Zoning Administration in New York City

Herman L. Weisman
ZONING ADMINISTRATION IN NEW YORK CITY

I.
THE SOCIO-ECONOMIC AND LEGISLATIVE BACKGROUND OF THE BUILDING ZONE RESOLUTION

The city abhors equilibrium; within it whole peoples migrate, great industries move. The processes of extension and evacuation; deterioration and growth are vital to its life. Phoenix-like, the city refashioned its skyline. A new architecture emerged. Yet little more than a decade ago this high mobility was not subject to control. Natural segregating forces produced the areas of big business and skyscrapers, the shopping and residential sections. But there was no economic security. When several factories invaded a district devoted mainly to retail trade or when a department store was established in a fashionable residential section the district was

* In its original form this paper was the writer's contribution to the seminar in Administrative Law conducted by Professor Felix Frankfurter in the Harvard Law School during the academic year 1926-1927.

1 See the study by Edward C. Pratt, "The Economic Cause of Congestion, Distribution of Industry and Workers," Vol. XLIII Columbia University Studies in History, etc. (1911); "Zoning and Mobility of Urban Population," by Nels Anderson, 1 City Planning, 155 (1925), and "The City," by Park & Burgess (1925), p. 75, contain interesting discussions of city growth.

2 "The evil results of allowing a city to develop 'naturally' is the best evidence of the need of social control of land utilization. . . . The more intensive the use of the land, the more highly developed must be the social control." "Elements of Land Economics," edited by Richard T. Ely, pp. 86, 23-n. Also, "Towards an Understanding of the Metropolis," by Robert Murray Haig, 40 Quart. J. Econ. 2.
well on its way to be "blighted." Problems of sanitation and safety pressed for solution. A commission was appointed to study and report. On July 25, 1916, the Zoning Ordinance was passed. New York City entered upon a new era of social control of land utilization. Old techniques were abandoned. A new administrative agency—the board of appeals in zoning was sworn into public service. This city's venture fathered the vogue in zoning activity throughout the land. The resident of fashionable Murray Hill and the garage builder—the mass of property owners generally were forced into contact with yet another governmental agency. What technique for action did it fashion? To what extent has that action authority of law,—i.e., freedom from judicial review? What is the scope and temper of the judicial review to which its actions are subject? With the answers to these questions this paper is mainly concerned.

The Legislative History of the Building Zone Resolution of the City of New York.

A natural concomitant of land urbanization is the increased restriction of the field within which the owner may deal freely with his property. That ownership is a concept with a changing content becomes strikingly apparent in the city where the need for governmental interference in the interest of public health, safety, and convenience of the interrelated group of communities, is incontestably urgent. The germs of such interference with property rights may be found in the city laws of long ago. Three main purposes


4 The Approach of the Commission to its problem may be gleaned from a few short quotations: (1) "There is an intimate and necessary relation between conservation of property values as here proposed and the conservation of public health, safety and general welfare." Commission on Building Districts and Restrictions (N. Y.) Tentative Report, March 10, 1916, pp. 4 and 5. (2) "It is not possible to secure the light and air that is essential to both the profitable use of land and to the health and comfort of the public unless the height and area covered by the buildings is limited," and "... there is too much at stake to permit a mere habit of thought to stand in the way." Final Report, June 2, 1916, p. 27; also p. 30.

5 1 Minutes of the Common Council of the City of New York (1675-1776), 137. This will be referred to hereafter as M. C. C.
appear; to prevent deterioration, to achieve a "reguler order and uniformity in the streets" and to eliminate those factors which by their unpleasantness have a bad effect on health and on the growth of the district in which they are located. It might be well hastily to observe the technique employed.

1. Preventing Deterioration.

"No person within the town of said municipium of Tarentum shall unroof or demolish or dismantle any house without a decree of the senate, unless he shall intend to restore such a house to its former condition." That was the safeguard against voluntary demolition of the existing buildings, the attempt to preserve the status quo, found in the Charter of Tarentum, which was drawn up in the time of Cicero. Not dissimilar is the legislation in seventeenth century New York. Acting upon a complaint on behalf of those who could not find houses to live in or land to build upon, the Mayor and Aldermen, in 1676, appointed a committee desiring "that forthwith they Serve and value all the vacant Land; and ruined and decayed houses within this City, convenient or fitt to build" and to report their findings and appraisals. On the basis of the report rendered, it was ordered that the right owners shall build or sell out to purchasers offering to pay the appraised value, and, in any event, "Owners or Purchasers are to build Sufficient dwelling houses and to bee built within one yeare after the Publication hereof or other wise to bee Rendered un Capeable of building upon Saide land hereafter and the Land bee lookt as other vacant Land and valued accordingly and disposed of by the gouernor for the Publick good."

2. Regulation of Building.

Further than to declare against decay and to encourage building on vacant land to accommodate its growing population, old

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7 1 M. C. C., 14.

8 By order of the Governor in Counsel, to the Mayor or Deputy Mayor and Aldermen of the City of New York to publish this order, proclaimed the 13th of June, 1676. 1 M. C. C. 19. Cf. 3 Russ. Stat. 303, 19 Car. II, c. 3—"for rebuilding the City of London." Section 15 provided that in case of persons omitting to rebuild, their ground shall be valued by an inquest and subjected to sale by the Mayor, Aldermen, and Common Council of the City.
New York did not go. To be sure, two months after the law mentioned, provision was made to keep record of the building activity undertaken in pursuance thereof, by a system of inspection and certification. But positive supervision of building went no farther than to appoint a committee of five, four of whom had to approve before paving in front of houses and in the streets could lawfully be begun. It was not until 1684, eight years later, that "sworne surveyors" were appointed for the city, "by whose advise and directions the ground in this city shall be built and that none do build before the front of their ground . . . (except as) layed out by them—as they shall direct—that a regular order and uniformity may be kept and observed in the streets." Nothing more is found in seventeenth or eighteenth century New York, and research in the field of ancient town planning seems to indicate that regulation stopped with the superficial provision for intersecting streets—some degree of uniformity in the grouping of dwelling houses.

3. Eliminating the Nuisance Uses.

There were two objections to property uses of this kind: their effect on health, and on the growth of the neighborhood. The earliest order in New York City, that owners of slaughter houses and tann pits shall "remove ye same out of ye citty," stated the first reason in its prefix, and forty years later, in 1720, when re-

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9 "Att a Mectinge the 24th date of July 1676.

"In pursuance of former ordrs made for the Buildings of houses in this Citty & Settinge forth ye ground Itt is ordered that noe Person or Persons whatsoeuer Shall build Erect or Sett Upp any house or houses Upon any ground within this Citty Unless the same be first Viewed allowed & Sett forth Undr ye hands of (naming five men) . . . or any fowre of them And they to Certify the Same to the Mayor or Deputy & Aldermen to the End the same may be Recorded In the Records of this Citty." 1 M. C. C. 21.

10 "That there be Sworne Surveyrs Appoynted for this Citty by whos Advise and Directions the ground with this City Shall be Built and that none doe Build Before the front of their ground (be) Reed & layd out by them, And as they Shall Direct That A regular Ordor, and Uniformity may be kept and Observed in the Streetes, And Buildings and yt none Paue before their houses, but in Such manner, as Apoynted by the Sayd Surveyors, And that for Laying out of Each house Lott, and giuing Certificate thereof the Sayd Surveyors Shall Haue and Recuce from the Owner thereof the Summe of Six Shilling." 1 M. C. C. 137 (March 15, 1684).


12 See "Ancient Town Planning, supra note 6, at 29, 35, 52."
moval to another place was urged, the second reason was mentioned.

"We the committee—are humbly of opinion that the present slaughter houses fronting the East River at the east end of Queen Street—are become a public nuisance and ought in a short time be removed in order more convenient and ornamental buildings may be erected there and in that neighborhood which now are retarded by occasion of said slaughter houses." 11

The increased seriousness of problems of health, order, convenience, brought on by the great number and size of cities that developed rapidly after the Civil War, was met not by a technique, but by an extension of the old. There was a recurrent classification and allocation of the objectionable businesses and industries,14 many of them not nuisances per se. Buildings not devoted to such uses were subjected to increasingly severe regulations over plan and mode of construction and materials used therefor. Thus, standards of sanitation in factories and tenements and safeguards against fire generally, were established.15 Before we turn to the work of the New York Commission on Building Districts and Restrictions, two apparent innovations in technique ought be mentioned. The first is limiting the heights of buildings. The earliest example in the United States is the act passed by the Massachusetts legislature in 1904.16 Though new in this country, limitation of the heights of

13 The law of 1676 is found in 1 M. C. C. 20. The report of the committee is given in 3 M. C. C. 249-51; the complaint is stated in 3 M. C. C. 241. Protection against fire was another important interest. In 1795 the Pennsylvania legislature empowered the Mayor and Common Council to pass an ordinance forbidding the erection of wooden buildings in a certain part of the city. This was held constitutional. Respublica v. Duguit, 2 Yeats 493 (Pa. 1795).

14 The amendment to the Municipal Act of Ontario, L 1904, s 541-A, has been referred to as the earliest type of zoning enabling act. By two-thirds vote of its council, a city could pass and enforce by-laws "to prevent, regulate and control the location, erection, use of buildings as laundries, stores and manufactures." To which later was added, "stables for horses for delivery purposes, butcher shops, blacksmith shops, forges, dog kennels, hospitals or infirmaries for horse, dogs or other animals."

15 In this connection, see the series of articles by Thomas Reed Powell, "Administrative Exercise of the Police Power," 24 Harv. L. Rev., 268, 333, 441. The cases cited in his footnotes on page 271 illustrate the scope of the regulations of sanitation and safety in constructions.

buildings in thickly populated communities dates back a long time. The "building law" of Rome regulated the heights to which tenements could be built and also included provisions similar to those discussed above, i.e., cemeteries and brickfields were excluded from the city. The other kind of regulation referred to, is the reservation of certain parts of the city for strictly residential purposes. It is believed that the enabling acts of Wisconsin and Minnesota, both passed in 1913, empowering cities of twenty-five and fifty thousand respectively, to create such districts, are very early examples.

It is readily apparent that the complementary processes of segregating nuisance and other offensive uses and reserving certain parts for desirable uses, residential or otherwise, in addition to supervision over construction and maintenance of buildings generally are all promotive of the numerous elements that are said to comprise the "public welfare." But the pressure of forces or conditions, call it what you will, economic and social, as indicated in the preceding part of this paper, operating in the largest city in the country, dramatically exposed the inadequacy of the old technique, that of seeking to control the evils within narrow and perhaps contiguous fields by successive, independent enactments. It was an exhaustive study of the city as a whole that suggested the new municipal venture in property regulation, the technique of controlled zoning.

On February 27, 1913, the board of estimate and apportionment, in pursuance of a resolution beginning—

17 Haverfield's investigation disclosed rules by the emperors limiting the height of tenement houses which formed the "insulae" and also rules forbidding balconies and similar structures which might impede the light and air in narrow streets. It was a common rule that cemeteries and brickyards had to be located outside the area of habitation. As to the latter, it was said that by "Royal Law" dating probably from one of the Attilid rules (300 B.C.), brickfields were expressly prohibited from Pergamum. See "Ancient Town Planning," supra note 6, at 137, 52. It is interesting to note that before the recent Euclid case, the language and decision of the Supreme Court in Hadachek v. Sebastian, 36 Sup. Ct. 143 (1915), was urged in state courts before whom the constitutionality of zoning was presented. That was a case upholding the exclusion of brickfields from the city of Los Angeles.

18 Wis. Laws (1913), ch. 743; Minn. Laws (1913), ch. 420. Cf. N. Y. Laws 1913, ch. 774—Housing Law for second class cities and also providing for limited residence areas.
"Whereas, there is a growing sentiment in the community to the effect that the time has come when effort should be made to regulate the height, size, and arrangement of buildings erected within the limits of the City of New York; in order to arrest the seriously increasing evil of shutting off light and air from other buildings and from public streets, to prevent unwholesome and dangerous congestion both in living conditions and in street and transit traffic and to reduce the hazards of fire and peril to life . . . ." appointed a Heights of Buildings' Commission that was to inquire into and investigate conditions actually existing . . . and report, whether in their judgment, it would be lawful and desirable for the purposes of such regulation to divide the city into districts or into zones and to prescribe the regulations of the heights, size and arrangement of buildings upon different bases in such different districts or zones." As a consequence of its report, the state legislature enacted an amendment and addition to the Greater New York Charter, empowering the board of estimate and apportionment to make such divisions and impose such restrictions, "having reasonable regard to the character of buildings . . . the value of the land and the use to which it may be put." The grant of power was conditioned, however, upon the appointment by the board of estimate of a commission "to recommend the boundaries of districts and appropriate regulations to be enforced therein . . . and that said board (of estimate and apportionment) shall not determine the boundaries of any district nor impose any regulations until after the final report of a commission so appointed." 19 Mr. George McAneny, president of the Borough of Manhattan at the time, asked for the appointment of the Heights Commission. It had nineteen members, numbering among them business men, representatives of labor, students of social problems, experts on taxation and city planning, and, of course, lawyers. Edward M. Bassett was chairman; George B. Ford was secretary. It reported Dec. 21, 1913. 20 N. Y. Laws 1914, ch. 470, amending Greater New York Charter by adding § 242-a and § 242-b. It was passed April 20, 1914. 21 The charter amendments provided a further guarantee against hasty and ill-considered action by the Commission, namely, the board was not to use its delegated powers before it had all the facts and conclusion stated in a tentative report which was required to be discussed at designated public hearings. Until that was done the Commission was without power to submit a final report.
Not more than two months elapsed before the Commission on Building Districts and Restrictions, appointed by the board of estimate, pursuant to this condition, was at work. As regards the division of the city into height, area and use districts, the board of estimate and apportionment, on July 25, 1916, passed the Building Zone Resolution, substantially as submitted in the Commission's final report. The subsequent amendments and additions to the Greater New York Charter indicated in the footnote are important.

But inasmuch as they concern the administrative features of zoning, they will be discussed hereafter. It is important, however, to note here that the original enabling act of 1914 did not give the board of estimate authority to amend the zoning regulations which it was permitted to enact pursuant thereto. That essential power "to amend, supplement and change such regulations" was granted by the state legislature after the commission submitted its tentative draft of the building zone resolution but before its final report.

Three maps of the city were incorporated in the building zone resolution and furnished the basis for its provisions. The Use District map provided for three district classifications; the

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22 The board of estimate and apportionment passed its resolution to have a Zoning Commission on May 22, 1914. It was appointed June 26, 1914. There were seventeen members; Edward M. Bassett was chairman and Robert H. Witten was secretary.

23 N. Y. Laws 1914, ch. 470, amended Greater New York Charter by adding §§ 242-a and 242-b (Board of Estimate and Apportionment: Power to regulate heights of buildings, and as to location of industries and buildings). N. Y. Laws 1916, ch. 503, added, inter alia, ch. XIV-A to the Charter, abolishing the board of examiners and providing for the constitution and appointment of a board of standards and appeals and a board of appeals, defining the jurisdiction and powers and procedure and prescribing penalties and court review by writ of certiorari. (This writ has recently been replaced by the "certiorari order." See Civil Practice Act, 1926, §§ 1283 et seq.) N. Y. Laws 1917, ch. 601, by amending § 718-d of the Charter which was added by N. Y. Laws 1916, ch. 503, gave board of appeals power to hear and decide matters under any resolution adopted in pursuance of §§ 242-a and 242-b, i.e., under the Zoning Enabling Act. N. Y. Laws 1920, ch. 346, gave the chairman of the board of appeals power to administer oaths and compel the appearance of witnesses. N. Y. Laws 1924, ch. 295, gave New York City remedy of enjoining violation of the zoning ordinance. Municipal Assembly, Local Law No. 13 (1925), abolished the board of appeals and vested all powers in the board of standards and appeals.

24 The tentative report was submitted March 10; the final report presented on June 2, 1916. The act giving the board of estimate power to amend its resolution was passed May 10, 1916. N. Y. Laws 1916, ch. 497.
residence, the business and the unrestricted. In residence districts, hotels, clubs, churches, public buildings, small private garages and railroad passenger stations are permitted; while in business districts forty-five enumerated trades, as well as all offensive uses, are excluded. The Height District map prescribing to what height new buildings may rise is based upon fixed multiples of street width, varying with the locality. Eight such multiples are now in use. Provision is also made for securing increased height by means of mansards or set-back vertical walls. The provisions for Area Districts regulate the proportion of the lot which may be covered by a building. Districts vary from A, waterfront and terminal property, where use of the entire plot is permitted, to F, from which are excluded all but detached residences.

This brief and quite inadequate summary of the technical portion of the zoning resolution is presented in the belief that it will prove useful in examining the work of the board of appeals which relies for its principal source of authority upon the provision that "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of the resolution the board of appeals shall have power in a specific case to vary any such provision in harmony with its general purpose and intent, so that the public health, safety, and general welfare may be secured and substantial justice done."

II.
THE NEED, HISTORY AND JURISDICTION OF THE BOARD OF APPEALS IN ZONING.

Necessity for a Board of Appeal.

The Building Zone Resolution foreshortens the field within which an owner of property may assert the most important incident of ownership, that of user. While such restriction upon all by a comprehensive zone plan calculated to produce benefits to be shared

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23 Building Zone Resolution, §§ 2-5. Two-thirds of the city was laid out for residence use; two-fifths of Manhattan was reserved for this purpose; while main thoroughfares, transit streets and others adaptable for stores or showrooms were denominated business streets.

24 Ibid. § 8; also § 8 of Resolution of Oct. 24, 1924.

25 Ibid. §§ 10-18.

26 Ibid. § 20 (changed in 1924 to § 21).
in common is justifiable under the police power, there remains the
danger that as to any particular property owner the prohibitions
and regulations may prove arbitrary and therefore confiscatory.
This danger may have its source in the physical relation of any
particular piece of land to the surrounding property, or in its
economic relation to that neighborhood property or to a combina-
tion of both. One who was largely responsible for the final form
of the law said: "... every builder knows that exceptional sit-
uations will arise where the written rule fails to provide the right
thing in a specific case. No words of a written law can prescribe
what ought be done in the thousands of exceptions which can arise
in the construction and use of buildings."\(^1\)

The process of introducing the vital element of flexibility was
two-fold; first, to make the zoning ordinance flexible in its terms
by enumerating the important foreseeable exceptions;\(^2\) secondly, to
create administrative machinery for enforcement with capacity to
deal with all exceptional cases whether enumerated or not. Before
we go into the reasons why the accomplishment of these purposes
was entrusted to an administrative board with large discretionary
powers, it must be noted that adjustability of the zoning resolution
was essential not as an attribute of good zoning, or a corrective of
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zoning, but as a quality of constitutional zoning.\(^3\)

\(^1\) "The Board of Appeals in Zoning," by Edward M. Bassett (2d ed.,
1921), 5.

\(^2\) See §7 of the Building Zone Resolution.

\(^3\) "If in any zoning ordinance there is not created a board of appeals ... the courts, bound by the duty to protect individuals from invasion of their
constitutional rights, would develop a line of decisions which by reason of
their number and character might eventually destroy the policy of zoning
itself." In the Matter of St. Basil's Church v. Kerner, 125 Misc. 526, 533,
211 N. Y. Supp. 470 (1925). Similarly, the court in Wellerup v. Village of
Hempstead, 120 Misc. 485, 489, 199 N. Y. Supp. 56, after declaring a zoning
ordinance void as applied to the plaintiff's premises, called attention to the
fact that the law failed to provide for an "appeal to any official or board of
appeals for relief from any grievance which is deemed to exist by virtue of the
passage of the ordinance," and as a result "the court is required to consider
the facts involved in the case with greater care to see that no injustice has
been attempted than if the property owner were in a position where he might
appeal to a local board having power to vary the literal requirement of the
law in individual cases of buildings where unnecessary and excessive hardship
is caused." It is believed that provision for such a board would have saved
the Mt. Vernon ordinance declared invalid in Hecht-Dann Construction Co. v.
The writings of Edward M. Bassett, the chairman of the zoning commission, reveal two distinct reasons for choosing a board of appeals as the agency for avoiding adverse decisions on constitutionality. The first is rooted in practical considerations, the second is prompted by legislative strategy. Let us examine each.

A lot may require exceptional treatment because of its topography, its size, its location on the boundary line between two use districts, its division by such boundary, or its peculiar value. In these situations strict enforcement of zoning restrictions may be arbitrary either because they would prevent the owner from erecting any building at all on his peculiarly shaped lot, or because what can be erected in conformity with the law would yield a return altogether disproportionate to the value of the land.4 But where constitutional rights of the individual compel compromise of zoning principles, that should be entrusted to an instrument of administration adjusting those rights without impairment to the zone plan as a whole. Since this requires affirmative supervision, expert knowledge and judgment, it was conceived that such discretion had best be vested with a board.5 A way may be devised to allow the owner

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4 That the authorized use would yield a return disproportionate to the value of the land was the main ground for upholding a variance under a section similar in wording to § 21 of the present New York Building Zone Resolution in Norcross v. Board of Appeal, 150 N. E. 87 (1928). And compare this case. O could not legally build an apartment house where he wished. He demonstrated to the board that he could make a better return if he were allowed to build such apartment house. The board granted his application. Held, the board went beyond its authority because O did not prove that an authorized use would not yield a fair return. In the Matter of Stevens v. Clark, 213 N. Y. Supp. 350 (Sup. Ct.), aff'd, 216 App. Div. 351, 215 N. Y. Supp. 190.

5 That such affirmative supervision and discretion had best be put in a board was expressed many times in the New York Courts. People ex rel. Broadway Realty Co. v. Walsh, 203 App. Div. 468, 474, 196 N. Y. Supp. 672 (1922); People ex rel. Beinert v. Miller, 188 App. Div. 113, 117, 176 N. Y. Supp. 398 (1919). Perhaps the language of the latter case is significant in that this was the first time a court dealt with the zoning ordinance in connection with the board of appeals. The board's decision was annulled at Special Term, and in reinstating that decision it was said: "The complexity of our modern social system and the impracticability of direct control over the application of general rules of law by the law-making body, have in a degree relaxed the strict application of the doctrine (of delegatus non potest delegare) where public rights are concerned. . . . It would be physically impossible for the board of estimate and apportionment . . . itself to determine and vary the application of use district regulations as provided by section seven of the resolution."
reasonable use of and income from his land and nevertheless pre-
serve the character of the zoned area by the imposition of suitable
conditions. A well known architect, expressing his satisfaction with
the Fisk building, explains the part that the board of appeals played
in attaining its fine balance:

"But the architects went to the Board of Appeals which
is purposely arranged so that such matters can be laid before
it and they compromised the matter by asking for a slight in-
crease of height here, a slightly less height there, a greater
space here and a little less space there, and balanced the
building; so that it now has a very effective architectural
appearance, and yet comes within that adjustment. Fortu-
nately, the Board of Appeals is there for just that purpose
of making the law sufficiently elastic to suit the various con-
ditions that arise in a city like New York."

A district is "business" or "residence" not because all the build-
ings are devoted to those uses, but because most of them are. Those
whose property is put to non-conforming use have interests that
must be protected. Repair, replacement, or extension of such prop-
erty may be necessary. An administrative board has for its task
to adjust these interests in a way not inimical to the welfare of the
predominant use in the district. Here too discretion and judgment
in the light of what is in harmony with the purpose of the Building
Zone Resolution are essential to resolve these competing interests,
to direct the nature of the new uses which are sought to be in-
troduced.

We come now to the second reason for the board of appeals.
Even if it were not impractical for the Building Zone Resolution to
contain numerous general exceptions or for the board of estimate
itself to make changes in the law in particular instances, a property
owner could nevertheless directly raise the question of constitu-
tionality. And in the pioneer days of zoning, it was important to
prevent the court from dealing directly with that question, viz.: Is

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6 Housing Problems in America (1923). "What the Architect Thinks of
Zoning," by Harvey W. Corbett, p. 238. See also an article, "Influence
of Zoning on the Design of a Telephone Plant," by Albert P. Allen, p. 237,
Proceedings of the American Society of Civil Engineers (1925).
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this act constitutional as to this plaintiff? The leading figure in the zoning movement in the United States feared the exceptional situations because they had "dynamite in them." The interposition of an administrative board was an effective "safety valve" because it is well settled that the plaintiff must first exhaust all his legal remedies before mandamus will issue against an administrative officer. In People ex rel. Sondern v. Walsh, mandamus was denied on the ground that:

"... the unrelenting rule of judicial courts is not to rush to mandamus administrative officials until all of their machinery for action has been tried and found wanting by the aggrieved party."

And if the aggrieved party does first obtain a decision from the board, the zoning law is not endangered by judicial review thereof, for the case turns not on the constitutional validity of the property restriction, but on whether the board had jurisdiction to act and whether its action was not in abuse of its discretion. But this board which it was found necessary to create in order to preserve the Building Zone Resolution against constitutional attack is itself subject to

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7 From this point of view it seems rather fortunate that the first time the Court of Appeals had to deal with the Building Zone Resolution, it was only as a question collateral to the main one, namely, whether the defendant could defeat a bill for specific performance of his contract to buy land on the ground that the Building Zone Resolution was an incumbrance thereon. In reply to that question, McLaughlin, J., said: "In a great metropolis like New York, in which the public health, welfare, convenience and common good are to be considered, I am of the opinion that the resolution was not an incumbrance, since it was a proper exercise of the police power." Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313, 317, rev'd, 183 App. Div. 225.

8 Edward M. Bassett, op. cit. supra, note 1, at 6, 7.

9 106 Misc. 193, 178 N. Y. Supp. 192. To say that the board of appeals is a safety valve is really to assume that the provisions of the zoning act are considered constitutional by the court and that the board of appeals is there to avoid hard cases. Therefore, where the court is otherwise inclined, the safety valve will not avert disaster; it will not even postpone it, for if the law is unconstitutional, mandamus against the officer will issue whether or not the plaintiff resorted to the board. This is illustrated by the New Jersey decisions. Prince v. Board of Adjustment, 129 Atl. 123 (1925); Land Co. v. Board of Adjustment of Newark, 133 Atl. 413 (1926); Warner v. Board, 132 Atl. 206 (1926); Rudensky v. Board, 131 Atl. 906 (1926). But where the plaintiff relies not on the unconstitutionality of the law but on the fact that the building allowed by the board will be a "public menace," then mandamus is not the proper remedy even in New Jersey; that finding of fact by the board is reviewable only on writ of certiorari. Chancellor Dev. Corp. v. Senior, 134 Atl. 337 (1926).
constitutional limitations.10 There must be reasonable notice to interested parties. It must furnish them a fair opportunity to be heard. Some form of judicial control of administrative action must be provided.11 What is necessary to make the creation of such a board by the city proper? What powers may be granted it? What shall be its structure, its personnel? The answers that the legislature and the board of estimate and apportionment furnished to these questions will next engage our attention.

History of the Board of Appeals in Zoning.

The Buildings Heights Commission which was responsible for the amendments to the Charter which enabled the city to formulate the zone maps and regulations omitted two things: first, to give the board of estimate and apportionment power to amend the maps and ordinance; secondly, to provide an agency for adjustment.

Section 14 of the tentative draft of the Building Zone Resolution first provided for an appeal, appeals to the board of examiners.12

Two months after this preliminary draft was submitted and less than a month before the final draft of June 2, 1916, was adopted, the legislature abolished the board of examiners which was

10 A Baltimore zoning ordinance which gave the board power to grant any permit upon appeal from the superintendent of buildings except when the erection of that building would be a public menace, was declared invalid. The court stated its reason as follows: "... whilst it was within the power of the mayor and city council to protect 'the public welfare by adopting legislation forbidding uses which would conflict with it, it was not within its power to delegate to an official or a board the power to do that." Tighe v. Osborne, 131 Atl. 801, 805 (1926), per Offutt, J. Similarly a permit to build a moving picture theatre on condition "that the consent be obtained of the authorities of St. Margaret's Church . . . which is directly opposite" is "fatally defective on its face" because this governmental function cannot be placed in the hands of an unofficial body. Wertheimer v. Schwab, 124 Misc. 825, 210 N. Y. Supp. 312 (1925). And when a proper board is appointed, mere notice will not be enough, for "no provision is made to inform the interested parties concerning the subject-matter to be considered; and consequently such parties are not sufficiently informed." In re Cobb, 217 N. Y. Supp. 593, 594 (1926).

11 In the Wigmore-Freund controversy as to whether reduction or control of administrative discretion is more desirable, Wigmore said: "The bestowal of administrative discretion, as contrasted with the limitation of power by a meticulous chain-work of inflexible detailed rules, is the best hope for governmental efficiency. What is needed only is not reduction, but control of discretion." 19 Ill. L. Rev., 440, 441.

of little usefulness and in its place created two boards,
the board of standards and appeals and the board of appeals which were given larger discretionary powers in the enforcement of the building laws of the city.

The final draft therefore omitted all reference to the board of examiners and instead named the board of appeals created by New York Laws 1916, ch. 503. People ex rel. Beinert v. Miller pointed out the error of supposing that the city to which the power to adopt a zone plan was delegated could itself delegate to “an inferior board the power to dispense in its discretion with compliance with such regulations.” Pending the decision of that case, however, the appropriate Charter provisions were amended. To the paragraph authorizing the city to have a zone plan was added a power to refer matters to a board of appeals; to the provisions creating the board of appeals for enforcing the building law was added a clause permitting the board also to decide such cases as the zoning ordinance may refer to it. The net result of the error was the cumbersome arrangement of distinct but interrelated boards, namely, the board of standards and appeals and the board of appeals. Both had the same chairman, the same rules of procedure, and similar duties in the enforcement of different but related ordinances. And it was not until three years ago that the board of appeals was abolished and the powers of both boards given to the board of standards and appeals.

**Jurisdiction of the Board.**

1. The enabling provisions.

The discarded board of examiners which existed under section 411 of the Greater New York Charter had power to reverse the superintendent of buildings when he incorrectly applied the law, but it had not discretion to grant a permit for the erection of a building according to plans which were not in strict compliance

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13 N. Y. Laws 1916, ch. 503.
16 Municipal Assembly, Local Law No. 13 (1925).
with the law. In its place, as we have seen, the legislature, by the addition of chapter 14-A to the Charter, placed the board of standards and appeals and the board of appeals. We must examine the jurisdiction delegated to the latter because the erroneous assumption of the Zoning Commission that such delegation was broad enough to take care of the enforcement of the zoning resolution was corrected merely by an addition of a sentence to the effect that this board shall also have jurisdiction over matters referred to it by the zoning ordinance.

Two independent grounds of jurisdiction were granted to the board of appeals:

1. Power to hear appeals from any order, requirement, decision, made by a superintendent of buildings or by the fire commissioner, and to make such order, etc., as in its opinion ought to be made in the premises.

2. Power to vary or modify any rule or ordinance relating to the construction, structural change, removal or use of buildings.

Under the first power the board could reverse or affirm or modify the official's order and to that end had all the powers of the officer from whom the appeal was taken. In pursuance of its second power the board could act only "where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the law . . . and its variation or modification was to be made to the end . . . that the spirit of the law shall be observed, public safety secured and substantial justice done."

In order to give the board of appeals jurisdiction over zoning matters, the act "to amend the Greater New York Charter in relation to the enforcement of the buildings district regulations of the

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17 Altschul v. Ludwig, 216 N. Y. 459, 116 N. E. 216 (1916). Under the first Illinois zoning act, cities which adopted zoning were required to have a board of appeals which had power to recommend variations which could be effected only by ordinance. There was no power of adjustment. Ill. Laws (1921), 180, 181. After considerable agitation conducted by the Chicago Real Estate Board, an amendment was adopted to bring the law in accordance with the provisions for a board of appeals in the New York ordinance. Ill. Laws (1923), 268.

18 New York Charter, § 719-5. An apt illustration of the distinction between the two kinds of relief that the board is empowered to give is Leverich Realty Corp. v. Walsh, N. Y. L. J., March 3, 1925, at 2095. Though the board was specifically denied power to hear appeals from the Tenement House Commission, it had original jurisdiction to "vary" the application of the law.
board of estimate and apportionment,” passed May 22, 1917, added but one sentence to section 718-d, namely—“They (the members of the board of appeals) shall also hear and decide all matters referred to them or upon which they are required to pass under any resolution of the board of estimate adopted pursuant to section 242-a and section 242-b of this Chapter.”

2. Jurisdiction of the board under the ordinance.

The first Building Zone Resolution of July 25, 1916—and those that were enacted since—place two classes of cases within the board’s power, both of which fall within the original jurisdiction of the board. A third class, namely, appellate jurisdiction to correct the errors of administrative officials who pass on the applications for permits, is carried over directly from the Charter and was discussed above. Insofar as the board deals with these appeals, it continues to function in the same manner as the old board of examiners; no variation in the application of the law is involved. The other powers do not, of course, enable the board to effect changes in the law. That power was granted to the board of estimate and apportionment by the state legislature. But the board may make adjustments in the application of the law. It may do so in two types of situations:

(1) A petitioner may appeal to the board to have it declare that his request falls within one or more of the exceptions set forth in the zoning law.

(2) A petitioner may apply to the board for a variation in the literal application of the law because practical difficulties or unnecessary hardship stand in the way of strict enforcement although the case is not covered by one of the enumerated exceptions.

Perhaps it will be profitable to say a word as to each at this point.

(1) The enumerated exceptions. “The board of appeals . . . may in appropriate cases, after public notice and hearing, and sub-

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19 Supra, note 13.

20 The use of the third person plural is explained by the fact that the board of appeals was constituted by naming five persons on the larger board of standards and appeals. This peculiarity was finally removed by Local Law No. 13 (1925), which consolidated the boards and removed the superintendents of buildings in the five boroughs from the new board of standards and appeals.
ject to appropriate conditions and safeguards, determine and vary
the application of the use district regulations . . . in harmony
with their general purpose and intent as follows . . . .” 21 That
section then goes on to enumerate seven exceptional situations, the
general nature of which has been indicated in the first part of this
chapter and of which more will be said later on when judicial con-
trol of the board is discussed.

While the power to determine whether an applicant establishes
the facts that bring him within one or the other of the expressed
exceptions is rather narrow, the field of discretion as to the form
of relief to be given him after he succeeds in so doing is very wide.
The board may “determine” what are “appropriate conditions and
safeguards;” the nature and extent of such exactions will be gov-
erned by its judgment of what is necessary to bring the result of
the variation in harmony with the general purpose and intent of the
use district provisions. 22 The interrelation of these exceptional situa-
tions to each other and to those within the wider power of the board,
i.e., those of unnecessary hardship will also be discussed later.

(2) The general power to grant variations. Section 21 23 of
the Building Zone Resolution which has been interpreted as being
practically identical 24 with the charter provision discussed above
is the most important source of the board’s power. And it is the
one that has caused the most trouble. Its generality is both its
strength and its weakness. 25 What is practical difficulty? What is

21 Building Zone Resolution, § 7.
22 In People ex rel. Sheldon et al. v. Board of Appeals, 234 N. Y. 313,
which was the first important decision involving the interpretation of § 7 and
the board’s power thereunder, counsel successfully argued that the board’s
jurisdiction under § 7 was quasi-judicial in character, i.e., to “determine”
whether there is unnecessary hardship. If it finds that there is, then it has the
further power to vary subject to suitable conditions. See Brief of Cadwal-
ader, Wickersham & Taft for the Farmers’ Loan & Tust Co., Trustee, inter-
23 In the original Building Zone Resolution (1916) this was § 20. It was
first numbered 21 in the Building Zone Resolution of 1924. In the interim
there were two amendments to that section on Dec. 6 and 19, 1919, with which
we are not concerned here. See Cosby’s Code of Ordinances (1925), 639,
640, 642, 651.
25 On June 16, 1916, the Zoning Commission heard a report of a sub-
committee appointed to consider the administration and technical features of
the proposed plan as affecting building development. This sub-committee was
unnecessary hardship? We shall return to these questions when we examine the cases to see how far the board is allowed to go in taking jurisdiction under this section; how quick the court is in checking abuse in its use and how (with all limitations considered) powerful an instrument it is for achieving the general purpose of the act and doing substantial justice in specific instances.\textsuperscript{26}

composed of Rudolph P. Miller (the first chairman of the board of appeals), the five building superintendents, the Tenement House Commissioner, the Fire Commissioner, John P. O'Brien—Assistant Corporation Counsel, and the Consultant Secretary of the Committee on the city plan.

Oddly enough, this committee, composed of men who were to have a great deal to do with these matters because of their membership in the board of standards and appeals, recommended that §20, the greatest source of power to the board of appeals, be dropped as unnecessary. (Section 20, entitled "Rules and Regulations; Modifications of Provisions," is not §21.)

Nothing was said of §7. But the report of the sub-committee states that "Your committee was directed to consider the resolution with special reference to Article IV, containing the general and administrative provisions. The committee has not had an opportunity to take up in detail the other articles of the resolution." In other words, §7 was not studied by the sub-committee. See the Final Report of the Zoning Commission, p. 230, the report of the committee beginning at p. 213.

\textsuperscript{26} The object of seeking to control city mobility as discussed in the first chapter is, in large measure, entrusted to the board of appeals. Thus §7(h) gives it power to "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 requirements of this article." Section 21 contains this sentence: "Where the street layout actually on the ground varies from the street layout as shown on the amended use, height or area district map, the designation shown on the mapped areas shall be applied by the Board of Appeals to the unmapped streets in such a way as to carry out the intent and purpose of the plan for the particular section in question. Before taking action authorized in this section the Board of Appeals shall give public notice and hearing." In addition may be mentioned that the board is required by §718-1-5 of the Charter to make annual suggestions to the Mayor concerning the amendments to the zoning resolution. Still further powers of this sort seem contemplated by the recent New York enabling act for city planning. Appeals from the decisions of the administrative officer acting thereunder are allowed to the same board that the city authorized to hear zoning appeals. The methods of court review are the same as in zoning. See N. Y. Stat. (1926), ch. 690, §36 and ch. 719 for towns. Both are based on the model act to be found in a pamphlet issued by the Regional Plan of New York and its Environs Commission. It is entitled "Planning of Unbuilt Areas in the New York Region, a Form of State Enabling Act with Annotation." It is by Edward M. Bassett.
III.

ORGANIZATION AND PERSONNEL OF THE BOARD OF APPEALS.

The Original Board of Appeals in Zoning.

The board originally created by the Charter had seven members; the six appointed members of the board of standards and appeals and the chief of the uniformed force of the fire department.

Meetings of the board were open to the public. Records of the proceedings, votes and other official action were filed in the office of the board and available for inspection by the public. The board was also required to publish its decisions and reasons therefor, together with any other material it desired, at least monthly.

The Present Board of Appeals.

The recent charter changes already referred to in another connection, and the latest Rules of Procedure have departed from the original plan of organization and personnel. The Municipal Assembly provided for the abolition of the board of appeals and the transfer of its powers to the board of standards and appeals as newly constituted.

Membership.

The new board of standards and appeals which now hears zoning appeals is smaller. Reduction in size was accomplished by eliminating the borough superintendents of buildings. This seems especially desirable in view of the fact that each superintendent under the former arrangement was in a sense the judge of the order from which an appeal was taken. At present there are five members; four appointees of the mayor and an officer above the grade of battalion chief designated by the fire commissioner. In the event of disability, the fire chief is to designate a substitute.

Qualifications of the Appointed Members.

Of the four appointees, one is named chairman and the other three are called "Commissioners of Standards and Appeals." Two of the commissioners must have had at least ten years of experience

1 Local Law, No. 13 (1925).
as civil engineer and "employing building contractor" respectively. No change was made in the qualifications for the office of chairman of the board.

**Term of Office, Appointment and Removal.**

Each of the appointed members serve six years, but can be removed and replaced by the mayor at any time. The uniformed officer serves without extra pay; the others receive an annual salary.

**Meetings and Records.**

As to meetings and records, no changes were made other than the interesting but minor difference in terminology. Instead of "meeting," the word "hearing" is used, and in the new Rules of Procedure, the phrase "Trial Calendar" is abandoned for "Hearing Calendar."

**IV.**

**ADMINISTRATIVE PROCEDURE.¹**

**Procedure Prior to the Hearing.**

**Who may appeal?**

The appeal to the board may be made (1) "by any person aggrieved;"² (2) by any officer, department, board or bureau of the city. No definite criterion has been established by the board as to who is an aggrieved person. When an applicant assumes to get eighty per cent. of the property owners "affected" as a basis for his application requesting a variation, the board is given power to decide what property it deems to be affected.³ Perhaps the class of people so deemed to be affected may be co-terminus with the class of aggrieved persons.

**What is appealable?**

Any order of the building superintendents or of the Fire and (by recent amendment) the Tenement House Commissioner may be

¹ The new Rules of Procedure, passed Feb. 15, 1927, will be the basis for this chapter. Discarded rules will be mentioned for purposes of comparison and will be cited as Rules '16 or Rules '18. The new Rules are printed in 12 Bulletin, 202.

² See Charter (N. Y.), § 719 (2).

³ Building Zone Resolution, § 7 (g).
appealed to the board.⁴ Such order, requirement, decision or determination may be reversed or modified wholly or in part.

**Classes of applications to the board.**

There are (1) appeals from erroneous orders made by an officer; (2) applications for a variation in the application of the zoning provisions.⁵ The latter may be based on any of the exceptions mentioned in Section 7 or on the fact of unusual difficulty or unnecessary hardship in the enforcement of the law. While relief so sought is different in kind from an appeal, the board will not exercise its original jurisdiction under Section 7 or Section 21 until the proper officer has acted on the petitioner's request for a permit.

**What is an application?**

"Any communication purporting to be an application, appeal, or petition shall be regarded as a mere notice of intention to seek relief and shall be of no force or effect until it is made in the form required."⁶ That the board used "application" technically is evidenced by the explicit requirement in another section of its rules that the proper forms and other necessary data must be filed within twenty days of the date of the order or decision appealed from.⁷ A mere communication of intent to apply to the board will not be sufficient though made within that time.

**The Clerk's Calendar: notification to interested parties.**

Upon filing of the requisite data in the form prescribed, each case is numbered serially and placed upon the docket. Then applications for zoning variations are placed in the Clerk's Calendar and a day is set for a hearing. Publication of such date in the "Bulletin" at least two weeks in advance is considered enough to satisfy the Charter requirement of adequate notice to interested persons. To the applicant, the secretary sends a formal notification to-

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⁴ But no appeal, application or petition will be entertained in connection with which court proceedings are pending or in progress. ⁹ Bulletin, No. 1, p. 1 (1924).

⁵ Application must be made within twenty days of the date of the official action from which relief is sought.


⁷ Supra, note 6, Art. II, § 3. Rules '18 added that upon failure to file data in the prescribed time "his case may be dismissed for lack of prosecution." ³ Bulletin, 673 (1918).
ZONING ADMINISTRATION

together with the form for the letters that must be furnished by the applicant to those property owners on the block that the board deems interested. A verified statement that they were so notified by registered mail or personal service must be made by the petitioner within three days after receipt of the form letters.

Call of the Clerk's Calendar.

The purpose of this preliminary hearing is to inform the parties interested of the subject-matter of the appeal and to give them an opportunity to offer their objections in writing. Owners who were personally notified and those who were notified by publication are expected to appear at this hearing in person or by representative to present documentary evidence in opposition to the petition for a permit or a variation. All of this forms part of the evidence that will be relied upon in the public hearing that will take place later. The Clerk's Calendar as well as the public hearing thereon, must be sharply distinguished from the trial or hearing calendar and the administrative trial.

Inspections.

While the board recognizes that its action will have to be taken largely in reliance upon information furnished in the manner described, it may decide to get additional facts in any case by sending a committee of inspection. By specific provision in the Charter, such independent gathering of evidence is authorized:

"Each member of the board and the secretary shall have all powers to enter, inspect and examine buildings and structures, that are conferred upon a superintendent of buildings or upon the Fire Commissioner."

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8 An owner who is deemed affected must file an affidavit certifying his ownership. While the class of people who are entitled to be deemed affected and those who may be "aggrieved" by the grant of an application may be co-terminus as suggested, there is no requirement that an aggrieved person file any affidavit, and the only notice to which he is entitled is such as is notice by publication in the Bulletin.

9 With the consent of the board, an applicant may withdraw his application before action is taken by the board. If a motion has been made but not voted upon, that is given preference.

10 A comparison of these regulations and the "Statement of Policy" passed by the board Aug. 4, 1916, does not reveal any substantial difference in the method of acquiring the data upon which the board's action must be based. See "Building Zones" (pamphlet), by G. B. Ford, p. 19 et seq. For safeguards against misinformation and delay, see infra.

11 Charter (N. Y.), § 718 (c).
Further provisions are there made prescribing that inspections if made at all, must be made by the chairman of the board together with at least two members appointed by him. The committee must report its findings to the board in writing. That the chairman of the board and the other members who act on committees of inspection use knowledge so gained not only in connection with the case that occasioned the inspection but in other cases involving the same district, becomes easily apparent to one attending any of its hearings. While judgment based on facts within its own knowledge may seem objectionable, the safeguard lies in the training and experience upon which the appointment of these men is conditioned. This safeguard is stressed in a dictum by Judge Cardozo in People ex rel. Fordham Manor Reformed Church v. Walsh:

“But the power of the board to do justice informally and promptly is not limited to cases where witnesses have been heard. Without any witness at all, it may act of its own knowledge, for, as constituted by the Statute, it is made up of men with special qualifications of training and experience. In that event, however, it must set forth in its return the facts known to its members, but not otherwise disclosed.”

Similarly it might be urged that provision for inspection by three out of five members of an administrative board required by law to decide specific cases at a public hearing is unconstitutional because it involves an unauthorized “prejudgment” of the case. If this argument is entertained, it would again lead to the elimination of an important reason for requiring special qualifications. The board would be deprived of an important source of primary evidence. It seems, therefore, that this objection must also fall. That the board is furnished with a written copy of the findings which will be considered along with the other evidence seems a sufficient guarantee against arbitrary action by such committee.

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12 All members of the inspection committee, save the Chairman, receive special compensation for each inspection that is made. See also Rules '27, Art. X.

13 244 N. Y. 280, 155 N. E. 575 (1927).

14 Examples of some objectionable inspection reports are given infra at pp. 145 et seq. As to the matter of prejudgments, there is another situation where the objection may be raised. It is the practice of the chairman and his staff to assist an applicant in the preparation of his papers. “Critics have urged that applicants should be given no information relating to the merits
Effect of taking an appeal to the board.

Unless the officer from whose action relief is sought certifies to the board that a stay in the enforcement of the order pending the appeal therefrom would endanger life and property, all proceedings are suspended by reason of such appeal. And even if the official does so certify, the applicant, upon showing cause, may get a restraining order from the board or supreme court.

The Public Hearing.

Date and notice of the administrative trial.

When the call of the Clerk's Calendar is over, the case is marked for hearing on the "Trial" or "Hearing" calendar. At least fourteen days' notice of that date is given by publication in the official weekly bulletin.

Charter provisions.

The Greater New York Charter contains nothing as to the manner of conducting this hearing save (1) that it shall be open to the public, (2) that "the board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice thereof to the parties and decide the same within a reasonable time," (3) that no hearing may be held unless at least four members of the board at-

of cases in order that the matter may come up the same as before a jury. I think that this view is too extreme. If the lot owner cannot get help at headquarters, he has nowhere to go but to expensive specialists. On the other hand, it is improper for any lot owner to seek help beforehand from any member of the board except the chairman. The reason for this distinction is * * * that the chairman has given his whole time to the work of the board, is daily in attendance, and is the head of the office administration. He is presumed to be able to advise on procedure in difficult cases without prejudice to his later decision on the merits after public hearing. * * *" Extract from a "release" issued by Edward M. Bassett, Counsel of the Zoning Committee, Nov. 6, 1926. In the Matter of Village of Saratoga Springs v. Saratoga Gas, etc., Co., 191 N. Y. 123, 148 (1908), a similar argument was disposed of. It was there objected that the employees of the commission could make inspections and reports based on facts that are not sworn to. The court answered that this was not unconstitutional because the commission could be requested to summon these witnesses and have them take oath that the statements in the report were true. This could hardly be done here because the members of the board make up the membership of the inspection committee.

15 Charter § 719-14.
Pursuant to its power to make necessary rules and regulations, the board has developed its own procedure for its "trials." Before venturing a summary of this administrative trial technique, the rather extensive powers of the chairman deserve special mention. The new rules give him disciplinary power over the members of the board and those appearing before it. "Discourtesy or disorderly or contemptuous conduct shall be regarded as a breach of the privileges of the Board and shall be dealt with as the chairman deems proper." A sergeant-at-arms under the direction of the chairman maintains "order and decorum" in the hearing room and lobbies. Subject to the contrary will of a majority of the board, the chairman may decide all points of order and procedure. His is the exclusive power of appointing all inspection committees of which he must also be a member. The chairman also has full power to engage and direct the employees that he deems to be necessary to carry on the work of the office. A function which is nowhere mentioned in the provisions of the law or of the board's own rules is that of advising applicants in filling out the proper forms and indicating under which section of the zoning resolution the application had best be made. Advice of this nature is given by the chairman during regular consultation hours. This eliminates the need of expert advice and brings the means of taking an appeal within the financial reach of all. That such participation by the chairman in formulating the case for the petitioner is objectionable

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16 See Charter §§ 718 (d) and 719-5. Under similar charter provisions, Buffalo's zoning ordinance prescribed sixteen days' notice of the hearing. But there was not a provision for notification of the interested persons of the subject-matter to be considered. On that account, the decision of the board was upset. In re Cobb, 217 N. Y. Supp. 593 (1926).

17 Charter § 718 (b), 1. Any change, amendment or repeal of the rules must be preceded by publication in the Bulletin at least ten days before and a public hearing held on a fixed day. And see Rules '27, Art. VII, § 1.

18 Rules '27, Art. II, §§ 5, 6, 7, on discipline are new.

19 The room in which the public hearing are held is on the 10th floor in the Municipal Building. It has a seating capacity for perhaps eighty people. Inside the railing there is a crescent-shaped platform. The chairman sits at the farther end; the members on either side. Underneath the chairman's place are the places for the secretary and stenographers. When the number of their case is called, the contestants step inside the railing to argue it.

20 Charter § 718 (c) requires the chairman to be a member of every inspection committee. For other powers of the chairman, see Rules '27, Art. XV, "Officers."
because it involves a “pre-judgment” has been denied by Edward M. Bassett. His argument was previously summarized in a footnote.21

**Order of presentation.**

The earliest Rules of Procedure required that any one wishing to be heard by the board must leave his name with the secretary beforehand. And it was provided that “Those in opposition to any proposed action shall be heard first unless otherwise ordered by the board.”22 That has not been abandoned in favor of the more natural procedure of allowing the petitioner to state his case before the arguments of the opposition are heard. The applicant then has an opportunity to reply.

**Who may appear before the Board.**

Whoever is “aggrieved” by an administrative order may bring the appeal; any person or persons “interested” have a standing as objecting parties. It will be recalled that parties on either side are ascertained when the Clerk's Calendar is called at which time the objectors are obliged to submit verified statements of the facts on which the objection is based and affidavits of property ownership. Lawyers are usually employed to appear, but not infrequently architects and others trained in building matters represent the contestants. It is quite common for the opposition, fired with the ambition to make a “grand showing” that a “high class” neighborhood is involved, to produce a crowd of property owners (middle aged women and old men usually) who proudly arise in a body as their representative is called on to state his case. Of course, one or two will be asked a question by the chairman about the character of the district perhaps, or the effect of the proposed building on a particular piece of property adjoining or on the other side of the street. But the presence of these people, while not objectionable, does not have its intended effect on the board.28

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21 Supra, note 12.
22 The first Rules of Procedure were adopted July 28, 1916. See “Building Zones,” by George B. Ford, at 19 et seq. They were of no effect “* * * because the board of appeals had not power to make rules governing the operation of the building zone resolution until the enactment of Chapter 601 of Laws of 1917.” People ex rel. West Side Mortgage Co. v. Leo, 174 N. Y. Supp. 451, 459.
23 “The board of appeals is not a legislative body like the board of estimate. It is more like a court. Whatever reason may exist for crowds turning out before the board of estimate does not exist in the case of the board of appeals. What the board of appeals wants are the facts.” “Crowds Not Necessary at Hearings,” a release by Edward M. Bassett, Dec. 22, 1923.
Evidence.

Problems as to the retention, abrogation or modification of the common law evidentiary rules by an administrative board which, in the conduct of elaborate investigations of facts, must rely on witnesses, are not present here. Though the chairman of the board has the power to administer oaths and compel the attendance of witnesses,\textsuperscript{2} that is rarely done. The explanation lies in the nature of the facts upon which the board must predicate its action. What the board needs to know is the location of the land or building involved, its present use, the contemplated use, the nature and use of the surrounding property, the attitude of the property owners toward the proposed structure, the financial consequences of denying the petitioner's request for a variation in the literal enforcement of the law. Those are the facts. What conclusion will follow depends first upon whether the established facts bring the case within any of the exceptions enumerated in Section seven or within the general power under Section 21 and then, upon whether the board decides this to be an appropriate case in which to exercise its jurisdiction. It becomes apparent then, that the best means of acquiring the essential facts are: (1) Documentary evidence consisting of maps, plans, photographs—copies of which must be furnished to each member of the board; (2) written reports by committees of inspection; (3) facts known independently by members of the board. In People \textit{ex rel.} Fordham Manor Reformed Church \textit{v.} Walsh,\textsuperscript{23} the Court of Appeals annulled a determination of the board and sent the case back to the board because the record did not indicate either the facts proven or the facts independently known to the board from which the conclusion arrived at could be inferred. But the general method of acquiring evidence was approved:

"The statements of the witnesses do not have to comply with the technical requirements applicable to testimony in court. They are not even under oath. It is enough that reasonable men could view them as entitled to probative effect. * * * Without any witnesses at all, it may act of its own knowledge."

\textsuperscript{2}A provision to that effect was added to §718-3 of the Greater New York Charter by N. Y. Laws 1920, ch. 348, which was passed April 27, 1920.

\textsuperscript{23} \textit{Supra}, note 13.
The Administrative Decision.

The board's "final determination."

Originally the board consisted of six appointed members and the chief of the Fire Department. It was provided that:

"Hearings on appeals shall be before at least five members of the board of appeals, and the concurring vote of five members of the board of appeals shall be necessary to a decision." 26

But what is a "decision"? If the customary meaning of the word were applied, there would not be a final disposition of the case unless five votes were cast for or against the applicant. But though the court in People ex rel. New York Central Co. v. Leo 27 criticized the ambiguity of the Charter provision, it took a different view of what "decision" meant. It was there argued that the normal use of the word would lead to a situation where an applicant receiving four votes in his favor and two votes against him was worse off than one whose application was denied by a vote of five to one; the latter could immediately seek court review, whereas the former needed to wait for a final 28 disposition of the case. The provision was, therefore, taken to mean that an application failing to receive five concurring votes in its favor is deemed to be denied. Though it was hardly necessary to do so, this construction was rested, inferentially at least, upon the assumption that the board's function was not judicial in nature.29 A less technical explanation and one more consistent with the later cases which emphatically declare that the board of appeals is a quasi-judicial body, was offered by Edward M. Bassett.

"Inasmuch as exceptional situations only come before a board of appeals there is always a presumption that the

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26 Charter §718-d.
28 The court will not review the proceedings before the board unless there has been a final determination. People ex rel. West Side Mortgage Co. v. Leo, 174 N. Y. Supp. 451 (1919).
29 "It is true this construction is not in accordance with the customary method of determining appeal in judicial proceedings, but I know of no reason why the Legislature should necessarily follow such customary methods in the case of appeals of the kind provided for in the statute now under consideration." New York Central Co. v. Leo, supra, note 27, 173 N. Y. Supp. at 219 (per Giegerich, J.).
applicant should observe the strict letter of the zoning ordinance just the same as all other citizens. Therefore if an exception is to be made in his case, the vote of the board should be greater than a mere majority. In other words, an applicant desiring an exception should be able to convince a large proportion of the board. On the other hand it should be possible for a mere majority to refuse to make an exception so that there may be a decision of denial on which the applicant can ask for a court review."

When the Charter provisions were amended, the clause was changed to conform with the view expressed by the court. If a hearing is held before four members only and the applicant received three votes in his favor, the case will be laid over to be heard again before the full board; if the vote is two in favor and two against the applicant, the action will be equivalent to a denial because the fifth member could not change the result.

Reconsideration and rehearing; administrative finality.

It seems clear that the board should have power over its own determinations to the extent of making changes in the wording or even in the nature or extent of the safe-guarding conditions. Of course, the board’s action ought not prejudice the applicant who had already suffered a change of position in reliance upon the determination as granted. Considerations of fairness support provisions for a rehearing upon the presentation of new evidence. The

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30 "The Board of Appeals in Zoning," p. 22.
31 "The concurring vote of four members of the board shall be necessary to reverse or modify any order, regulation, decision, or determination, or to a decision in favor of an applicant upon any matter upon which the board is required to pass under any law, ordinance or resolution, or to effect any variation in such law, ordinance or resolution. * * * Municipal Assembly, Local Law No. 13 (1925).
32 Rules 27, Art. IV, § 7. But under a statute that requires the concurring vote of three of the five members for a final disposition, an even division when only four are present ought not be deemed a denial, because the vote of the fifth would make a difference and the applicant is entitled to a hearing before the full board. It is submitted, therefore, that Richard v. Zoning Board of Review, 130 Atl. 802 (R. I.), reached an unfortunate result.
33 It was held that the board had power to correct a clerical error in its decision without a rehearing. Barker v. Boettger, 124 Misc. 461, 208 N. Y. Supp. 295 (1924). And see People ex rel. Flengenheimer v. Walsh, N. Y. L. J., decided April 27, 1918, at 328, where an injunction was denied because the irregularity in the board’s decision was of no consequence.
engineers will report on the new data, the request for rehearing will be presented to the board, and if four of the five members approve, the case will be set for "calendar call" and from then on, the same procedure is followed as in the ordinary proceedings preliminary to the first public hearing. 34

Serious difficulty was encountered by the board when it essayed to control its final decision in a case for purposes other than to change its wording or qualifying conditions, or to grant a rehearing on the basis of new evidence. The rules of procedure adopted June 6, 1918, and continuing until the adoption of the new rules February 15, 1927, provided as follows: 35

"No application, appeal or petition dismissed or denied can be considered again except (1) on motion to reconsider the vote or (2) on request for a rehearing."
The word "rehearing," it appears, was used with reference to a situation where the petitioner offered new evidence and need not detain us longer. In an explanatory sentence of the rules, it was said that:

"No motion to reconsider can be entertained unless it is made by a member of the board who voted against the application ** (and if such motion is passed) ** the case must be put on the calendar for a public hearing."

And in another paragraph on this point, it was stated that:

"Either board may, on the motion of any member, review any decision that it has made, and may reverse or modify such decision, but no such review shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified." 36

Before we go on to see the effect of three court decisions on the question of reconsideration and rehearing, it must be observed that the last quoted paragraph adds a third way for the board to deal with a case that it had previously decided.

An answer to two questions is sought: (1) Has the board power to "reconsider" its final determination, viz., to grant a rehearing in the absence of new evidence? (2) Has the board power to

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34 Rules '27, Art. IV, § 5.
35 Rules '18, Art. IV, §§ 3, 4, 5, 6 and 7. 3 Bulletin, No. 23, p. 674.
36 It will be recalled that up to 1925 these rules governed the board of standards and appeals as well as the board of appeals.
"review" its decision upon motion by any member? An affirmative answer was given to the first question in People ex rel. Brennan v. Walsh. Judge Callaghan, speaking for the Special Term, expressed his reasons in this manner:

"The Board of Appeals is a quasi judicial body and should not ordinarily be permitted to sit in review of its own decisions and revoke action once duly taken. * * * But, having regard for the power granted to the Board of Appeals by the Building Zone Resolution with the idea of bringing about a uniformity of building, * * * it seems more reasonable to conclude that there is power to recall and correct orders than to hold that the sole method of correcting is in courts through a writ of certiorari." 38

A year later the question came up before the same court and Judge in People ex rel. Swedish Hospital v. Leo 39 and was decided the other way. Judge Callaghan frankly reversed his position stating that absence of finality in administrative proceedings makes the contrary position untenable. 40 In the second case, the learned judge believed the quasi-judicial nature of the board's jurisdiction compelled a negative answer to the question of whether it may reopen and redetermine a case on the same evidence. Matter of Equitable Trust Co. v. Hamilton 41 relied upon in the previous opinion to reach the opposite result, was distinguished on the ground that the rehearing of a claim was proper because the audit of a claim by the board of supervisors is administrative rather than judicial. On the other hand, it was said:

"The board of appeals can in no sense act other than in a quasi judicial capacity. It does not perform a single administrative or legislative act. As its name implied it is an appellate tribunal. It passes upon matters formally brought to its attention much the same as courts. It hears

40 "In People ex rel. Brennan v. Walsh, a contrary view was expressed, but pride of opinion does not compel an adherence to a decision which incorrectly states the law." Supra, note 39, at 359.
41 Supra, note 38.
evidence and argument and decides controversies as the evidence dictates." 42

When in yet another case, the Appellate Division dealt with the question, 43 it was urged in support of the board's power to "rehear" a case on the same evidence that the board was not acting as a quasi-judicial tribunal but in a purely administrative capacity of enforcing the law in an exceptional rather than ordinary manner in special situations. But this was rejected and People ex rel. Swedish Hospital v. Leo was held to control. Then an altogether new attack was attempted. It was argued that the Charter authorized the board to review its decision in that it was there provided that

"Any rule * * * order * * * decision, from which an appeal may be taken to the board of appeals may be reviewed by the board of appeals upon motion of any member thereof, but no such review of a decision upon an appeal shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified." 44

Judge Manning rejected the argument that this provision justified the board in rehearing a case that it had finally disposed of, by saying: 45

"As I interpret the section, a review may be had by appeal from a decision or determination of the superintendent of buildings upon motion of any member of the board of appeals, but I do not believe it confers the power on the board of appeals to review of its own free will an appeal once heard and determined by the board itself in what appears to me a quasi-judicial manner and not in an administrative manner as asserted, where the Charter provides certiorari for such purpose."

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42 Supra, note 39, at 359, 360. The statement which is frequently quoted is slightly misleading because the board is not entirely an appellate board. "The application to the board, though called an appeal, is not strictly such, but is a matter of its original jurisdiction." People ex rel. Kannensohn Holding Corp. v. Walsh, 120 Misc. 469, 199 N. Y. Supp. 534 (1923).

43 Matter of McGarry v. Walsh, 213 App. Div. 289 (1925). It is interesting to note that the board was not impressed with the dignified appellation "quasi-judicial body."

44 Charter § 719 (6).

45 213 App. Div. at 297.
It will be observed that Judge Manning answered our second question (i.e., has the board power to review its own decisions?) in the negative. The board has neither the power to rehear upon motion of the applicant or to review upon motion by one of its members, any case that it has once disposed of unless there is new evidence. In view of these decisions, the board of appeals in formulating its new rules omitted entirely the paragraph about "reconsideration," but retained the provision previously quoted, to the effect that "the board may, on the motion of any member review any decision that it has made." Matter of McGarry v. Walsh which held that the board did not have that power, was decided two years before these Rules of Procedure were adopted by the board. Similarity in phrasing reveals that the Charter provision allowing a member of the board as well as any aggrieved person to initiate proceedings to change or reverse an order of the superintendent of buildings or other official, was erroneously understood by the board to allow it to review "any decision that it has made" upon such motion. Certainly there was no excuse for the retention of the rule after Matter of McGarry v. Walsh. The writer, therefore, ventures to submit that Article IV, Section 6 of the Rules of Procedure should be removed.

Form of the administrative decision.

By the Charter, the board of appeals was given power "to hear and decide" all matters referred to it by the zoning ordinance. In another place, the Charter prescribed that:

"The decision shall be in writing and shall be filed in the office of the board and promptly published in the bulletin of the board. Each decision shall so far as is practicable be in the form of a general statement or resolution which shall be applicable to cases similar to or falling within the principles passed upon in such decision."

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46 The rules still state that there are two ways to get the board to reconsider: (1) to reconsider the vote; (2) to move for a rehearing. But the succeeding paragraphs define the rehearing and omit mention of the "reconsideration." The word was probably left by mistake, unless it takes care of postponements where the vote taken is not properly a final determination either way. Rules '27, Art. IV, §§ 4-6.

47 See Laws 1917, ch. 601, amending §§ 242-a and 242-b of the Charter to that effect.

48 Charter § 719-5.
The nature of the decision is argumentatively indicated by the Charter when, in providing for the filing and publication of the resolution, it is stated that "every order, requirement, decision or determination of the * * * board of appeals shall immediately be filed in the office of the board and shall be public record." For any other details we must look to the board's Rules of Procedure.

Every decision of the board is in the form of a resolution which, in its preliminary clauses, recites the findings of fact. It will later be seen how important the content of such recitals are in relation to the strict rule imposed by the reviewing courts that the content must clearly indicate the facts upon which the board based its conclusion. The resolution decides either to grant the application by "reversing, varying, or modifying the order, requirement, decision or determination appealed from," or to affirm the order by denying the application.

The board adopts its decision in this manner. After both sides have presented their arguments, the chairman or the clerk at the chairman's direction reads the preliminary clauses which state the facts. If it is a resolution to grant, it is apt to be long, and the chairman then and there reads off the conditions upon which the variation is granted. The roll is then called. Specific provisions in the Charter, as well as in the Rules of Procedure, call for each member to record his vote. If present, a member has but one excuse for not voting, viz., a member may not vote if he or any corporation in which he is a stockholder or security holder is interested in the case.

Provisions for Judicial Review.

Taking the case to court.

Those who are aggrieved by any decision of the board of appeals may, jointly or severally, present to the supreme court, a verified petition, setting forth the illegality of the decision and the

40 Charter § 718-4.
50 N. Y. Cent. Co. v. Leo, supra, note 27, criticized the former practice of the board to grant or deny the appeal when it was authorized to reverse, modify, or vary the order, etc., appealed from. Cf. Art. IV, § 2 in Rules '18 and '27. See also Charter § 718-d, as amended by Local Law No. 13 (1925).
51 The relevant provisions are §§ 719 (a), 1 to 6, of the Greater New York Charter.
grounds thereof. The petition must be presented not more than thirty days after the board filed its decision or published it in the Bulletin.

**Allowance of a certiorari order.**

After the presentation of this petition, the court may allow a certiorari order directing the board to serve a return thereupon on the relator's attorney within a prescribed time which must not be less than ten days from the date of allowance. The order is returnable to the supreme court of the judicial district in which the property affected is situated.

**Effect of the allowance.**

The allowance will not stay proceedings upon the board's decision unless the court on application and after notice to the board decides there is cause for granting a restraining order.

**The nature of the "return" required.**

The board need not send its original records, but it must present a full transcript of the proceedings before it. And "the return must concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from. * * *" 53

**Scope of judicial review.**

The court may reverse, affirm or modify, wholly or in part, any decision of the board which is brought before it for review.

**The court's power to take testimony.**

"If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made." 54

This provision has been restricted in meaning to authorize the court to take evidence or order a reference only for the purpose of dis-

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52 The writ of *certiorari* was abolished, and wherever that is mentioned in the statute, the *certiorari* order is to be substituted. Civil Practice Act (1925) §§ 1283 et seq.

53 Charter § 719 (a), 3.

54 Ibid. 4.
covering whether this was or was not a proper case upon which the board could act, i.e., there is no finality as to the board's determination that it has jurisdiction to act.”

Costs.
Unless there was gross abuse of discretion or bad faith, costs will not be assessed against the board.

Preferences.
“All issues in any proceeding under this section shall have preference over all other civil actions and proceedings.”

V.
PERFORMANCE OF THE BOARD:
ITS TECHNIQUE AND ACCOMPLISHMENT.

Administrative Methods.
Introductory.
When the board of appeals was in operation less than three years, Edward M. Bassett, in reply to a question concerning its work, said:

“This board has a regular calendar. It passes on its cases after deliberation like a regular court. Millions of dollars of property go under its consideration and its work goes on smoothly.”

It is hoped that the content of this chapter will enable the reader to judge for himself. We have examined the procedure, the manner in which the administrative machinery is set in motion, the steps to be taken to procure an administrative “trial” and decision, and the method by which such determination may be brought before a reviewing court. The more difficult task of looking into the temper of the board, its attitude to the problems that come before it and the technique which it has developed for their disposition, is now before us. It has been recognized that the temptation to right an apparent wrong may lead the board to overstep its proper authority.

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55 *Infra* Chapter VI.
56 *Supra*, note 53, at 6.
2 “The Board of Appeals in Zoning,” p. 16.
In People ex rel. Brannon v. Walsh, the court annulled the board's determination and made this comment:

"There is a natural desire for boards of similar jurisdiction to magnify their power and extend it no doubt in good faith in many instances; but, unless curbed, the magnifying of their powers would lead to a total disregard for the statute."

On the other hand, the board has been recognized as a necessary instrument of constitutional zoning, for, where it acts within its powers,

"* * * the inequalities and injustices resulting from a strict enforcement of a general zoning ordinance will in most instances be avoided; the board in this respect acts with something of the ancient powers of a court of equity in a field where the law by reason of its generality works an injustice."

It is the behavior of this modern instrument in its role of dispensing equitable relief in particular cases that now engages our attention.

Conduct of the "administrative trial."

Proceedings at the public hearing though governed by the rules as previously described, are nevertheless very informal. Since there is no privilege of cross examination, each side is subjected to interrogation by the chairman. Apparently there are not rules as to the scope of questions or answers. Anything that is relevant will be heard. But inasmuch as the board may itself have knowledge of the case through the written report of its inspection committee, or from its previous experience in the locality involved, either side may be interrupted by the chairman and be told that further elaboration of an argument was unnecessary or perhaps futile because "we know all that." In other instances, the chairman will turn to the chief of the Fire Department, a member of the board, to consult him about what was just said in argument concerning a building or street referred to. Not infrequently a petitioner will be interrupted to be told of a similar case that the chairman recalls. Of course, the board is not bound by its own decision. Its "raison d'être" is the need of a particularized judgment in each case. And so the similar case seems to be introduced only by way of argument, that

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ZONING ADMINISTRATION

is to say, the petitioner may nevertheless win 'by producing special facts, or additional evidence of "unnecessary hardships." And failure to meet the challenge to produce stronger evidence will probably lead the board to follow its previous decision. And so while the doctrine of stare decisis does not prevail here, reasons psychological and practical in nature may influence the board to found its determination of the instant case upon one previously decided under similar circumstances. In any event, the board's practice is not to cite the precedent in its final resolution. The reason is perhaps that each case must be sustained by its own strength, for in the event of judicial review, the court will not be content with a precedent, but will insist upon a full statement of the grounds for this decision.5

The informality of the chairman's conduct has been commented upon in two cases. The decision of the board was disallowed by Judge Dowling speaking for the majority in Application of Goldenberg v. Walsh, and it was there said:

"The so-called 'hearing' before the board consists principally of colloquy between the chairman and an objecting property owner. * * * Much of the dialogue between the chairman and this objector was devoted to a discussion of general garage conditions in the Bronx, having nothing whatever to do with the merits of the application then pending." 6

And in an earlier case, the Special Term said:

"The hearing had before the board was the usual cursory proceeding commonly had there with little regard for the real essentials or merits involved in the controversy." 7

In the first case the opinion that gave rise to the general indictment of the board's method of action was reversed by the Court of Appeals; in the second, the universality of the statement was hardly necessary to the decision because the board was clearly in error when it premised its denial of a permit to avoid "the desecration of the community." Whether deserved or not, both strong utterances reveal how this informality is apt to irritate a reviewing judge who

5 See infra.
sees it properly and certainly in good faith. A similar innuendo may be discerned in the language of Judge Cardozo:

"Upon a record made up for the most part of informal colloquy with counsel, the board granted the petition, one member dissenting."  

This matter is wholly within the control of the chairman and it would be wise for him to do his utmost in reducing to a minimum the "colloquy" and "general discussion." Of course, much of this talk gets into the record because of the board's conciliatory policy and desire to have the parties before it see just why discretion dictates one decision rather than the other and why the added conditions are necessary.

That the board does realize the seriousness of its task despite the air of informality, may be illustrated by a passage in the transcript of its proceedings in connection with the application for a variance in the use of the Astor property on Madison Avenue. The question was whether the vote should be taken that day or a subcommittee appointed for further investigation.

Chief Kenlon: "Learned counsel on both sides have been over every point in the arguments here. But the principal point to my mind is that we should eliminate the fact that it concerns Mr. Astor, or Lord Astor as Mr. Baylies puts it. * * * We consider only whether this is a proper extension and what our powers are in regard to it; whether such an extension would improve conditions there or depreciate the value of the property in the neighborhood."

Mr. Baylies, representing the objecting residence owners, then suggested that printed record and documents be considered in subcommittee or in executive session.

Chief Kenlon: "I take exception to your statement, on the grounds that all cases are heard in public. This is an important board and this is the greatest case we have had yet. The law requires that we discuss and vote on it in public. I do not want a committee; we are here and ready

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8 People ex rel. Fordham Manor Church v. Walsh, 244 N. Y. 280, 285 (1927).
to decide. We are intelligent men,—I think we are anyway; and I think every man is familiar with the case.”

The reports of inspection committees.

Examination of the premises and locality by the experts who will participate in deciding the case is an important, primary source of evidence. The object of the inspection committee of which the chairman must always be a member, is to find the facts and submit its recommendations to the board. It is particularly useful to have an inspection because the board is then in a better position to judge whether a denial of relief would result in unnecessary hardship, or whether (if there is such hardship) the proposed non-conforming use is suitable for the district; and if it is, what conditions need be exacted to safeguard the neighborhood. Three committee reports will be used to illustrate the actual operation of the board through this evidence-finding device.

1. Where unnecessary hardship would not result. This was an application for a permit to build a forbidden public garage in a district which was designated “business” on the map but which was as yet undeveloped. A dominant use had not yet established itself, but the presence of a playground and a school nearby as well as the two-family dwellings situated in the sidestreets, led the zoning authorities to believe that the locality in question could be used for small neighborhood stores and shops. The reasoning of the committee recommending a denial of the application was as follows:

“(a) The mere existence of a non-conforming use in the nature of a wet-wash laundry * * * before the creation of the Zoning Law, is not sufficient to warrant the further invasion of the district with prohibited uses.

(b) After a description of the surrounding property, the committee observed that the pupils of the school use both Herzl Street and Douglas Street not only to reach the playground but to get to their homes.

(c) The extensive development of the side streets with conforming uses in the nature of dwellings would seem to indicate the necessity of shops on Livonia Avenue for the

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9 Transcript of Proceedings of the Board of Appeals on Apr. 30, 1918, in connection with the case, People ex rel. Sheldon v. Board of Appeals, 234 N. Y. 484, as reprinted in the brief for the Relator-Respondent.

10 9 Bulletin, No. 6, p. 158 (1924).
accommodation of the neighborhood, and the reasonable and practical use of this property for store and business uses and community requirement.

(d) The committee therefore believes the element of hardship does not prevail, *in that the property may be used for conforming structures, and recommend denial of the application."

2. Where there is hardship, but the suitability of the proposed variation is in question. Twenty-five persons filed objections to the petitioner's application which was based on Section twenty (now twenty-one), *viz.,* unnecessary hardship. The inspection committee reported that the board would be justified in granting the appeal with appropriate conditions, "if it can be shown that the petition on file (in opposition) was engendered by other than substantial, presumed offense." And the reason for the committee's approval of the proposed non-conforming use was thus expressed: 11

"From a general observation of the neighborhood it would appear that there are no public garages for the accommodation of these apartment house developments. It cannot be denied that there is a community requirement for garage use. *The point the board may well bear in mind is where public garages could best be placed with least offense to the neighborhood and properties."

3. Where the committee is concerned only with safeguarding conditions. It was found that the business area as to which the request for a variance was made "was evidently established by the Board of Estimate as a *buffer district* between the residential use of Ocean Parkway and the unrestricted use of Caton Place." The report therefore concluded:

"The committee feels that the granting of this application, with proper restriction as to height, entrances, etc., *would be an equitable adjustment permitting the reasonable use of this property."

12 *Ibid.* at 158. And *Cf.* 10 Bulletin, No. 3 (1925), case number 1128-23-BZ, where a committee was appointed for the express purpose of reporting on the advisability of imposing the condition that no vehicular use or opening shall be maintained on a certain street by the applicant if he is allowed to operate a garage there.
Because of the task of inspection in determining whether a denial or equitable adjustment would entail unnecessary hardship or whether a building devoted to a conforming use would yield an income proportionate to the value of the land, or if in any event the harm to the whole district far exceeds the hardship resulting, is admittedly a delicate one, the viewing committee may be tempted to the broader domain of generalization on "community interest." When it does so and the resolution of the board incorporates that report as its main ground for action, the determination will not be allowed to stand.\textsuperscript{8} And it is not the concern of an inspecting committee to recommend a denial because the applicant was so bold as to begin the proposed extension in violation of the law. Accordingly the board's decision which was based on such report, was deemed illegal. The report in People \textit{ex rel.} Kannensohn Holding Corp. \textit{v.} Walsh concluded in this manner:\textsuperscript{14}

"The expression of the committee as to the disapproval of this appeal was for the reason that the building was and is being erected on the presumption of a disregard for the Building Zone Resolution and the committee therefore recommends the denial of this appeal."

Despite the analogy of orthodox equity powers being vested in the board, it must act within its statutory authority and not invoke the familiar equity rule of "clean hands."\textsuperscript{13}

\textsuperscript{8} People \textit{ex rel.} Smith \textit{v.} Walsh, 211 App. Div. 205, 208, 207 N. Y. Supp. 324, \textit{aff'd}, 240 N. Y. 606, 148 N. E. 724 (1925). The ground of the board's action was that "There seemed substantial community requirement for automobile storage and accommodation and that the community interest would best be served and the integrity of the Zoning Resolution maintained by permitting," etc. The board's action was fortunately saved because, though the stated reason was erroneous, there existed in fact unnecessary hardship. The court went into the matter and found that was the fact. On appeal the Court of Appeals affirmed the case on the merits, but stated that a sounder procedure requires the case to be sent back to the board. Since no substantial damage was done, the opinion was allowed to stand.

\textsuperscript{14} 120 Misc. 469, 471, 472, 199 N. Y. Supp. 534.

\textsuperscript{13} Good faith or the lack of it is material only to determine the question of unnecessary hardship, thus: An applicant established that he had bought some property with the intent to construct a building, the ground floor to be devoted to stores. After the purchase and while plans were being prepared, the board of estimate, in amending the map, put this plot into a residence district. The board held that there was unnecessary hardship in the strict enforcement of the law, emphasizing the fact that the petitioner bought the property in good faith. 9 Bulletin, No. 5, p. 125, Case No. 1194-23-BZ. And
The nature of the protective conditions.

Unquestionably the outstanding feature of the board's technique is the power to grant applications conditionally. That the board possesses this power is important, but the manner of its exercise is more so. As early as 1699, there is an entry in the Minutes of the Common Council of New York City containing the report of "the Committee appointed to view the place whereon Jasper Nessepot intends to build a mill at Kings Bridge." It was recommended that the petition be granted—

"on condition that he take out of the way the stones and rocks on the other side thereof, that the same may not hinder the passage of boats and canoes and when any is to pass, at their reasonable request, he is to shut his sluices and on the other side of the bridge erect a post in the water and have a rope ready to assist them in passing."

These conditions were given in full to indicate the element of bargaining, the element of exacting a price for the permission to build the mill. Anyone present at the hearings of the board of appeals will soon be persuaded that here, too, there is bargaining. Perhaps it is fairer to say there is compromise, the process of give and take, so necessary in the adjustment of competing interests. If the petitioner is to be allowed to extend his building devoted to a business use, into a residence district, it is fair to have him agree not to maintain delivery entrances with the attendant noise and dirt on that side of his building which fronts on the residential street. It is perhaps another matter to impose upon him requirements that are frankly aesthetic in nature. And if it is not improper for the board to impose conditions of that character under the formula of "to preserve the amenities of the neighborhood," what is the limit of its authority to do so? The court has not yet had occasion to

compare the case where an applicant knowing the district to be zoned "residential," purchased a corner lot with the intent to build a garage there and upon the assumption that it was a proper case for a variance. He was mistaken and the board's denial that there was "unnecessary hardship" was sustained. People ex rel. Apollo Bldg. Corp. v. Walsh, N. Y. L. J., Aug. 9, 1926. A similar case is People ex rel. Hamal Co. v. Walsh, N. Y. L. J., Aug. 7, 1925, at p. 1602.

16 Minutes of the Common Council of the City of New York (1675-1776), 98.

deal with a case where the jurisdiction of the board to act is undisputed but objection is made to the nature of the safeguarding conditions imposed.

What legal sanction is there for the power to fix conditions? Nothing specific is found in the enabling provisions on the point. The answer may be contained inferentially in the broad language of those provisions granting the board power to vary the application of the law “so that the spirit of the law shall be observed, public safety secured and substantial justice be done.” 18 Section seven of the zoning ordinance which, it will be recalled, enumerates the exceptional cases wherein the board may determine and vary the use district regulations, mentions conditions twice. Its introductory paragraph states that relief may be given in appropriate cases “subject to appropriate conditions and safeguards.” Section seven (c) allowing the board to authorize the extension of an existing building into a more restricted district also gives it power to impose “such conditions as will safeguard the character of the more restricted district.” Strangely enough Section twenty (now twenty-one), conferring the general power to vary where hardship exists, contains nothing about conditions. The board itself has never deemed it helpful to express its policy as the imposition of protective conditions. There are no rules as to the manner of wording them. One attending a public hearing of the board would be sure to note that at the end of the argument, the chairman announces that there is a resolution to grant on condition that—and then the conditions are by him enumerated. The roll is then called. Neither the Rules of Procedure nor any of the board’s general resolutions concern themselves with this important source of power. The only time it is mentioned is when the administrative officer is directed to inform the board when the conditions are not observed. The board did announce its policy as to “time conditions,” i.e., the time within which the necessary permits for the building contemplated by the resolution were to be procured and how long thereafter the work was to be completed. 19 Of the other conditions, those which in their operation give the board greatest opportunity affirmatively to control the structure, use and appearance of the non-conforming

18 Charter § 719-5.
buildings that it allows, nothing is said. The exact nature and scope of these conditions will now engage our attention.

Except for some typical conditions that the board uniformly imposes when dealing with the construction and design of garage roofs and skylights, the control in number and style of vehicular openings, the description of front walls and walls that shall remain unpierced, each set of conditions is unique. We can get some idea of their nature by examination of some samples.

1. An early case, October 3, 1916.\(^{20}\) Resolved that the appeal be and it is hereby granted on condition that the Fulton Street front of the building be so designed as to eliminate any entrances for vehicles and to give that street front the appearance of a business building rather than that of a garage.

2. A petitioner who under law could not build higher than 127 feet, requested a permit for 143 feet straight wall height. It was resolved\(^{21}\) "that the application be and is granted on condition that the height of the street wall shall not exceed 133 feet." In substance the board changed the request. It is mere pretense to grant a 143 feet application on condition that the building shall not be carried higher than 133 feet. But it is not objectionable for the board to impose this condition because it makes it unnecessary for the applicant to make a new application for authorization to build up to the lesser height allowed by the board. But now we come to more complex resolutions.

3. On the ground of unnecessary hardship, the applicant was allowed in a residence district to erect a corner building to be used for stores. The following conditions were imposed:

   (a) They must be retail stores or shops: (b) a delicatessen store or a fish store is specifically forbidden: (c) the remainder of the premises must be used for dwellings: (d) commercial openings, windows or doors were not to be located on Dahill Road: (e) the exterior face of the building on the entire street fronts other than the store show windows were to be finished with "light colored face brick with architectural terra cotta or stone trimmings": (f) the westerly gable wall

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\(^{20}\) Calendar, No. 160. From a collection of 180 early cases decided by the board that were reprinted in "Building Zones," by G. B. Ford.

\(^{21}\) 10 Bulletin, No. 3, Case No. 1198-24-BZ, p. 63.
for a distance of 12 feet from Dahill Road, shall also be faced with front brick: (g) there were to be no signs or advertising of any nature or description permitted on the Dahill Road front, and any advertising on the Ditmas Avenue front was restricted to the plate glass show windows of the stores: (h) the usual time conditions.

Of course this is a far throw from the simple conditions that the board imposed in the early cases. If so many conditions are necessary, one wonders why it was a proper case for a variation at all. Nevertheless such elaborate conditions are not at all exceptional. They are frequent. And along with this development came the board's anxiety lest it be easy to evade the conditions. In a resolution granting an application for a garage fronting on Fifth Avenue to which were attached conditions even more detailed than in the example just given, we, therefore, find a final condition, "that on completion of the structure the architect-appellant shall certify that the conditions as above laid down have been observed in spirit as well as in letter." How that may be enforced is difficult to perceive. A similar condition imposed in another case is better calculated to produce the desired result, namely, "on condition that * * * a return of the proposed finished design of the Thayer Street elevation shall be made to this board for its approval before submitting same to the superintendent of buildings." Of course the regular means of enforcing observance is in the hands of the official who grants the final building permit. And it is provided in the Rules of Procedure that—

"Any administrative official discovering any misstatements of essential information is requested to notify the Board, in order that it may take such action as the circumstances require. All approvals shall remain valid only as

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23 That such conditions are not unusual is evidenced by the fact that E. M. Bassett cited this particular resolution as an example of the board's work. See "City Planning," April, 1926, p. 127.
24 Bulletin, No. 4, Case No. 636-20-BZ, p. 94.
25 Ibid. No. 7, Case No. 1125-24-BZ, p. 190. An inspection may be necessary to determine the necessary conditions. See Ibid. No. 3, Case No. 1128-23-BZ.
long as the *information and conditions* on which the resolution was based are maintained." 26

It seems clear that the exaction of conditions is an important instrument in the hands of the board for the accomplishment of its task to adjust exceptional and difficult cases in harmony with the purposes to be achieved by the restriction of the other property in the district. The use of this device does make for a controlled mobility.27 On the whole, it is not difficult to agree with the opinion expressed by the most prominent exponent of zoning in the country, that—

"These conditional requirements accompanying variances produce remarkable results—results that could not possibly be attained by the comparatively broad regulations of the ordinance itself." 28

But some criticism does suggest itself. Conscious of its power to impose numerous specific protective conditions, the board can more readily be persuaded to grant variances on the theory that the conditions are a sufficient protection. Of course, that would be an improper use of this device. The board must be clear that it has jurisdiction before it can properly act at all. If the established facts bring the case within the board's power, it may consider the wisest manner in which its jurisdiction ought to be exercised. Exaction of safeguarding conditions is not the price for any favor conferred upon the applicant. By hypothesis he has made out a case under Section seven or twenty-one. If he failed, he may be willing to take the granting resolution under any conditions. But that ought not influence the board to act beyond its authority. And just as the board may abuse its power in taking jurisdiction, it may be guilty of a like abuse in the exercise thereof. It is very difficult to draw the line, but it seems that where instead of saying that conditions achieve results that could not "possibly be attained" otherwise, it could fairly be said to be reaching results that "could not constitutionally be attained" otherwise; *i.e.*, a statutory provision for aesthetic purposes—the resolution ought not be allowed to stand. Cases call-


27 Milwaukee is perhaps the only city in which the zoning board of appeals grants or refuses to grant. Conditions are not imposed.

28 1 City Planning, 129, "Zoning Roundtable," conducted by Edward M. Bassett.
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ing for judicial control of the scope of the board's power to impose conditions have not come up. When the board's action was annulled, there were other reasons; when its decision was upheld, the court spoke approvingly of the conditions. In People ex rel. Beinert v. Miller, Judge Benedict, speaking for the Supreme Court, objected to the board's resolution which by operation of its conditions, effected so material a reduction in size and plan of the proposed building as to merit the charge that the board re-made the plans. And therefore, it was argued that this was not really a final determination as required by the Charter because—

"Its decision was in effect to promise, in advance of any application by the owner of the property for approval of new plans * * * that the board would approve such new plans upon appeal, whatever might be the attitude of the superintendent in respect thereof." 29

This decision was reversed in the Appellate Division on the ground that the board did have jurisdiction to act and that abuse was not established.30 It is submitted, however, that while the fact that the variance was granted may not be an abuse of discretion, the nature and extent of the "safeguarding conditions" imposed may render the decision arbitrary and upsettable. The question is not likely to arise save in an extreme case, because (1) though compliance with excessive conditions increases the cost, the applicant stands to lose more if he gets no variance.31 When alternative evils beset him, his eagerness to escape the greater leaves him prepared to accept the lesser. (2) The second reason is that the board is aided by a presumption of correctness once its jurisdiction is established, and the court will hesitate in the usual case to send the case back because the conditions are excessive.

The field of peremptory action.

When an applicant makes fraudulent representations to the board, the board has power to revoke his permit. Revocation by the board of a certificate of occupancy because the petitioner repre-

31 All owners of property affected by the zoning law suffer "hardship". But a general hardship is not "unnecessary hardship" and the applicant will not wish to take his chance in court where he must overcome the presumption of correctness.
sented his land to be 60 feet wide when it was but 40 feet wide was sustained by the court in The Matter of Fontana.\textsuperscript{32} On the other hand where the owner in good faith relied upon a permit erroneously granted him by an officer in the bureau of buildings, the board by resolution decided to let him continue the forbidden use for two years:

"** * * as it appears that the owner at least informed the administrative authority presumed to have knowledge of the law, the board feels an equitable adjustment supports at least a temporary use."\textsuperscript{33}

As to matters preliminary to the public hearing, the board announced that any action "tying the hands of the administrative official in the performance of his duty" will invite summary dismissal of the application. Though the application was properly filed, failure within a reasonable time to complete the papers requested by the board will lead to dismissal of the case.\textsuperscript{34} The same consequences may attend failure on the part of the appellant to appear at the public hearing after being notified.\textsuperscript{35}

\textit{General resolutions.}

General resolutions are confined, practically to a statement of the board's interpretation of the statute as applied to a certain class of property use. It was decided, for example, that offices of doctors and dentists come within the meaning of "sanitarium" and so are not excluded from residential districts. And it was also decided that a Turkish and Russian bath establishment may properly be operated in a "business district." Of a more general nature is the resolution interpreting Section three of the zoning ordinance as follows:

"It is the sense of this board that bill boards are within the purview of the objectionable and prohibited features under the building zone resolution in a residence district."\textsuperscript{36}

\textsuperscript{32} N. Y. L. J., May 19, 1925, at p. 700.
\textsuperscript{34} Ibid. No. 8, p. 190.
\textsuperscript{35} 3 Ibid. No. 21, p. 608.
A public hearing advertised in the usual manner must be had before such interpreting resolution is adopted. Another class of resolutions that are general, are those adopted pursuant to the Charter provision that the board make annual suggestions to the mayor concerning amendments to the zoning ordinance.

Administrative Statistics.

The board is required to submit a report to the mayor at the close of each year. Unfortunately those reports as printed in the board's official Bulletin are of little value for our purpose. In the first place about half of the reports made no attempt to differentiate the cases decided by the board of appeals from those decided by the board of standards and appeals. When that was remedied, just one rough classification of cases appeared: those that are appeals from administrative orders and those that are applications under the Building Zone Resolution. We should like to know more; the proportion of applications granted with conditions to those granted outright; the number of variations in use districts as compared with variances in height and area zones; and the relative number of variances in each of the five boroughs. The reports of the Chicago and Pittsburgh boards of appeals are certainly more informative. Presumably this information would be useful in the work of remaking the zone maps from time to time.

Some idea of the volume of business that came before both boards may be had from figures covering the years 1916-1925. Of 14,401 cases filed, 2,057 were withdrawn, 2,034 dismissed, and 2,507 denied, and 7,678 were granted. It seems that from the very beginning garage cases outnumbered by far all others coming before the board of appeals. From October 5, 1916, when the board first began to function until January 16, 1917, there were 206 cases, of which 35 were left pending and 169 were decided. The following table is based on figures for that period given in an unofficial publication, "Building Zones":

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37 Charter § 718a-5. And see Rules '27, Art. IX, §§ 1 and 2, "Other Resolutions."

38 It seems curious that the New York board, though invited, did not join in the Symposium on Boards of Appeals in Zoning. See City Planning for Jan., 1927, "Zoning Roundtable."

39 The writer was told at the office of the Zoning Committee that such tabulations were not available.
In the whole city 80% of all the cases were for garages for more than five motor cars in a business street where there was an existing garage or stable. 82% of the 98 appeals granted were garage cases; 80% of the 36 appeals denied; 80% of the 17 appeals dismissed; and 76% of the 18 appeals withdrawn. It would be interesting to know if the same proportion of garage cases exists today.

For reasons already explained the second table, showing the number of appeals and applications that were taken to the board of appeals, is incomplete. The figures were taken from the annual reports.

VI.
JUDICIAL CONTROL OF ACTION TAKEN BY THE BOARD OF APPEALS IN ZONING APPLICATIONS.

Introductory.

Where property restrictions imposed by a zoning law are not considered a proper exercise of the police power, the board of
appeals cannot be an effective, constitutional "safety valve." It seems proper, therefore, to ascertain what is the judicial attitude towards the zoning law as a whole. And so we shall briefly examine the significant decisions, not involving the board of appeals, which deal with the effect of the Building Zone Resolution upon private property generally.

It is nowhere denied in the New York decisions that the Building Zone Resolution, adopted pursuant to an authority expressly delegated by the legislature to the city, has the force of a statute. Matter of Stubbe v. Adamson, frequently cited on that point, accords such ordinance the presumption of constitutionality, for—

"* * * however the courts may doubt the wisdom of an enactment they cannot pronounce the same unconstitutional unless able to see either that there is no real substantial evil of public interest to be guarded against or that there is no reasonable relation between the evil and the purported cure or prevention offered by the statute."  

In the first line of cases to be considered, the constitutionality of zoning was present as a collateral issue. Anderson v. Steinway was a case where the seller, seeking specific performance of a contract to purchase land, was met by the defense that because the Building Zone Resolution was passed after the contract was made but before the time of performance, the buyer need not go on in view of the restriction imposed on the property in question. The Special Term held that the zoning ordinance was not an encumbrance and that the buyer had no defense. Upon appeal this was reversed on the ground that if the ordinance was valid, the buyer could not lawfully use the land as contemplated by the contracting parties; if it is invalid, he is burdened with a lawsuit. Some time thereafter, a purchaser under a contract made after the passage of the ordinance, was denied a defense in a suit for specific performance unless special damage was shown. The Court of Appeals, in Lincoln Trust Co. v. Williams Building Corporation, held that

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1 This has been previously indicated by a citation of New Jersey cases. See supra, II, n. 9.
3 Ibid. at 469.
the zoning resolution "was not an incumbrance, since it was a proper
exercise of the police power." Since the contract was made after
the ordinance was passed, Anderson v. Steinway did not apply;
there was not special damage. And the Court of Appeals further
limited the meaning of special damage in Biggs v. Steinway Sons.6
That the zoning law is not an encumbrance on property sold at a
judicial sale was decided by Creighton v. Burns.7 And when at a
judicial sale the purchaser refused to take title on the ground that
the zoning law was being violated on the premises, it was held that
the violation of that law does not constitute a defect in title.8 But
the fact that the zoning restrictions were coextensive with the private
restrictions which the purchaser later discovered, does not obligate
him to accept title. It was held that Lincoln Trust Co. v. Building
Corporation did not apply because the repeal or amendment of the
ordinance would still leave the land encumbered.9

In another line of decisions which directly involve the effect of
the zoning ordinance on private right, it was held that the general
hardship produced by the zoning restrictions afforded no ground
of complaint.10 The theory that the zone plan was a community
plan seemed clearly to be applied in Whitridge v. Park.11 That was
an early zoning case where neighborhood property owners were
denied an injunction on the ground that a violation of the zoning
law, if not a nuisance per se, does not injure the owners of adjoining
property any more than the rest of the public. Nor did the
Court of Appeals shrink from this view of zoning as a comprehen-

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6D contracted to buy lots X and Y from independent owners who knew
he wished to erect a large building on both. The zoning ordinance affected
Y but not X. It was held that the owner of X is entitled to specific per-
formance because he could offer a good title; his knowledge that D was also
relying on Y did not matter. The opposite conclusion arrived at by applying
Anderson v. Steinway was reversed in the Court of Appeals. 229 N. Y. 320

7N. Y. L. J., Oct. 29, 1925, at p. 137.

8Davis v. Philbert, N. Y. L. J., April 16, 1925, at p. 222.

9Kimball Co. v. Fox, 239 N. Y. 554, aff'ing, 209 App. Div. 812, which

10People ex rel. Rosevale Realty Co., Inc., v. Kleinert, 237 N. Y. 580, 143
N. E. 750 (1924), writ of error dismissed, 45 Sup. Ct. 618 (1925), because
the constitutionality of the zoning law as a whole was not properly raised.

11N. Y. L. J., Feb. 19, 1917, at p. 1808. But an injunction will be granted
where the neighborhood owners show special damage. Cohen v. Rosevale
sive, community plan when the Matter of Wulfsohn v. Burden,\textsuperscript{12} called for its application to an ordinance that prescribed fifty feet set backs and a height not exceeding five stories in residential district "A." Though aimed to prevent apartment houses in such a residential zone, the Act was held a valid exercise of the police power. Judge Hiscock said:

"The power is not limited to regulations designated to promote the public health * * * or to the suppression of what is offensive * * * but it extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity * * * (Therefore) zoning authorities should have the right in a residential district to promote these purposes * * * by excluding big apartment houses * * * whereby the enjoyment of light and air by adjoining property would be impaired, the congestion and dangers of traffic be augmented on streets where children might be and the dangers of disease and fires would be increased to say nothing of other things such as destruction of the character of the district as a residential one and the impairment in value of property already devoted to private residences."\textsuperscript{17}

If to these cases which indorse zoning as a community plan, will be added the cases previously cited,\textsuperscript{14} which considered the board of appeals to be a constitutional device to make necessary adjustments, we shall be prepared to examine the decisions which deal merely with the operation of the board in deciding the specific case before it.

The nature of a variance.

People \textit{ex rel. Sheldon v. Board of Appeals,}\textsuperscript{15} which was the most important case decided by the board and the first important determination of the board that was brought up to the Court of Appeals, involved the question whether the west side of Madison Avenue, between 35th and 36th Streets which was zoned residential could be used for business purposes. A chronological statement of

\textsuperscript{12}241 N. Y. 288 (1925).
\textsuperscript{13}Ibid. at 298, 301.
\textsuperscript{14}Supra II, n. 3.
\textsuperscript{15}234 N. Y. 484 (1923) rev'ing, 200 App. Div. 907 (1922), which had affirmed 115 Misc. 449 (1921).
the steps taken in the case seems necessary for a proper understanding of the board's action and the opinions of the courts.

The zoning commission had great difficulty in deciding upon the proper districting of Madison Avenue between 35th and 40th Streets. In the tentative report, that part of the city was zoned residential; on June 2, 1916, the date of the final report, a hearing on the matter resulted in a change of those streets to a business district. At a subsequent hearing, the mayor suggested a reconsideration. That was held on June 21, 1916, and resulted in a confirmation of the commission's decision to designate that district, including the property owned by Mr. William Astor, "all business." But when that report went through the committee of the whole, it emerged as the "checker-board plan" for the westerly side of Madison Avenue. The street was designated as residential from 35th to 36th, as business from 37th to 38th, as residential from 38th to 39th, and as business from 39th to 40th. By this compromise plan, the Astor property (35th to 36th) was left restricted to residential uses. An amendment was sought from the board of estimate and apportionment. The application was sent to the committee on the City Plan. It was there recommended that an appeal be taken to the board of appeals. During the pendency of the second petition for an amendment, such appeal for a variance was taken. In the spring of 1918, after a reorganization of the board caused by the replacement of four of the six appointees of the mayor, the appeal was heard and a variation granted on April 30, 1918. On May 3, 1918, the board of estimate and apportionment heard the petition to change the Astor block into a business district. The Flintlock Realty Company, of which Mr. Morgan was president, and the owners or residences in the neighborhood, among them Mr. William D. Guthrie, appeared in opposition. Having won a denial to amend, those opposed to the Astor interests sought to upset the board of appeals' grant of a variation and brought certiorari proceedings.

What were the issues before the board? Madison Avenue was in a transition stage at that point. It had been a celebrated residential district. But business uses soon came to predominate; the street became a main business thoroughfare between 34th and 42nd Street.\(^{16}\) The Astor plot extended 245 feet on 35th Street, 200

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\(^{16}\) The eastern side of Madison Avenue was protected by private covenants. See Schoonmaker v. Heckscher, 218 N. Y. 722 (1916).
feet on Madison Avenue, and 220 feet on 36th Street. Both side streets were in business districts and Mr. Astor wanted to erect a building to be used for a dry goods establishment having a frontage on Madison Avenue which was in a residence area. Section seven (c) allowed the board in appropriate cases and subject to proper conditions to "permit the extension of an existing or proposed building into a more restricted district." The board found that strict enforcement of the law would result in unnecessary hardship and that conditions safeguarding the more restricted district "can" be imposed. The board, therefore, adopted a resolution granting the application. The elaborate conditions are given in the footnote. Upon review by the Supreme Court the order granting the permit was annulled. This was affirmed without opinion by the Appellate Division. Upon what theory may the court's opinion be supported?

It will be remembered that the theoretical premise is that the board of appeals does not under any circumstances have, nor could it have been given, the power to amend the provisions of the zoning ordinance. It does have the power in certain exceptional cases to modify the application of the law. What is the distinction between an amendment in the law and its modification or variation by the board? Apparently Mr. Astor was not particular. Either one would enable him to build the way he wished. In a later case, Chief Judge Cardozo, dealing with this distinction, said:

"No one can doubt that Aqueduct Avenue at this point will be taken out of the residence district as effectively as if the old map had been withdrawn and another with a new

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17 "Resolved, that the appeal be and it hereby is granted on condition that the building shall conform in appearance, except as to the parapet wall, with the water-color perspective submitted by the appellant; that the building shall not exceed seven stories, nor 112 feet in total height; that the three facades shall be faced, uniformly, with either limestone or marble; that there shall be but one entrance to the building on the Madison Avenue front; that the balcony shown over the second story shall be constructed of material uniform with the rest of the facade; that the parapet wall above the main cornice of the building shall be designed to harmonize with the architecture of the three facades; and that during the occupancy of said building only the windows of the first story shall be used as show windows." Order dated May 1, 1918. Note that the board omitted a condition limiting the use of the building to dry-goods.


contour established instead. The power to change the map is reserved by the charter to the board of estimate and apportionment. The power of the board of appeals is confined to variations in special cases to meet some unusual emergency, some unnecessary hardship. The consequences at times may not be greatly different."

Edward M. Bassett does suggest a difference between an amendment and a variation. If the board of estimate changes a district from residence to business, every owner of property therein enjoys the enlarged scope of utility. But if the board of appeals grants a variation, that represents an equitable adjustment in the specific case before it. The next week an application for a similar variation in the same district may be denied. It is not necessary to go into the merits of the distinction to observe that, such as it is, it vanished when applied to cases where the whole "district" consists of one square in a "checker-board plan." The fact remains that the square, which was deliberately and perhaps artificially set up by the legislative, was wiped out by the board's determination as effectively as by a change in the map. Those with a taste for niceties may dismiss the coincidence as accidental. But it would seem that if it is unconstitutional for the board of estimate to delegate the power to amend the law to the board, it is also unconstitutional for the board of estimate to establish a number of small districts and call the change effected by the board of appeals a "variation" in the application of the requirements therein. That was the thought of the Supreme Court in annulling the board's action.

"Indeed, it appears to me to be so plain that the so-called variance is not a variance at all, but an amendment that only the board of estimate and apportionment itself has the power to make, as to make it unnecessary to state reasons that must suggest themselves to any one who gives the matter the slightest thought.”

On appeal the case was elaborately argued and the Court of Appeals

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20 People ex rel, Fordham Manor Reformed Church v. Walsh, infra note 28, 244 N. Y. at 289.
21 See the first part of his brief, filed as amicus curiae, in People ex rel. Sheldon v. Board of Appeals, supra note 15.
22 People ex rel, Werner v. Smith, infra note 43.
took a position different from both lower courts and re-instated the board’s decision. The argument made below that, what the board did was virtually to amend the law, was not directly dealt with. The court seemed greatly impressed with the argument that if the board could not legally extradict Mr. Astor from his difficulty, then the zoning law as a whole was unconstitutional. But this argument is really an evasion of the question: Is this a “variance” or is this a statutory provision “set at naught by the board of appeals, taken in the guise of a variance?” If this is an amendment, of course the board cannot grant relief. And the source of unconstitutionality would not be the lack of this power which could not be given the board, but the fact that the “checker-board” compromise was irrational and arbitrary. If the discussion in Chapter II will be recalled for a moment, it was there indicated that the board of appeals was needed not as a correcting or improving agency of unwise zoning, but as a device for adjusting exceptional situations that may arise in the enforcement of the law. The results of the “checker-board” arrangement were stated by the Court of Appeals, but the constitutionality of the plan was not discussed. Once it is assumed that this is properly a case for a variance, as did the court, the board’s decision was properly sustained under Section (c).

The relation of Sections seven and twenty to each other.

Section seven:

The Board of Appeals * * * may, in appropriate cases, after public notice and hearings * * * determine and vary the application of the use district regulations * * * as follows:

(c) Permit the extension of an existing or proposed building into a more restricted district under such conditions as will safeguard * * * the more restricted district.

(e) Permit in a business district the erection or extension of a garage or stable in any portion of a street between two intersecting

24 234 N. Y. 484.

25 The courts below have decided that the board of appeals exceeded its power. In that event, the owner-appellant, argues that the zoning is wholly invalid as the same is violative of its constitutional and property rights. 234 N. Y. at 490.

26 Section 20 was later changed to Section 21. When the cases arose, it was still numbered 20. In order not to have different references, the old number is used where the cases discussed refer to that number.
streets in which portion there exists a garage for more than five motor vehicles * * * which existed July 25, 1916.

Section twenty:

Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the provisions * * * the Board of Appeals shall have power in a specific case to vary any such provision in harmony, etc.

In the Sheldon case Section seven (c) was involved. The quotation which will follow, will indicate what Judge Hogan, speaking for the Court of Appeals, conceived to be the power of the board thereunder.

"When the instant case was before the board of appeals it was required by law * * * as a result of the hearing and investigation to conclude and decide the question rising thereon and thereupon to 'determine' the disposition to be made relating thereto. If as the result of investigation the board of appeals shall 'determine' as it did in this specific case, that there are unnecessary hardships in the way of carrying out the strict letter of the provisions of the zone resolution and that substantial justice would be promoted both to the property owners and the public interest, its power then was enlarged to 'vary' (i.e., under Section twenty)." 27

It is readily granted that from such interpretation of "determine and vary" used in Section seven, it does not follow that Section twenty was eliminated as an independent source of jurisdiction. But it does follow that in every case where the board acts under Section seven, it must find that there is unnecessary hardship. This is not an unsound construction, for it may be argued that the use of "appropriate case" in Section seven referred to situations where there were such hardships. But, though never expressly criticized, this view of the inter-relation of both sections was not followed. When dealing with Section seven (e), Chief Judge Cardozo, in a dictum, said: "The presence of such a garage, without more, permits the board in (his?) (its) discretion to authorize a new garage in a business district." 28 This would seem to indicate that Sections seven

27 234 N. Y. at 494.
28 People ex rel. Fordham Reformed Church v. Walsh, 244 N. Y. 280, at 284.
and twenty where wholly independent and that it is within the board's discretion to determine what is "an appropriate case" in which to "determine and vary."

That these sections are independent sources of jurisdiction is clearly established by People ex rel. Smith v. Walsh. The owner of a corner lot in a business district was authorized by the board to erect a public garage. On one street there was another garage, and so Section seven (e) applied. On the other street, however, there was not an existing stable or garage. To bring himself within Section seven, the applicant would have to rely on part (g) which requires him to file consents of 80% of the owners deemed to be affected. Consents were not filed. The Supreme Court sustained the writ of certiorari. On appeal this was reversed and the board's decision reinstated. However, the Appellate Division did decide that it was error for the board to act on the assumption that since the corner premises faced on the street where Section seven (e) did apply, the side street where it did not apply could be safeguarded by conditions. It was pointed out that there were two grounds for jurisdiction. The board must act under one or the other. It was then held that despite its erroneous reasons, there was unnecessary hardship and therefore there was, in fact, jurisdiction under Section twenty. The Court of Appeals approved of the holding that Sections seven and twenty were sources of independent power. But the practice of going into the facts to determine whether there was a sound ground for the board's decision and then and there reinstate that decision which as read states a bad ground of jurisdiction, was condemned. The case should have been sent back to the board. However, since substantial rights of others were not affected, the Appellate Division was affirmed. In a later case, therefore, the Appellate Division looked only to the record to find whether there was in fact

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30 It is important to note that Smith v. Walsh established that each paragraph of Section 7 is of equal force. If any two of them apply, the board is powerless to act under Section 7 unless both are satisfied. And another point is, that if the applicant can prove "unnecessary hardship," he need not first attempt to get his remedy under Section 7, by obtaining consents under Section 7(g) for example.
a valid ground for the board's determination. Failing in this, the writ was sustained.\textsuperscript{31}

The last case that we shall consider on the question whether or not Sections seven and twenty are independent is People \textit{ex rel.} Gross \textit{v.} Walsh.\textsuperscript{32} The Special Term annulled the board's order for a variance. It was granted on the ground that there was unnecessary hardship, \textit{i.e.}, Section twenty. It was held that if that could be done, then Section seven (g) authorizing the board to vary where the applicant filed consents, was mere surplusage. On appeal, the Special Term was reversed. If there was unnecessary hardship, the board could grant a variance under Section twenty even where the applicant did not try to get the consents. But the Appellate Division was not sure that such hardship was established and so the case was sent back to the board to have that determined on a rehearing.

\textit{The presumptive correctness of the board's action.}

That the court is not at liberty to consider facts \textit{de hors} the return and that the facts set forth therein must be accepted as true seems to be the accepted doctrine in New York and elsewhere.\textsuperscript{33} In People \textit{ex rel.} McAvoy \textit{v.} Leo,\textsuperscript{34} the action of the board was up-

\textsuperscript{31} The board purported to grant the application under Section 7(g), when in fact 80\% of the owners affected did not consent. The Special Term annulled the action because the return indicated that the members of the board would have voted differently if the application had been brought under Section 21. In the Matter of Sloan \textit{v.} Walsh. 217 App. Div. 614, 216 N. Y. Supp. 181 (1926).


"The reasons stated on the record in the case at bar, while not overpow-

\textsuperscript{34} 109 Misc. 255, 175 N. Y. Supp. 513.
held though the consents upon which the board based its jurisdiction to act were not "duly acknowledged." The court was disposed to look upon the requirement of a formal acknowledgment as technical. But the main ground upon which rested the dismissal of the writ was that "the board had power to grant the relief asked for, even though there had been no consents at all." Judge Manning thought that Section twenty gave jurisdiction and that the board—

"evidently considered this to be one of the cases in which the discretionary power possessed by it should be exercised, and having so determined, and acted within its jurisdiction its determination *** cannot be considered as an illegal official act."

Two years later the board granted an application authorizing the owner to destroy his stable and replace it by a public garage. This action was taken under Section seven (a) which allowed the board to permit to the owner of a non-conforming use "the extension of an existing or the erection of an additional building." Here again the court was inclined to interpret Section seven (a) liberally to include a power to allow the destruction of the old non-conforming use and authorize the erection of a new one. But it also appeared that a public garage was located on the same side of the street and that a noisy car barn was situated directly opposite the applicant's premises. And so the Supreme Court said that even if the liberal construction of the section cannot stand, the decision of the board will not be upset because there are facts from which it may be inferred that the board believed there was unnecessary hardship in the way of strict enforcement of the law. Two appeals were taken, but with no effect. The upper courts did not write opinions, but the case was recently approved as correct on the ground last stated by Judge Cardozo.

On the authorities therefore, it appears that when the board grants an application stating an unsound reason for jurisdiction, the administrative decision will be:

(1) annulled where the return does not state facts which indicate that the board did in fact have jurisdiction for another reason.

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"Ibid. at 514.

Supra note 35.


Supra note 28, 244 N. Y. at 290.

Sloan v. Walsh, supra note 31.
sent back to the board if the court feels that a re-hearing of the facts may disclose a basis for taking jurisdiction.\(^4\)

allowed to stand where along with the unsound reasons for exercising its power, the return does indicate that the situation is one in which it would have been proper for the board to have assumed jurisdiction.\(^5\)

The last paragraph involves something more than giving presumptive effect to what appears in the return. It involves treatment of the administrative decision in the same manner as though the board had made the correct inference from what appears in the record. The point is well expressed in a dictum by Judge Cardozo:\(^6\)

"The hardship may be found as an inference from evidence submitted at a hearing * * * At all events, when there is evidence in the record, whatever inferences therefrom are proper will be presumed, in aid of the dispensing resolution, to have been drawn by the board."

When the court was called upon to review a refusal by the board to grant a variation, the contest as may be expected, was more bitterly fought. The story of the battle is told in two cases. Both involved substantially the same issue. The board had previously granted one or more applications for variations on the same street. In each, the petitioner's request for a similar variation was refused. The Special Term sustained the writ in both cases. But the action of the board of appeals in both was reinstated by the Court of Appeals. In the Appellate Division, different results were reached. In the first, the board was upheld, two dissented; in the second, the board's denial of the application was annulled as "unreasonable and discriminatory.” The first is People ex rel. Werner v. Smith; the second is In the Matter of Goldenberg v. Walsh.\(^7\)

Judge McAvoy, writing for the majority in the Werner case, urged in support of the board’s action (1) that the applicant is not entitled to a variation because a garage is more profitable than other uses; (2) the circumstance that the Board of Appeals had pre-

\(^4\) Smith v. Walsh, supra note 29.
\(^5\) McAvoy v. Leo, supra note 34; Facey v. Leo, supra note 37.
\(^6\) Supra note 28, 244 N. Y. at 287.
viously authorized permits for four other garages does not show that as to this petitioner there is unnecessary hardship; (3) it does not follow that because the board had already granted four variations that the denial of the request for a fifth amounted to arbitrary discrimination. He concluded by saying: "The duty of regulation presupposes that there will be some limit to the number of garages on one block." The same judge, dissenting in the Goldenberg case, elaborated his argument as follows:

"* * * there will always be a point at which this legitimate discrimination must be exercised in refusing further permits to vary the application of the building zone resolution * * * and whether or not such permits should be issued is committed by statute to the Board of Appeals. The court should not, as we have heretofore decided in the Werner case, attempt to exercise a function for which it has neither the requisite information nor the personal knowledge necessary to act for the preservation of the surrounding territory designed to be protected in the use to which the building zone resolution committed it."* * *

The counter argument expressed by Judge Dowling, speaking for the majority in the Goldenberg case, was based on an elaborate re-examination of the facts which was concluded by a finding that—

"Much of the dialogue between the chairman and this objector was devoted to a discussion of general garage conditions in the Bronx, having nothing whatever to do with the merit of the application then pending. * * *"

The board's denial of the permit was, therefore, deemed discriminatory. It is interesting to note that a few months previous, Judge Dowling was not with the dissenters in the Werner case, but was with the majority, which, in reaching the other conclusion on even stronger facts, said: "There is a presumption in favor of the correctness of the determination arrived at by the Board of Appeals" and that the record does not show that the board—

"* * * abused its discretion, or acted in bad faith, or that its action was unreasonable, arbitrary, discriminatory or

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42 212 App. Div. at 638.
43 215 App Div. at 399 and 400.
44 Supra note 46.
illegal in refusing to vary the application of the use district regulations; and in such instance we may not substitute the court's determination for that of the duly constituted municipal authority.\(^4\)

It was the latter view that prevailed in the end, for the Goldenberg case was reversed on the dissent of Judge McAvoy. The Werner case, it will be remembered, was affirmed in a memorandum decision. *Where the presumption of correctness did not save the administrative decision.*

The clearest case where the court will not indulge in the validating presumption is where the record shows abuse of discretion or bad faith on the part of the board. Perhaps the strongest decision of this kind is People *ex rel.* Cotton *v.* Leo.\(^40\) A garage in a residence district was authorized by the board. The board reasoned that since there was no garage in the locality, the community had need of this one. Its action was based on Section seven (g) requiring consents by 80% of those affected. It appeared that some owners rather distant from the premises in question who were “deemed by the board to be affected” gave their consent, while property directly opposite was not deemed to be affected and was owned by one who was known to be opposed to the proposed garage. It appeared further that the very site of the garage was included with the property deemed to be affected. Judge Cropsey concluded that the board’s departure from its previous rules further indicated that action was arbitrary. He found that the board did not even act in good faith, for its desire to see the applicant get 80% of the owners to consent influenced it to decide what property was affected according as its owner would or would not give his consent. The determination by the board was, therefore, annulled.

“This provision of the resolution giving the board the power to determine what property is immediately affected does not give the board arbitrary power in that regard. It cannot merely by its assertion determine that certain property is affected and other property not affected when the location and all the facts indicate otherwise.”\(^50\)

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48 212 App. Div. at 638.
40 110 Misc. 519, 180 N. Y. Supp. 554.
50 180 N. Y. Supp. 554, 556. Because the action was not in good faith, costs were assessed against the board.
At the other extreme lies the case where the presumption in aid of administrative finality is ineffective though the board acted in good faith and in furtherance of the general purpose of the zoning law. Such a case is In the Matter of Multiplex Garages v. Walsh. The law forbids in a business district a garage for more than five motor vehicles. An owner who obtained permits for a number of small garages for less than five cars, had the permits revoked by order of the Board of Appeals and the case was taken to court and the Special Term annulled the determination. The Appellate Division reached the opposite conclusion and reinstated the board's order.

"There is practically no difference between a public garage for more than five motors under one roof and the distribution of small garages over an entire plot where more than five motor cars may be accommodated."

But in a memorandum opinion the order of the Appellate Division was reversed and that of the Special Term affirmed upon the opinion of Judge Merrell, who dissented below. The dissent founded itself upon the fact that the building zone resolution was in derogation of common law rights and as such, must be strictly construed. That being done, there was no violation of the ordinance.

The middle group of cases that we shall now consider concerns the annulment of the board's determination, not because evidence of abuse or bad faith rebutted the aiding presumption, but because the record failed to disclose the necessary facts upon which that presumption could become operative. It was thought, for example, that "Section 20 of the zoning resolution is usually the final refuge of the board when it wants to do something for which there is no authority in law." And so it was laid down that the facts showing practical difficulty or unnecessary hardship in the way of literal enforcement of the law must appear in the return, for the conclusion that there is hardship must be a reason and not an afterthought. The year after these two decisions, an inspection com-

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51 See Building Zone Resolution, §4(5).
52 213 App. Div. 289, rev'd, 241 N. Y. 527 (1925). And see People ex rel. Hyman v. Leo, 108 Misc. 39, 177 N. Y. Supp. 503 (1919). An "existing" garage does not include one that has been under construction for three years.
54 Supra note 53. And see People ex rel. Brennan v. Walsh, 195 N. Y. Supp. 264 (1922).
mittee resented the fact that the applicant had already built the extension for which a permit was now sought. The case was previously mentioned in another connection. It was there said:

"* * * it is clear that none of the recited 'whereases' of the decision touch upon or deal with even impliedly, the question of 'practical difficulties and unnecessary hardship,' and it does not appear from the return that such question was decided. A refusal to 'vary' without a determination of that primary and necessary question is at least an illegal disposition."

And we have also seen that "desecration of the community," and "a reasonable adjustment of the Building Zone Resolution" were not proper reasons upon which to deny or allow a variance.

The whole question was finally disposed of by the Court of Appeals in People ex rel. Fordham Manor Reformed Church v. Walsh. The board allowed an application for a public garage in a residence district because (1) the existence of a garage for 180 cars immediately adjoining is sufficient justification to permit another garage; (2) "the Board of Appeals is of the opinion that a real hardship would be imposed on the owner of said property if prevented from using it for garage purposes;" (3) hardship or injustice will not befall the objecting parties, rigid conditions having been imposed. The allowance of the certiorari order at Special Term was reversed in the Appellate Division which in turn was reversed by the Court of Appeals. Nothing in the return indicated

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36 Ibid. at 471.
38 Matter of McGarry v. Walsh, 213 App. Div. 289 (1925). Not infrequently, one finds in the final resolution of the board the preliminary "Whereas the applicant contends that there would be great hardship in preventing him from making the proposed use of his property," followed by a resolution granting the application. 10 Bulletin, No. 5, pp. 120, 121. These resolutions would probably be held bad for it is not enough to contend; one must prove that there is hardship.
39 244 N. Y. 280 (1927).
40 While the majority (per Clarke, P. J.) thought that In The Matter of Goldenberg v. Walsh controlled, supra note 44, the dissent felt that "it is clear that the board of appeals acted upon a mere assertion of claim that practical difficulties or unnecessary hardship existed without any evidence or fact to justify such conclusion." 217 App. Div. 177, 184 (1926).
that this land if not occupied by a garage was incapable of application to some other profitable use—an apartment house, for example. Judge Cardozo found no evidence of unnecessary hardship in the record.

"If such hardship exists, the reasons for its existence should appear from the return. Only thus can a court know whether they are substantial or illusory. * * * We thwart the scheme of the statute if we uphold a resolution for the concession of a privilege with neither evidence at the hearing, nor allegations in the answer to be accepted as a substitute for evidence. The Legislature had said that there shall be review by certiorari. Such review becomes impossible if without supporting evidence or equivalent averment, the mere conclusion of hardship is sufficient and indeed decisive. There has been confided to the board a delicate jurisdiction and one easily abused. Upon a showing of unnecessary hardship, general rules are suspended for the benefit of individual owners, and special privilege established. Nothing is before us to justify or even suggest doubt of the good faith and sincerity with which the power has been exercised. At the same time judicial review would be reduced to an empty form if the requirement were relaxed that in the return of the proceeding (and?) all hardship and its occasion must be exhibited fully and at large. Safeguards of this order have at times an aspect of triviality when our scrutiny is narrowed to one instance or another. Their value is perceived when the outlook is extended to something wider than particulars. Disclosure is the antidote of partiality and favor."

The power of the court to hear evidence.

It will be noticed that in the Fordham case, the Court of Appeals sent the case back to allow the renewal of the appeal before the board. In Kannensohn v. Walsh62 and in Parry v. Walsh63 another practice was followed, viz., the court went into the weight of the evidence to reach a conclusion on the merits. When this procedure was followed in Smith v. Walsh,64 the Court of Appeals

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61 240 N. Y. 280, 290, 291.
62 Supra note 55.
63 Supra note 57.
64 Supra note 29.
expressed its disapproval and recommended that a proper procedure required the case to be sent back to the board. It, therefore, becomes pertinent to inquire what interpretation was given to the charter provision authorizing the court to take evidence in some cases.

"If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made."\(^6^5\)

The nature of the power thus conferred upon the court was involved in the early zoning case of People *ex rel.* West Side Mortgage Co. *v.* Leo.\(^6^6\) An application to the board for a permit approving plans for a building to be used for a stable and a garage was granted. But on the record it appeared that through some error, the granting resolution of the board referred in terms only to a garage. It was held that the applicant's remedy must be sought of the board and not of the court because the court's jurisdiction begins only after the board takes final action. In other words the Charter does "not provide for a hearing of the matter *de novo*, nor that the status of the matter shall be the same as if it had been instituted originally in the reviewing court."\(^6^7\) It is only when the reviewing court is in doubt as to whether the board was justified in taking jurisdiction that it may take testimony calculated to show whether jurisdictional facts were established.\(^6^8\) This was illustrated in a case where, upon an erroneous interpretation of Section twenty in relation to Section seven (g), the Special Term annulled the board's

\(^6^5\) Charter §719a-4.


\(^6^7\) Ibid. at 456.

\(^6^8\) The matter lies within the discretion of the court. Thus where the granting of a variation in the application of set back requirements was sought to be reviewed, and the existence of evidence not considered by the board was alleged, it was held that "inasmuch as the function of the court in a proceeding of this character is merely to determine whether the board of appeals had jurisdiction to take the action (they) did take and whether (sic) they abused their discretion on the evidence before them, I do not think a reference should be ordered." People *ex rel.* Helvetia Realty Co. *v.* Leo, 183 N. Y. Supp. 37, aff'd, 195 App. Div. 887, 185 N. Y. Supp. 948, aff'd, 231 N. Y. 619, 132 N. E. 912 (1920). There were no opinions by the upper courts.
determination. On appeal the lower court was reversed, but since it was not clear that the jurisdictional fact of unnecessary hardship existed, the court in the Appellate Division said:

"We therefore remit the proceeding to the Special Term to take testimony and determine the question as to whether practical difficulties or unnecessary hardship existed justifying the variance under Section twenty."

Though this seems to be an effective and direct method of judicial control, it has not been often employed. A literal application of the charter provision brings us dangerously near the point of making the reviewing court an appellate board of appeals. As opposed to the courts which say that the board's findings of fact and decision are presumptively correct and will not be disturbed unless abuse or bad faith are apparent upon the record, we have this charter provision that enables the court to look beyond the record and enter its own findings and conclusion. The court has delimited its power in this manner. In the West Side Mortgage Co. case, all the court had before it for decision was that court review will not be allowed unless the board first makes a final disposition of the case. But Judge Giegerich went on to say that the charter provision allowed the court to go into the facts only for the purpose of discovering whether the board reasonably took jurisdiction. The same judge decided the Helvetia case where the question of ordering a reference was directly involved. As indicated in the footnote, it was there decided that unless the record evidences an abuse of discretion, the court in its discretion will not order a referee to take the case over. In other words, the express charter provision that the courts have power to take testimony was almost completely whittled away. For it is not denied that in the absence of such provision, the court may, upon reasonable suspicion of abuse arising from facts in the record, send the case back to the board. That is all that the court did when acting pursuant to this charter provision. People ex rel. La Vine, Inc. v. Walsh was a case where the Special Term took testimony and upon the basis of its findings annulled the board's decision which refused a variation.

69 It is believed that the cases here discussed are the only cases decided involving this phase of judicial control of the zoning board of appeals.

70 Supra note 68.
"Upon record before us, we make a finding of fact that the enforcement of the strict letter of the Zoning Resolution would work unnecessary hardship to the relator; and as a conclusion of law, we hold that the case is one for a variance under and pursuant to Section twenty of the Building Zone Resolution."71

Of course, the actual granting of the variance and the safeguarding conditions that may be necessary, was left for the board.

Herman L. Weisman.

New York City.

71 N. Y. L. J., Jan. 1925, at p. 1215. This was affirmed in 124 App. Div. 805, 219 N. Y. Supp. (1925), where this method of taking testimony and entering findings was approved.