permit, every adjustment, which is in effect an instance of spot zoning, is a leak in the zoning ordinance. And it doesn't take very many such leaks to exhaust the strength of the zoning plan. Even if the excess densities, or the fudging on yard and area requirements or, mayhap, the change of use, permitted by improper actions of the board of appeals do not greatly affect the broad land use and density pattern (if any) of the master plan, they do start a disintegration of the zoning plan, and they do undermine confidence in its integrity.

No comprehensive survey has been made of the activities of zoning boards of appeals, but enough comparative information exists to show the alarming number of appeals granted in many of our cities. While mere numbers are not proof of improper action they are certainly grounds for suspicion. In Cincinnati from 1926 through 1937, the board of appeals granted 1,493 variances out of 1,940 requests. In Cleveland from 1929 through 1937, 1,289 out of 2,307 variance requests were granted. In Denver from 1925 through 1937 there were 1,516 variance applications, of which 893 were granted. In Philadelphia during the period 1933-1937 the board of adjustment granted 4,000 appeals out of 4,800 cases appearing before the board.⁷

More recent data show the number of variances approved in twenty cities during 1946. For example, in Austin out of 358 applications, 240 were granted; in Mil-

⁴ For cases distinguishing between variances and exceptions, see *Mitchell Land Co. v. Planning and Zoning Board*, 140 Conn. 527, 102 A.2d 316 (1953); *Stone v. Cray*, 89 N.H. 483, 200 Atl. 517 (1938); *Dunham v. Zoning Board of Town of Westerly*, 68 R.I. 88, 26 A.2d 614 (1942); *Application of Devereux Foundation*, 351 Pa. 478, 41 A.2d 744 (1945); *Hickox v. Griffin*, 298 N.Y. 365, 83 N.E.2d 836 (1949); *Carson v. Board of Appeals of Lexington*, 321 Mass. 649, 75 N.E.2d 116 (1947).

⁵ For example, see Baker, *The Zoning Board of Appeals*, 10 MINN. L. REV. 277, 280 (1926): "The chief value of the board of appeals in zoning is in protecting the ordinance from attacks upon its constitutionality."

⁶ Pomeroy, *Losing the Effectiveness of Zoning Through Leakage*, Planning and Civic Comment, Oct. 1941, pp. 8-9.

⁷ AMERICAN SOCIETY OF PLANNING OFFICIALS, ZONING CHANGES AND VARIANCES, BULL. No. 43 (April, 1938).

waukeee 121 out of 163; in Pasadena 475 out of 586; in Rochester 230 out of 325.⁸ Another source reveals that in Chicago from 1923 to 1953, the board of appeals granted 4,260 variances, and more than half of these were awarded since the comprehensive zoning amendment in 1942.⁹

Whether through ignorance of the law, political influence, the belief that mistakes in legislation can be cured through administrative relief, or magnification of power for purposes of prestige, the board of appeals in many cities has become a device of danger rather than safety. Certainly the granting of unjustified permits is one of the causes of urban blight and decay in existing neighborhoods.¹⁰ Granting of only a few unwarranted permits in undeveloped areas may also prevent sound growth at the city's fringe. Land acquisition costs for community improvements may be increased by inflation of condemnation awards which take into account more intensive uses allowed by improper permits.¹¹ Moreover, since these special permits do not appear on the zoning map, it is difficult for the average citizen to know exactly what land use regulations are operative in his neighborhood. This "hidden zoning" is unfair and will eventually undermine confidence in the protection that zoning is supposed to bring. Undeserved permits to which the board has attached conditions also mean additional administrative costs if essential periodic inspections are made to see that the conditions are being upheld.¹² Finally, the use of zoning as a positive and thus necessarily strict measure to aid in comprehensive city re-planning is impossible if the board of appeals constantly creates new problems of land use.¹³

II

THE POWER TO ISSUE VARIANCES IN CASES OF HARDSHIP

What is the extent and what are the limitations of the variance power? It is obviously impossible to provide an answer valid in every state. What the writer has attempted is the statement of a thesis buttressed by decisions selected for the most part from a few eastern states.

The fundamental requirements for a variance are succinctly stated in the often cited opinion in *Otto v. Steinhilber*:¹⁴

⁸ *Administration of Zoning Variances in 20 Cities*, 30 PUBLIC MANAGEMENT 70 (1948); See also AMERICAN SOCIETY OF PLANNING OFFICIALS, MEASURES OF VARIANCE ACTIVITY, PLANNING ADVISORY SERVICE INFORMATION REP. NO. 60 (1954).

⁹ Comment, *Zoning Amendments and Variations and Neighborhood Decline in Illinois*, 48 N. W. L. REV. 470, 481 (1953).

¹⁰ *Ibid.*

¹¹ *Moyerman v. Koons*, 80 Pa. D. & C. 63 (C.P. 1952).

¹² In *Mitchell Land Co. v. Planning and Zoning Board of Appeals*, *supra* note 4, five of the nine conditions specified would require almost daily inspection. For cases dealing with the legality of conditional permits, see Repts, *Legal and Administrative Aspects of Conditional Zoning Variances and Exceptions*, 2 SYRACUSE L. REV. 54 (1950).

¹³ *Heady v. Zoning Board of Appeals of Milford*, 139 Conn. 463, 467, 94 A.2d 789, 791 (1953): ". . . unless great caution is used and variations are granted only in proper cases, the whole fabric of town- and city-wide zoning will be worn through in spots and raveled at the edges until its purpose in protecting property values and securing an orderly development of the community is completely thwarted."

¹⁴ 282 N.Y. 71, 76, 24 N.E.2d 851, 853 (1939), *rehearing denied*, 282 N.Y. 681, 26 N.E.2d 811 (1940).

Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

These three basic requirements for a proper variance will be examined in more detail.

1. *There must be proof of hardship.*

(a) There must be proof of inability to make reasonable use of the property for a purpose or in a manner authorized by the zoning ordinance. The New Jersey Supreme Court stated its rule for determining hardship in *Beirn v. Morris*:¹⁵

The inquiry is whether the use restriction, viewing the property in the setting of its environment, is so unreasonable as to be confiscatory.

In *Devaney v. Board of Zoning Appeals of New Haven*,¹⁶ the Connecticut court defines conditions of hardship as

. . . situations where the application of zoning to a particular property greatly decreases or practically destroys its value for any permitted use and the application of the ordinance bears so little relationship to the purposes of zoning that, as to that property, the regulation is in effect confiscatory or arbitrary. . . .

And in *Calcagno v. Town Board of Webster*,¹⁷ there was a similar ruling:

The petitioners, in order to become entitled to a variance, must show factors sufficient to constitute such a hardship as would in effect deprive them of their property without compensation.

See also: *Application of Devereux Foundation*, 351 Pa. 478, 484, 485, 41 A.2d 744, 747 (1945): "Mere hardship is not sufficient; there must be *unnecessary* hardship. . . . Moreover, the power given by the statute and by the ordinance to authorize a variance is limited by the provision that it must be such 'as will not be contrary to the public interest' . . ."; *Walton v. Tracy Loan & Trust Co.*, 97 Utah 249, 255, 256, 92 P.2d 724, 727 (1939): "The conditions fixed by statute . . . under which the Board may grant a variance are: (a) It must not be contrary to the public interest . . . (b) there must be special conditions, that is, conditions not applying or that would not apply to other lands in the vicinity; (c) due to said special conditions a literal, that is, rigid or strict enforcement of the provisions of the building ordinances, must result in unnecessary hardship . . . (d) but even with all the foregoing conditions present the spirit of the ordinance must be observed . . ."; and *Brackett v. Board of Appeal of Boston*, 311 Mass. 52, 60, 39 N.E.2d 956, 961 (1942): ". . . All relevant factors, when taken together, must indicate that the plight of the premises in question is unique in that they cannot be put reasonably to a conforming use because of the limitations imposed upon them by reason of their classification in a specified zone. When this appears, the further question has to be determined, whether desirable relief may be granted without substantially derogating from the intent and purpose of the zoning law, but not otherwise."

¹⁵ 14 N.J. 529, 103 A.2d 361, 364 (1954). See also *Leimann v. Board of Adjustment*, 9 N.J. 336, 342, 88 A.2d 337, 339 (1952): "The statute contemplates proof that the property . . . cannot reasonably be put to the permitted use. . . ."

¹⁶ 132 Conn. 537, 543, 45 A.2d 828, 830 (1946).

¹⁷ 265 App. Div. 687, 689, 41 N.Y.S.2d 140, 142 (4th Dep't 1943), *aff'd mem.*, 291 N.Y. 701, 52 N.E.2d 592 (1943).

It is not sufficient proof of hardship to show that greater profit would result if the variance were awarded. In the leading North Carolina decision of *Lee v. Board of Adjustment of Rocky Mount*,¹⁸ the application was for the establishment of a grocery store and gasoline station in a residential district. There was no evidence that the property could not be reasonably devoted to residential purposes, and the court stated:

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.

This general rule has been adhered to in numerous decisions.¹⁹ What facts are sufficient to demonstrate inability to make reasonable use of the property for a permitted use vary widely from state to state. Detailed analysis of decisions on this point would be a useful study.²⁰

(b) The hardship complained of cannot be self-created. For example, in *Selligman v. Von Allmen Brothers*²¹ the owner of a non-conforming milk bottling plant was ordered to put on a new roof by the health authorities. A permit was obtained and work started, but it was discovered that the old wooden walls were not structurally sound. The owner proceeded to construct brick walls without a permit. When the work was nearly completed the building inspector halted construction, and a permit was refused on the grounds the new walls constituted structural alterations of a non-conforming building. The board of appeals refused to issue a variance to permit completion of the job. The owner maintained he was suffering unnecessary hardship, but the court held:

. . . appellee created the situation which it now complains is working the hardship in that it razed the frame walls and started replacing them with brick under a permit which allowed it only to repair the roof. It should have sought a variation from the Board and a permit from the Building Inspector before commencing this work. One cannot proceed in the face of building restrictions or of zoning laws and then complain that a great hardship is being imposed upon him when not allowed to complete the work.

This proposition also seems one that is generally supported in other jurisdictions.²²

¹⁸ 226 N.C. 107, 110, 37 S.E.2d 128, 131 (1946).

¹⁹ See *People ex rel. Werner v. Walsh*, 212 App. Div. 635, 640, 209 N.Y. Supp. 454, 458 (1st Dep't 1925), *aff'd*, 240 N.Y. 689, 148 N.E. 760 (1925): "The mere fact that a garage is more profitable than any other structure is not sufficient evidence of hardship"; *Thayer v. Board of Appeals*, 114 Conn. 15, 22, 157 Atl. 273, 275 (1931): "Disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions, does not, ordinarily, warrant relaxation in his favor on the ground of practical difficulty or unnecessary hardship"; *Beirn v. Morris*, *supra* note 15, 14 N.J. at 534-535, 103 A.2d at 363: ". . . profit motive is not an adequate ground for a variance."

²⁰ For a comparison of a number of decisions on the nature of proof of hardship, see PHILIP P. GREEN, JR., *ZONING IN NORTH CAROLINA* 343-353 (1952).

²¹ 297 Ky. 121, 126, 179 S.W.2d 207, 210 (1944).

²² *Piccolo v. West Haven*, 120 Conn. 449, 181 Atl. 615 (1935); *National Lumber Products Co. v. Ponzio*, 133 N.J.L. 95, 42 A.2d 753 (1945).

(c) Hardship cannot be claimed by one who purchases with knowledge of restrictions. In *Clark v. Board of Zoning Appeals of Hempstead*,²³ the court invalidated a variance permitting the use of a residence as a funeral home. The property had been purchased a few years previously, and the residential zoning classification had remained unchanged. The court ruled:

. . . one who thus knowingly acquires land for a prohibited use, cannot thereafter have a variance on the ground of "special hardship."

While other decisions follow this same rule,²⁴ some hold that the fact of purchase with knowledge of restrictions is not wholly conclusive but merely persuasive in showing lack of hardship.²⁵

(d) The hardship must result from the application of the ordinance. The property in *Brackett v. Board of Appeal of Boston*²⁶ was in a general residence district where multiple dwellings, clubs, hotels, and other similar uses were permitted. A restriction in the deed, however, prohibited any building other than a single-family residence. The owner, a hotel corporation, had requested and was awarded a variance to use the land as a parking lot. In invalidating the action of the board, the court observed:

. . . it would seem that the board had in mind the disadvantage of the corporation arising from the restriction upon its lot, rather than any disadvantage attributable to the fact that the premises are zoned in a general residence district. In short, apart from the fact that the premises in question are restricted to a single family dwelling, there is no finding that there are any other conditions that render the premises unsuitable for residential and other uses permissible under the zoning law. . . .

Other decisions in New York and Rhode Island are in accord with this principle.²⁷

(e) The hardship complained of must be suffered directly by the property in question. Applicants frequently come before boards of appeals arguing that the lack of their proposed use in the neighborhood constitutes a hardship on the residents which should be relieved. This argument was rejected in *Brackett v. Board of Appeal of Boston* (*supra* note 26), previously discussed, where it was urged that provision of a parking lot would help to relieve the "hardship" of traffic congestion

²³ 301 N.Y. 86, 92 N.E.2d 903 (1950).

²⁴ *Matter of Henry Steers v. Rembaugh*, 259 App. Div. 908, 20 N.Y.S.2d 72 (2d Dep't 1940), *aff'd*, 284 N.Y. 621, 29 N.E.2d 934 (1940); *Devaney v. Board of Zoning Appeals of New Haven*, *supra* note 16.

²⁵ *Coble Close Farm v. Board of Adjustment*, 10 N.J. 442, 92 A.2d 4 (1952); *Application of Devereux Foundation*, *supra* note 14; *Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece*, 271 App. 33, 60 N.Y.S.2d 750 (4th Dep't 1946). See also *293 North Broadway Corp. v. Lange*, 282 App. Div. 1056, 126 N.Y.S. 2d 374 (2d Dep't 1953): "Although one who purchases land with knowledge of a use restriction will not be permitted to claim special hardship . . . that rule does not apply to a variance of an area restriction."

²⁶ 311 Mass. 52, 58, 39 N.E.2d 956, 960 (1942).

²⁷ *Hickox v. Griffin*, 298 N.Y. 365, 83 N.E.2d 836 (1949); *Winters v. Zoning Board of Review*, 96 A.2d 337, 340 (R.I. 1953): ". . . hardship . . . is one resulting from restricted use of petitioner's land by virtue of the terms of the ordinance, and not personal hardship growing out of petitioner's physical infirmities."

in the neighborhood. Similarly, in *Young Women's Hebrew Ass'n v. Board of Standards and Appeals*²⁸ the court dismissed the contention that a "hardship" within the meaning of the zoning law would be relieved by allowing a gasoline station on one side of a street where no other station existed, so that south-bound traffic would not be forced to cross to the opposite side of the street to reach an existing station.

2. *There must be proof of unique circumstances.*

While the existence of hardship may be proved by the applicant, that alone is not sufficient, since hardship may result from either of two reasons:²⁹

. . . the fault may lie in the fact that the particular zoning restriction is unreasonable in its application to a certain locality, or the oppressive result may be caused by conditions peculiar to a particular piece of land.

The board of appeals has authority to grant relief only where the hardship arises out of special conditions inherent in the property itself. If the hardship is general, that is, shared by neighboring property, relief can be properly obtained only by legislative action or by court review of an attack on the validity of the ordinance.

Thus in *People ex rel. Arverne Bay Construction Co. v. Murdock*,³⁰ while the court was sympathetic to the claim of hardship by an owner who wished to establish a commercial use in an undeveloped area restricted to residential purposes, refusal of the variance by the board was sustained,

. . . the conditions 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. . . . 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 appeal to the legislative authority which created the zone.

Other decisions in New York, Massachusetts, Connecticut, and New Jersey, among others, have followed this ruling.³¹

²⁸ 266 N.Y. 270, 194 N.E. 751 (1935).

²⁹ *Otto v. Stenhilber*, *supra* note 14, 282 N.Y. at 75, 24 N.E. at 852.

³⁰ 247 App. Div. 889, 286 N.Y.Supp. 785, 786 (2d Dep't 1936), *aff'd mem.*, 271 N.Y. 631, 3 N.E.2d 457 (1936).

³¹ *Levy v. Board of Standards and Appeals*, 267 N.Y. 347, 196 N.E. 284 (1935); *Young Women's Hebrew Ass'n v. Board of Standards and Appeals*, *supra* note 28; *Ostrove v. Cohen*, 269 App. Div. 1054, 58 N.Y.S.2d 900 (2d Dep't 1945), *leave to appeal denied*, 270 App. Div. 818, 60 N.Y.S.2d 295 (1946); *Hickox v. Griffin*, *supra* note 27; *Brackett v. Board of Appeal of Boston*, *supra* note 26, 311 Mass. at 58, 39 N.E.2d at 960: "If there is a general hardship, this situation may be remedied by revision of the general regulation, and not by granting a special privilege of a variation to single owners"; *Lumund v. Board of Adjustment*, 4 N.J. 577, 582-583, 73 A.2d 545, 548 (1950): ". . . a finding of 'unnecessary hardship' to an individual owner, due to 'special conditions' is a *sine qua non* to the exercise of the board of adjustment's authority to grant a variance from the terms of the ordinance, and . . . if the difficulty is common to other lands in the neighborhood so that the application of the ordinance is general rather than particular, the remedy lies with the local legislative body or in the judicial process . . ."; *Devaney v. Board of Zoning Appeals of New Haven*, *supra* note 16, 132 Conn. at 541-542, 45 A.2d at 830: ". . . the use of the adjective 'unnecessary' in modification of 'hardships' . . . can only be related to those hardships which do not follow as the ordinary results of the adoption of the zoning plan as a whole."

This principle is of critical importance. Even in those states where opinions on this point have been most numerous and consistent, there have been occasional questionable decisions in the highest courts.³² And in these same states some lower courts and many boards of appeals consistently ignore the fundamental requirement of unique circumstances. In other states the highest courts have strangely overlooked this principle, upholding variance permits on the grounds of hardship in situations where the alleged hardship was plainly shared by adjacent property.³³

There are convincing reasons why this principle should be followed. As the New York court has observed,³⁴

Equality of privileges is a basic principle of government. To cure by exemption in his case the loss resulting to one owner from general deterioration of a neighborhood is to depreciate the adjacent properties of other owners, and is unjust also to those whose properties remain subject to the same restriction in other localities likewise impaired.

Moreover, violation of this concept allowing relief only in exceptional and unique circumstances would strike at the basic authority of the legislative body to determine the proper classification of zoning districts. Thus, in invalidating a variance granted where heavy traffic and general conditions in the vicinity made the location unsuitable for a permitted use, the court in *Levy v. Board of Standards and Appeals*³⁵ stated:

No power has been conferred . . . to review the legislative general rules regulating the use of land. . . . The board does not exercise legislative powers. It may not determine what restrictions should be imposed upon property in a particular district. It may not review the legislative general rules regulating the use of land. It may not amend such general rules or change the boundaries of the districts where they are applicable. Its function is primarily administrative. . . . Its power is confined to relief in proper cases from hardship unnecessarily caused by application of a general restriction to a particular piece of land. It 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.

No hard and fast rule can be formulated as to what reviewing courts will regard as satisfactory proof of unique circumstances. In *Hammond v. Board of Appeals*,³⁶ the court decided "with hesitation" that a residence in an area of mixed stores and homes, located near a number of non-conforming business uses, and incapable of

³² See, for example, the early New York opinion in *People ex rel. St. Albans-Springfield Corp. v. Connell*, 257 N.Y. 73, 177 N.E. 313 (1931), where the hardship was clearly general, and the recent New Jersey case of *165 Augusta Street v. Collins*, 9 N.J. 259, 264, 87 A.2d 889, 891 (1952), where existing business uses in the vicinity and the division of a lot by the zone boundary line were deemed to constitute an "extraordinary and exceptional situation or condition of the property." Justice Heher's vigorous dissenting opinion should be carefully studied.

³³ *Triolo v. Exley*, 358 Pa. 555, 57 A.2d 878 (1948); *Messenger v. Zoning Board of Review*, 99 A.2d 865 (R.I. 1953). In both decisions the courts cited conditions of the *neighborhood* in justifying the grant of special privilege.

³⁴ *Young Women's Hebrew Ass'n v. Board of Standards and Appeals*, *supra* note 28, 266 N.Y. at 276, 194 N.E. at 753.

³⁵ *Supra* note 31, 267 N.Y. at 352-353, 196 N.E. at 286.

³⁶ 257 Mass. 446, 154 N.E. 82 (1926).

being rented as a house, was so uniquely situated as to warrant a variance for its conversion to a retail store. And in *Dooling's Windy Hill, Inc. v. Zoning Board of Adjustment*,³⁷ the court seemed to rely on such irrelevant matters as the suitability of the property for its proposed hotel use and the "trend . . . toward increasing commercialization" of the immediate vicinity.

On the other hand, the New Jersey court now requires compelling proof of unique circumstances. In *Beirn v. Morris*,³⁸ the property was the first interior lot north of an acute-angle intersection. Immediately to the north was a fire station. Adjoining on the south in the apex of the triangle formed by the streets was a gasoline station. Another gasoline station was across the street. Real estate experts testified that the lot was unsuitable for a residence and that few houses had been erected in the vicinity since the fire station was built twenty years previously. The court regarded these facts as insufficient evidence of hardship not shared by others. Further analysis of this point would be a valuable contribution to zoning knowledge.

3. *There must be proof that the proposed use would not alter the essential character of the neighborhood.*

The applicant for a variance who is able to prove hardship as well as unique circumstances must still satisfy a final requirement. The board must find that the use, if allowed, would not effect a substantial change in the character of the district or be in conflict with the general intent of the zoning law. The recent decision in *Rexon v. Board of Adjustment of Haddonfield*³⁹ illustrates this principle. The property was in the interior of a block, parts of which were residential. The building was used for a machine shop that the appellant wished to enlarge substantially. The courts held the land could reasonably be used for conforming purposes, adding:

Moreover . . . relief is not to be granted . . . unless it may be done without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zoning plan. The evidence pointing to a serious threat to the health and well being of the citizens of this residential community from the continuance of plaintiff's factory operation fully supports the local board's finding that a variance could not be granted without substantial detriment to the public good. . . .

Many other decisions in New Jersey, Connecticut, Massachusetts, and New York are in general agreement.⁴⁰

³⁷ 371 Pa. 290, 295, 89 A.2d 505, 507 (1952).

³⁸ *Supra* note 15.

³⁹ 10 N.J. 1, 8, 89 A.2d 233, 236 (1952).

⁴⁰ *Leimann v. Board of Adjustment*, *supra* note 15; *Heady v. Zoning Board of Appeals of Milford*, *supra* note 13, 139 Conn. at 468, 94 A.2d at 791: "A variance should not be granted unless it is in harmony with the general purpose and intent of the zoning ordinance"; *Prusik v. Board of Appeal of Boston*, 262 Mass. 451, 457, 160 N.E. 312, 314 (1928): "Exceptional circumstances alone justify relaxation in peculiar cases of the restrictions imposed by the statute. The dominant design of any zoning act is to promote the general welfare. . . . The stability of the neighborhood and the protection of property of others in the vicinity are important considerations"; *Holy Sepulchre Cemetery v. Board of Appeals of Greece*, *supra* note 25, 271 App. Div. at 41-42, 60 N.Y.S.2d at 756: "Assuming . . . that petitioner did show generally a peculiar situation, not of its own creation, which will result

In those states adhering to the rule requiring proof of hardship, a showing that such hardship is due to unique circumstances, and a showing that the relief of the hardship must not alter the essential character of the locality, a variance allowing an otherwise prohibited *use* can rarely be justified. The highest courts in these states are reluctant to uphold variances except for modifications in yard, height, or lot area requirements. In another group of states, chiefly in the mid-west, courts have made a complete prohibition of *use* variances explicit. In the leading North Carolina decision the court based this prohibition on the doctrine of maintaining the spirit of the ordinance.⁴¹

No power to convert a residential section into a business district . . . is conferred. Therefore it 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. . . .

As the new building and its use must harmonize with the spirit and purpose of the ordinance . . . no variance is lawful which does precisely what a change of map would accomplish. . . . Action to that effect is in direct conflict with the general purpose and intent of the ordinance and does violence to its spirit.

And in *Nicolai v. Board of Adjustment of Tucson*,⁴² the Arizona Supreme Court, citing similar decisions from Utah, Oklahoma, Texas, Missouri, North Dakota, and Iowa, ruled that use variances were not valid.

III

THE BOARD OF APPEALS AND SPECIAL EXCEPTIONS

Most zoning statutes authorize the board of appeals to grant permits for uses which are listed in the zoning ordinance and which are not authorized as a matter of right but only on special permit. These "use permits" (less exactly but more commonly termed "special exceptions") are intended as an effective method of exercising control over certain exceptional or unusual uses of land and buildings. Special exception uses often include sanitariums, hospitals, cemeteries, airports, public utility structures, and other uses, not likely to occur in great numbers, but potentially troublesome in their impact on surrounding property, and for which it is difficult to prepare specific regulations adequate in all cases. Other situations frequently regulated by the special exception device are extensions or alterations of non-conforming uses, conversion of old and large single-family houses to apartments, temporary permits for otherwise prohibited uses in undeveloped areas, and location of certain types of heavy industry.

Under the Standard Act, and enabling statutes similarly worded, authorization

in unnecessary hardship to it if the ordinance be enforced, still the board was not obligated, on that score alone, to grant the variance. On the contrary, it was required to balance such hardship against the equities, namely, to what extent the variance would interfere with the whole zoning plan and the rights of owners of other property"; *Matter of Taxpayers' Association of South East Oceanside v. Board of Appeals of Hempstead*, 301 N.Y. 215, 93 N.E.2d 645 (1950).

⁴¹ *Lee v. Board of Adjustment of Rocky Mount*, *supra* note 18, 226 N.C. at 112, 37 S.E.2d at 132-133.

⁴² 55 Ariz. 283, 101 P.2d 199 (1940).

for special exceptions is unaccompanied by the qualifying or limiting language found in provisions authorizing variances. Most statutes simply allow the legislative body to delegate this power to the board under such conditions and guided by such standards as are considered appropriate. Generalizations on the scope of board of appeals authority in granting special exceptions are dangerous, since ordinance provisions vary so widely even among municipalities in a single state. The following general principles are advanced with some hesitation because of this lack of standardization in the special exceptions sections of existing ordinances.

1. *The special exception use must be listed in the ordinance and jurisdiction over it granted to the board.*

In the section of the ordinance specifying the powers of the board, the specific uses over which it has jurisdiction will usually be listed. In other ordinances these uses will appear among the list of permitted uses in the sections dealing with district regulations, and will be accompanied by some statement that the board of appeals must pass on permit applications for such uses. Only the uses identified in the ordinance may be permitted as special exceptions.

In at least one state—Rhode Island—many communities follow a different and disturbing practice. Here, instead of, or in addition to, a list of particular special exception uses, ordinances frequently contain a grant of authority for the board to,⁴³
. . . approve in any district an application for any use or building deemed by the said Board to be in harmony with the character of the neighborhood and appropriate to the uses or buildings permitted in such district.

The results of this practice have been a deluge of applications for exceptions and a growing lack of certainty that zoning restrictions will not be subverted by arbitrary action of an administrative board.

2. *The board must make findings of fact consistent with ordinance provisions.*

Most special exception sections contain some kind of statement intended as a general guide applying to all listed special exception uses. Typical of one type of provision is the following clause limiting the grant of an exception to situations,⁴⁴
. . . when in the judgment of the Board such special exceptions and grants and decisions shall be in harmony with the general purpose and intent of the zone plan . . . and will not tend to affect adversely the use and development of neighboring properties and the general neighborhood. . . .

Here it would appear the board must follow one of the rules for variances discussed previously: namely, that the proposed use would not alter the essential character of the locality. Note that no showing of hardship is required, nor proof of unique circumstances—only that the proposed use will not have an “adverse” effect in the vicinity and will be in “harmony” with the general purposes of the ordinance. The board must attempt to measure each application by this elastic yardstick.

⁴³ *Harrison v. Zoning Board of Review of Pawtucket*, 74 R.I. 135, 138, 59 A.2d 361, 363 (1948).

⁴⁴ *Montgomery County v. Merlands Club*, *supra* note 3, 202 Md. at 283, 96 A.2d at 263-264.

Another type of special exception provision includes an additional requirement, more positive in character although not necessarily capable of more precise definition. In ordinances of this type the board must find that if the proposed use is approved,⁴⁵

. . . the public convenience and welfare will be substantially served. . . .

If this phrase has any real meaning, it adds an additional burden on an administrative body ill-equipped to make intelligent decisions in this area. The determination of whether or not a proposed use is needed in a particular district surely lies with the local planning agency. This is a possible modification in the handling of special exceptions that deserves further investigation.

There is yet another frequently encountered ordinance provision with which the board must comply. In *Matter of Underhill v. Board of Appeals of Oyster Bay*,⁴⁶ the ordinance provided that

. . . The Board of Appeals may in a specific case after public notice and hearing *and* subject to appropriate conditions and safeguards, authorize special exceptions.

The permit was invalidated because the board failed to specify conditions and safeguards. Although many ordinances *authorize* conditions and safeguards, not all are worded so that they are apparently mandatory. In cases where this point has been raised, and where the ordinance was similarly phrased, decisions have followed that above.⁴⁷

3. *Adequate standards must be specified in the ordinance to guide the board.*

Authorization for the board of appeals to grant variances and exceptions is a delegation of legislative power, valid only if accompanied by a standard or rule of conduct sufficiently precise to guide the board. The statutory rule of "unnecessary hardship," as a guide for variances, has been generally upheld as adequate. Since statutory authorization for special exceptions is rarely accompanied by any standard or rule, this must be provided in the ordinance.

In New York special exception provisions containing no standards, even general ones, have been held unconstitutional.⁴⁸ There is some doubt about the validity of general standards. In *Matter of Underhill v. Board of Appeals of Oyster Bay*,⁴⁹ the ordinance listed certain exception uses, preceded by a grant of power to the board to authorize such uses, when in its judgment, the

⁴⁵ *Miriam Hospital v. Zoning Board of Providence*, 67 R.I. 295, 297, 23 A.2d 191, 192 (1941). In this ordinance the clause quoted was made an alternative requirement to a finding that the proposed use would not be detrimental to the neighborhood.

⁴⁶ 72 N.Y.S.2d 588, *aff'd mem.*, 273 App. Div. 788, 75 N.Y.S.2d 327 (2d Dep't 1947), *aff'd mem.*, 297 N.Y. 937, 80 N.E.2d 342 (1948). (Italics supplied.)

⁴⁷ *Strauss v. Zoning Board of Warwick*, 72 R.I. 107, 48 A.2d 349 (1946); *Youngs v. Zoning Board of Appeals of Norwalk*, 127 Conn. 715, 17 A.2d 513 (1941).

⁴⁸ *Little v. Young*, 82 N.Y.S.2d 909, *aff'd*, 274 App. Div. 1005, 85 N.Y.S.2d 41 (2d Dep't 1948), *aff'd*, 298 N.Y. 918, 85 N.E.2d 61 (1949); and *Concordia Collegiate Institute v. Miller*, 301 N.Y. 189, 93 N.E.2d 632 (1950).

⁴⁹ *Supra* note 46, 72 N.Y.S.2d at 593, 594.

public convenience and welfare will be substantially served [and] the appropriate use of neighboring property will not be substantially or permanently injured. . . .

In holding this an unconstitutional delegation of power, the court said:

The preamble is too general in its terms to be claimed to be any attempt to lay down any standards . . . a delegation of legislative power to an administrative officer is not brought within the permissible limits of such delegation by prescribing the public good as the standard. . . .

However, in the more recent decision in *Aloe v. Dassler*,⁵⁰ the ordinance authorized the board to permit certain listed uses,

. . . after taking into consideration the public health, safety and general welfare and subject to appropriate conditions and safeguards.

This provision was sustained by the court:

The provisions of the zoning ordinance under review confer no power on the Board of Appeals which may not be lawfully delegated to an administrative body. Standards are provided which, though stated in general terms are capable of a reasonable application and are sufficient to limit and define the Board's discretionary powers.

In *Sellors v. Town of Concord*,⁵¹ the Massachusetts court similarly sustained a general standard in an ordinance authorizing listed exceptions if the board found "that such use is not detrimental or injurious to the neighborhood."

The Rhode Island court also accepts standards written in general terms, but apparently requires a more affirmative rule that the proposed exception use is needed in the neighborhood. In *Flynn v. Zoning Board of Review of Pawtucket*,⁵² the ordinance permitted the board to

. . . approve in any district an application for any use or building deemed by the said Board to be in harmony with the character of the neighborhood and appropriate to the uses or building permitted in such district.

For the first time in that state an attack was made on the validity of such a sweeping delegation of legislative power. The court refused to uphold the ordinance, observing:

By virtue of this provision the council purported to authorize the board not only to exercise its discretion on any application for exception but also empowered the board to fix the limits of that discretion as it deemed desirable in accordance with its own undisclosed standards and unqualified judgment.

The following year the same court, in *Woodbury v. Zoning Board of Warwick*,⁵³ reviewed an ordinance authorizing unspecified exceptions,

⁵⁰ 278 App. Div. 975, 106 N.Y.S.2d 24, 25 (2d Dep't 1951), *aff'd*, 303 N.Y. 878, 105 N.E.2d 104 (1952).

⁵¹ 329 Mass. 259, 261, 107 N.E.2d 784, 785 (1952).

⁵² 77 R.I. 118, 123, 125, 73 A.2d 808, 811, 812 (1950).

⁵³ 78 R.I. 319, 321, 82 A.2d 164, 165, 167 (1951).

. . . where the exception is reasonably necessary for the convenience and welfare of the public.

The ruling in the *Flynn* case was held inapplicable because the legislative body,

. . . fixed a limitation upon the exercise of the board's discretion and did not give it absolute power to act. Such limitation was that a special exception could be made only when the board found that it was reasonably necessary for the convenience and welfare of the public.

These decisions, and those in other states, make it clear that standards must be specified in the ordinance and must be capable of reasonable interpretation.⁵⁴ A fruitful line of inquiry would be an exploration of the limits of acceptability of standards written in general terms.

IV

LEGISLATIVE VARIANCES AND EXCEPTIONS

No treatment of the board of appeals would be complete without some discussion of "legislative" variances or exceptions—applications which are reviewed by the board but which require legislative confirmation before they are effective. This device has been used in several states, including California where the statute failed to provide for a board of appeals, and Illinois after the decision in *Welton v. Hamilton*⁵⁵ rendered invalid the standard of "unnecessary hardship" for variances. In New Jersey the 1928 legislation provided for legislative variances in the case of proposed uses more than 150 feet from a district in which such a use was permitted. In *Brandon v. Montclair*,⁵⁶ the New Jersey court ruled that a showing of hardship was necessary for a variance of this type.

In 1948 the board of appeals section of the New Jersey statutes was amended, and legislative variances were authorized in any district "in particular cases and for special reasons" where relief "can be granted without substantial detriment to the public good" and where the action "will not substantially impair the intent and purpose of the zone plan and zoning ordinance."⁵⁷ A series of recent cases have interpreted this statute, which to some appears an open invitation to seekers of special privilege.⁵⁸

In *Monmouth Lumber Co. v. Ocean Township*,⁵⁹ the court held no proof of unnecessary hardship was required for a permit of this type. In *Schmidt v. Board of Adjustment*,⁶⁰ the court pointed out that the statute need not have standards to guide the board if the legislative body reserved final authority.

⁵⁴ See RALPH CROLLY, THE NECESSITY FOR ADEQUATE STANDARDS FOR BOARDS OF ZONING APPEALS IN SPECIAL EXCEPTION CASES (N. Y. REGIONAL PLAN ASS'N, 1949).

⁵⁵ 344 Ill. 82, 176 N.E. 333 (1931).

⁵⁶ 124 N.J.L. 135, 11 A.2d 304, *aff'd*, 125 N.J.L. 67, 15 A.2d 598 (1940).

⁵⁷ N. J. REV. STAT. §40:55-39d (Cum. Supp. 1953).

⁵⁸ For a brief critical analysis of the statute and decisions before 1952, see Stickel, *A Review of Powers and Functions of the Board of Adjustment in the Light of Recent Court Decisions*, New Jersey Municipalities, June, 1952, p. 7.

⁵⁹ 9 N.J. 64, 87 A.2d 9 (1952).

⁶⁰ 9 N.J. 405, 88 A.2d 607 (1952).

In *Ward v. Scott*,⁶¹ the statute was assailed as an unconstitutional delegation of power to an administrative agency on the ground that since the standard of hardship did not govern there was no clear rule to guide the board. The court held that proper standards were provided by the statement of purposes of zoning in the statute's preamble and by the negative requirement that the proposed use must not substantially impair the intent and purpose of the ordinance. The dissenting opinion, however, should be noted:

. . . unless the recommendatory relief procedure . . . be confined to cases of undue hardship inherent in the particular lot . . . or to permissible special uses prescribed by ordinance according to certain and definite standards of conduct . . . the measure is assailable as purporting to delegate power that is at once arbitrary and an invasion of the legislative domain.

Whatever may be the rule of law, the wisdom of this type of variance or exception procedure is questionable. It almost hopelessly confuses the differences between legislative and executive functions. It increases the time necessary for a final decision, and it is unnecessarily confusing to the citizen. Perhaps most undesirable of all, the granting of variances is removed from the jurisdiction of a specialized, non-partisan body and placed in the hands of a politically motivated, often uninformed, and frequently overworked council. A technique better calculated to destroy the beneficial effects of sound zoning could scarcely be devised.

V

CONTROL OF THE BOARD OF APPEALS

Although the past twenty years has seen some general agreement on the proper scope of board of appeals powers at the highest judicial levels, let no one think that all is well. Thousands of board decisions are made each month. A very high percentage of them would not survive review by even the most tolerant court. But it is only in flagrant cases of abuse of authority—and then only if the financial stakes are sufficiently large—that decisions are taken to *any* court. The large number of reversed decisions at the appellate level is proof enough also that many lower courts have only the vaguest understanding of or sympathy for the law in this field. And in some states the rulings of even the highest courts are difficult to understand.

Fortunately, there are some remedies. If no one or combination of these seems likely to transform the board of appeals into a model administrative tribunal, they should at least help to eliminate some of the features that have made our appeals boards the shame of our cities.

1. *Statutes and ordinances should specify clearly the separate powers of the board.* The Standard Act satisfies this suggestion, but in some states, like New York, the statutes hopelessly jumble the powers of the board so that a lay member has no

⁶¹ 11 N.J. 117, 134, 93 A.2d 385, 393 (1952). See also *Ward v. Scott*, 16 N.J. 16, 105 A.2d 851 (1954).

clear understanding of the limits of authority.⁶² Too many ordinances simply repeat or paraphrase the wording of the statute. Simple and unambiguous phraseology should at least serve to distinguish variances from exceptions and indicate generally the grounds on which they may be granted.

2. *Rules of procedure should be required.* If the drafting of rules of procedure were required, instead of being made optional, the board would be forced at least once to consider the procedure for hearing appeals, the nature of the evidence required, and the basis for reaching decisions. These rules should be given wide distribution, and such groups as the local bar association, a citizens' planning council, and neighborhood associations should be given an opportunity to examine and criticize them.

3. *The board should adopt administrative forms that focus attention on the proper requirements for variances and exceptions.* Forms on which appeals to the board are made should provide more than the usual spaces to record the name and address of the appellant, the variance or exception requested, and the reasons for the appeal. The applicant applying for a variance should be required to state why he is suffering a hardship, why he believes the hardship is unique, and why the variance would not alter the character of the neighborhood. Similarly, the form on which the board records its decision should require a statement of the findings under those same three headings. This single administrative device should reduce confusion, eliminate irrelevant lines of inquiry, and force both the applicant and the board to consider only the essential issues.⁶³

4. *Maps showing the location of variances and exceptions should be mandatory.* The cumulative damage done to the municipal zoning plan is little understood by most boards, immersed as they are in the regular flood of applications to be considered each week or month. Maps indicating the location of every special permit would be a constant reminder of the effect of their actions and might exercise a restraining influence. Boards might also begin to understand that a concentration of variance symbols on the map in one area perhaps indicates conditions of general hardship, a situation which they have no power to relieve. And if separate symbols were used to show all permits issued with conditions attached, the board might begin to consider both the administrative difficulties and administrative costs which these actions have created.

5. *Jurisdiction over special exception uses requiring a showing of community need should be given to the planning board.* It is difficult to see why the board of appeals should be required to hear applications for these types of uses when it lacks the staff resources, the experience, and the understanding necessary for intelligent decisions. Discretionary authority for this type of exception should be given to the planning board.

⁶² See, for example, N. Y. TOWN LAW Art. 16, §267 (1951).

⁶³ Hoover, *Local Governments Try New Zoning Forms*, American City, Nov. 1951, p. 124; BROOME COUNTY PLANNING BOARD, FORMS FOR ZONING ADMINISTRATION.

6. *Use variances should be prohibited.* Since under the rule of hardship, unique circumstances, and preservation of neighborhood character use variances can be justified only in extremely rare situations, it might be wise by statute to prohibit them altogether. This is a drastic measure but one not without precedent.⁶⁴

7. *Legislative variances should be eliminated.* No useful purpose is served by legislative review of board decisions. For reasons previously stated, this type of procedure should be purged from the statutes.

8. *The lay board of appeals should be replaced by a board of experts or by a single zoning appeals administrator.* The concept of the board of appeals as a kind of poor man's court where common sense justice is dispensed by one's friends and neighbors no longer has much validity. With zoning ordinances increasing in complexity and detail and with the growing demands for more positive zoning as an aid to vigorous community planning and urban renewal, zoning appeals should be reviewed by those qualified through professional training or experience. There may be compelling arguments for retaining the board form in our zoning appeals organization, but we have had experience in other fields with appeals to a single administrator, and some examples also exist in zoning. The difficulties in the selection of an expert board or administrator should not prove insurmountable, and the potential benefits may well outweigh possible dangers. Our statutes should at least make possible the use of a single administrator as an alternative to the traditional board, and we should begin to reconsider the methods of selection of board members should we elect to retain the existing form of organization.

9. *The general standard of "unnecessary hardship" might be replaced by more specific rules.* Twenty years ago Alfred Bettman suggested that,⁶⁵

... experience ought sooner or later to disclose typical and recurrent situations for which more definite rules could be formulated to govern the board's necessary, though dangerous, power of allowing variances from the standards set forth in the zoning ordinance.

Surely by now we have had sufficient experience to prepare more specific rules and to describe in more detail the types of hardship situations over which the board should have jurisdiction. In effect this would mean abandoning the idea of variances entirely and increasing the scope of special exception jurisdiction by defining precisely the various types of hardship situations in which the board might grant relief.

VI

CONCLUSIONS

The discretionary powers of the board of appeals, while of considerable scope, are not limitless. The decisions of the past twenty years have been increasingly re-

⁶⁴ N.J. REV. STAT. §40:55-39c (1948), as amended in 1953.

⁶⁵ EDWARD M. BASSETT, FRANK B. WILLIAMS, ALFRED BETTMAN, AND ROBERT WHITTEN, *MODEL LAWS FOR PLANNING CITIES, COUNTIES, AND STATES* (HARVARD CITY PLANNING STUDIES, VII) 64-65 (1935).

strictive, and one might almost begin to hope that the hundreds of boards throughout the country, now so generous with their special favors, would begin to absorb the basic principles laid down at the highest judicial levels. The variance requirements for a showing of genuine hardship, unique circumstances, and compatibility with neighborhood character have become generally accepted by our courts. Requirements for valid special exceptions cannot be so precisely stated, and in this area of jurisdiction there are perhaps questionable tendencies for courts to sustain broad and ill-defined grants of legislative power. The problem of educating our boards of appeals to their responsibilities and limitations still remains. If this goal can be achieved, one of the obstructions to good zoning will have been removed.