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THE ZONING BOARD OF APPEALS

BY NEWMAN F. BAKER*

I. NECESSITY FOR A BOARD OF APPEALS

If it were possible to frame a perfect zoning ordinance there would be no necessity for a zoning board of appeals, but perfect ordinances never have been and probably never will be passed. It is easy to underrate the technical difficulties in drawing up zoning ordinances. To prepare use and bulk maps for the various sections of the city, to calculate height limitations, and to plan the future expansion of the city, keeping in mind the promotion of municipal aesthetics and at the same time protecting, so far as possible, the property rights of the individual, is an almost superhuman task. Fortunately, most of the larger cities have employed experts to assist the local authorities in accomplishing their purpose. But, nevertheless, experience shows that zoning ordinances need adjustment and modification after being put into operation.

It has been said that "a defective or deficient zone ordinance is probably as fertile a source of disturbance and maladjustment as a public body can create."¹ It is extremely difficult to avoid mistakes in the highly technical language necessary in such ordinances and it is well known that even ordinary legislation does not always avoid vague and unintelligible expressions. Moreover, it is often perplexing to define the words used in these ordinances, many of which are in common use, such as "street," "alley," "block," and "structure."² Many ordinances are passed with the framers

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¹Sumner, The Board of Adjustment as a Corrective in Zoning Practice (April, 1924) 13 Nat. Mun. Rev. 203.
merely speculating as to the future growth, and it is well known that cities do not always grow in the way that they are planned. Those who are employed to zone the city and to forecast the future development may be led to provide for business and residence districts in sections as yet unimproved. If the city should not grow as predicted the rules drawn up become, in most cases, arbitrary and unenforceable. The city’s zoning ordinance must be comprehensive and city-wide in application and, as a result, it is impossible to provide for the details of the great number of exceptional cases which every builder knows must arise. The zoning ordinance might require the leaving of open spaces which are unnecessary, due to the location of the lot. The ordinance might forbid the use of a lot for business, when no other use is practicable. On the other hand, the ordinance might allow a garage to be built near a school or a hospital, a location not in spirit with the purpose of the ordinance, though legal. Very often we find lots of odd sizes and shapes where conformity is out of the question and it is almost impossible to provide by ordinance for the innumerable questions that arise when old buildings are rebuilt or extended, and adaptation is necessary.

The purpose of a board of appeals or adjustment is “to safeguard the rights of individuals by providing a convenient remedy against the arbitrary or unreasonable exercise of the police power.” This board is created to keep the law “running on an even keel” by interpreting vague expressions, defining unintelligible ones, and by deciding exceptional cases, “where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.”

Mr. Edward M. Bassett, counsel for the Zoning Committee of New York, uses this illustration to show the necessity for the board of appeals:

“An outlying unbuilt district may properly be zoned as residential. In it there may be a hill composed of good sand for cement blocks. It is both economy and common sense that some

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3Sumner, The Board of Adjustment as a Corrective in Zoning Practice, 13 Nat. Mun. Rev. 203.
THE ZONING BOARD OF APPEALS

board should have the authority to permit the temporary use of cement blockmaking. The ordinance should give such power to a board of appeals. If there is no board of appeals, the council itself would have to consider the question of altering the sand hill from a residence district to an unrestricted district so that the cement block works might be built and operated. But this change would open up the locality for a chemical factory or some other nuisance factory that might later prevent the upbuilding of the district with good residences. The other horn of the dilemma would be for the council to make a specific exception for the sand hill and allow cement blocks to be made temporarily. Where, however, the council itself goes into the field of making specific exceptions for particular plots or buildings all over the city, it would mean the breakdown of the zoning ordinance. The best way to handle the subject is for the council to control the ordinance and maps which should be as permanent as possible, and a board of appeals should exercise discretion on specific permits of exceptional character."

It has been objected by some that the board of appeals is made into a legislative body instead of being quasi-judicial body, and as such its functions are illegal. As will be pointed out later, the board is not empowered to change the ordinance but to authorize "such variance from the terms of the ordinance as will not be contrary to the public interest." Whenever the board has rendered a decision obviously against the will of the legislative body the courts make it a practice to quash such proceedings.

Another objection commonly voiced is that errors should be corrected and exceptions made by the city council instead of by the board of appeals. In other words, the wrong should be corrected by amendment rather than by variance from the ordinance. In theory this may be true but this would not give proper relief because the process of amendment is too slow and expensive. We should note that the vested interests of those who comply with the zoning ordinances are protected by making the process of changing the ordinance more difficult than the passage of an ordinary local law, an extraordinary majority being required in case of protest by a small percentage of the adjoining owners.

We can expect to hear charges of favoritism made against boards of appeals. The number of members usually is small and there are opportunities for arbitrary and biased decisions. "If,

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7 Standard Act supra, sec. 7, p. 10.
however, a city administration is not competent to establish a good board of appeals it is not competent to administer a zoning ordinance fairly." It is usual to find the board of appeals composed of members chosen from the technical professions allied to the building industry. This group of men, skilled in the building trades, visiting the premises in question for personal inspection, has proved to be far more competent than the city council in considering exceptional cases. As was stated by the court in People ex rel. Broadway Realty Co. v. Walsh: "The procedure of appeal within the line of administrative officials before allowing recourse to the courts, insures the benefit of trained and competent expert opinion and judgment, applied to the facts of each particular case by an experienced tribunal, which is not limited to an affirmance or reversal of the action of the superintendents of buildings, but may use its judgment in making such modification in his action as in its opinion should be made, and to that end is vested with his powers, in order that the spirit of the law shall be observed, public safety secured and substantial justice done."

Land owners do not desire to go to court and are "not seeking to overturn a sensible zoning plan." Nor do land owners desire to await the action of the city council to amend the law in their favor. As a general thing they are satisfied to have a board of experts hear their grievances and vary the strict letter of the zoning law if they can show that they have claims of merit. There is no other or better method for providing for the "orderly, legitimate flexibility which zoning administration requires" than through a board of appeals.

The chief value of the board of appeals in zoning is in protecting the ordinance from attacks upon its constitutionality. Zoning is done under the police power and must have some relation to the public health, safety, morals, or the general welfare of the community. Nearly all cases hold that the constitutionality of zoning depends upon the reasonableness of the ordinance and its freedom from arbitrary rulings. If there is no board of appeals, the landowner can obtain a writ of mandamus against the local official who grants building permits, and this brings the

11The Greater New York Charter sec. 718 (1) requires an architect, structural engineer, and builder to be included in the board and the chairman must be an architect or a structural engineer. The Chicago board is composed of five men: an architect, a structural engineer, a builder, a real estate dealer, and a lawyer.
question of the reasonableness of the ordinance directly before the courts and the ordinance may be declared unconstitutional in that particular case. After an ordinance has proved defective in several instances it is likely that it will be declared void as a whole.

In the case of *Isenbarth v. Bartnett* the petitioner's property had been zoned residential when the street it faced was undoubtedly a business street, being a main thoroughfare between railroad stations and having three trolley lines. The value of the petitioner's property for residential purposes was from $15,000 to $17,000, as compared to its value of $55,000 for business purposes. Moreover, it seems that the petitioner's property had been zoned residential to preserve the vista of a private park at the rear of the premises in question. In a suit for a mandamus to the building inspector the court held that the zoning resolution was "legally unreasonable." In California no board of appeals has been provided by statute and the same court that decided two leading cases in favor of the constitutionality of zoning held invalid an ordinance of a California city which designated only one and one-tenth acres out of 2,500 acres as "unrestricted territory," all three decisions being made on the same day. A zoning ordinance of Omaha, Nebraska, provided that buildings, erected within a certain district, could cover only twenty-five per cent of the lot. The relators in *State ex rel. Westminster Presbyterian Church v. Edgcomb* desired to build a church which would cover thirty-seven and one-half per cent of the lot. Having no board of appeals to make adjustments, the permit was refused and upon appeal to the courts, the ordinance was held unconstitutional. An ordinance of the city of Mount Vernon, New York, established a zoning line between the residential and business districts which traversed at an angle the lot owned by the petitioner in the case of *Hecht-Dann v. Burden*. The result of this districting was to


15Ex parte White, (Cal. 1925) 234 Pac. 396.

16(1922) 108 Neb. 859, 189 N. W. 617.

make it practically impossible to use the petitioner's land for residential purposes and absolutely impossible to erect a residence thereon, leaving a set-back of twenty-five feet as required by the ordinance. In this case the courts allowed a mandamus to issue and declared the ordinance to be unreasonable and not a "well considered plan" as required by statute. In the above cases it is undoubted that adjustments might have been made to relieve the arbitrariness of the ordinances had there been application to a board of appeals for adjustment.

In the case of *Allen v. City of Paterson*\(^{18}\) we find that the board of appeals for the city of Paterson, New Jersey, had varied from the strict letter of the zoning ordinance and had allowed an owner to build a garage seven and one-half feet from the street, his lot not permitting its construction fourteen feet therefrom in strict compliance with the ordinance. This action of the board, being authorized by statute,\(^{19}\) was upheld, whereas it is probable that the ordinance would have been held unconstitutional had no adjustment been made. The court in *People ex rel. Facey v. Leo*\(^{20}\) upheld the action of the New York board of appeals in granting a permit for a garage in a residence district. In this case there were car barns across the street and two other garages near by and the "spirit of the ordinance was not violated."\(^{21}\)

Commenting upon the necessity for a zoning board of appeals, Mr. Bassett made this statement:\(^{22}\)

"In New York State, where the zoning plan has been adopted for the last six or seven years, in many cities there is no doubt that the courts would have punched holes through every zoning plan unless the city had a Board of Appeals. A Board of Appeals acts like a safety valve. Where there is no Board of Appeals to inject a sensible amount of adaptation in exceptional cases, the courts say that the zoning is void in that particular case because it is confiscatory or discriminatory. In New York City the Board

\(^{18}\)(1924) 98 N. J. L. 661, 121 Atl. 610; affd. 99 N. J. L. 489, 123 Atl. 884.

\(^{19}\)N. J. Laws 1921, ch. 82.


\(^{22}\)Proposed Amendment to the Illinois Zoning Enabling Act (Preceded by a statement as to the need of the amendment by Mr. Bassett) (1923) Chicago Real Estate Board p. 4.
of Appeals has passed on at least one thousand cases, deciding somewhat less than half of these cases in favor of the applicant. If there had been no Board of Appeals, there is no doubt that from twenty to fifty adverse decisions would have been made by the courts against the zoning ordinance. Instead of this, the adjusting power of the Board of Appeals has brought it about that not one single word of criticism against any provision of the zoning ordinance has been made by any court regarding the zoning plan of New York City. In states that have no Boards of Appeals the courts are more and more rapidly handing down decisions that are upsetting the zoning."

In conclusion we might say that in the majority of the states the constitutionality of zoning is no longer questioned,23 but the strength of the law depends upon its enforcement. The board of appeals has been a very important factor in the continued popularity of the zoning movement and by its adjustment of difficulties and the interpretation of provisions it has given the zoning ordinance the needed elasticity which would otherwise be lacking.

II. THE CHICAGO BOARD OF APPEALS

In 1921 the Illinois legislature passed an enabling act providing for the zoning of Illinois municipalities. This act required the establishment of a zoning board of appeals as follows:24

"Section 3. All ordinances passed under the terms of this Act shall be enforced by such officer of the city, village or incorporated town as may be designated by ordinance. Each city, village or incorporated town exercising the powers conferred by this Act shall provide by ordinance for the creation of a board of appeals of not less than three members nor more than five members to be appointed in the same manner as the zoning commission. Such board of appeals shall have power: (a) Upon application to review the actions of the enforcing officer of the city, village or incorporated town in order to determine whether they are in accordance with the terms of ordinances enacted under the terms of this Act; (b) To recommend to the city council or board of trustees such ordinances or amendments as it may deem necessary or desirable, including power in specific cases of particular hardship to recommend variations of the original ordinance or amendments thereto. Variations from or amendments to ordinances enacted under the terms of this Act shall in all cases be made by ordinance.

"Section 4. The regulations imposed and the districts created under the authority of this Act may be varied or amended from

time to time by ordinance after the ordinance establishing same has gone into effect, but no such variations or amendments shall be made without a hearing before the board of appeals, provided for by section 3 hereof. Such board shall give notice and proceed in the same manner as is provided by section 2 with respect to the zoning commission. Upon its report the city council or board of trustees may adopt the proposed variation or amendment, with or without change, or may refer it back to the board for further consideration. Any proposed variation or amendment which fails to receive the approval of the board of appeals shall not be passed except by the favorable vote of two-thirds of all of the members of the city council in cities or of the members of the board of trustees in villages or incorporated towns."

As will be noticed from reading the terms of the 1921 act, cities which adopted zoning were required to provide for boards of appeals, but these boards were given power only to recommend variations, and the variations from or amendments to ordinances enacted under the terms of the act were in all cases to be made by ordinance. In other words, the board had no power to vary the strict letter of the zoning ordinance. During the winter of 1923 there was agitation for a more useful board of appeals, and the legislature of that year passed an amendment which gave the board of appeals the right to vary the terms of the ordinance:

"Section 3. All ordinances passed under the terms of this Act shall be enforced by such officer of the city, village or incorporated town as may be designated by ordinance. The regulations by this Act authorized, may provide that a board of appeals may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained."

It should be noted that this act does not require zoned cities to provide for a board of appeals and that the act allows the variance of the application of the ordinance. The act also makes detailed provisions for the appointment and procedure of the board, for appeals before the board and the decision of such appeals, and for the review of the board's decisions by writ of certiorari.

The Chicago zoning ordinance was passed by the city council April 5, 1923, and went into operation on May 15 of that year. It makes provision for a zoning board of appeals and for the guidance

26See Proposed Amendment to the Illinois Zoning Enabling Act supra. note 22.
26Ill. Laws 1923, p. 268.
of the board makes specific mention of certain types of cases in which hardship may be found to exist, and in which a "variation" may be wise and permissible. Moreover, the statute allows the board to vary from the strict letter of the ordinance "where there are practical difficulties or unnecessary hardship."

Acting under this authority, the Chicago board of appeals has rendered a great service to municipal zoning in that city. An investigating committee of the city of Cleveland made this comment upon the work of the Chicago board:

"The Chicago Board of Appeals visits the premises covered by every application, and a skilled engineer in the employ of the commission makes a careful survey of the situation in each case, his report to the board being one of the principal factors considered by them in the determination of the application. The Chicago ordinance required that the board be made up of a representative of the architects, the real estate men, the legal profession (?), the building contractors and an engineer. Your committee is satisfied that a great deal of the success of the zoning law in Chicago and the reason why it is so enthusiastically supported there arises from the fact that so careful and satisfactory a board supervises its operation."

When the Chicago land owner seeks a building permit and his application is denied by the building department as being contrary to the zoning ordinance, he may petition the board of appeals for a variance of the ordinance. Three things are done by the board to prevent a bad decision: (1) The board causes maps to be made showing the bulk and use of all surrounding buildings. Each member of the board is supplied with a map and necessary data and has it before him at the hearing of the appeal; (2) The board makes a personal inspection of the premises. No "committee" is sent out by the board, but, as a general thing, each member visits the locality in question, two making their observation on Friday, two on Monday and the other one at his convenience; (3) Direct notice is given to the adjoining owners and a public hearing is held in the presence of the board before the decision is made.

An idea of the importance of the Chicago board of appeals can be obtained from these figures which show the number and variety of decisions made by the board since its organization:

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28Sec. 29, (d), (1) — (17) See Pond, Another Version of the Leopold Case and its Effect on Zoning (October 1925) Chicago Realtor 38:10.
29(December 17, 1924) City Record, Official Publication p. 6.
30Not required by the 1923 Statute.
An afternoon spent in the "court" room of the board of appeals while public hearings are being held should be of great interest to lawyer and layman alike. One would be led to note the great number of apparently insoluble cases that come before the board under the zoning ordinance. Most of the cases that come before the board of appeals are cases where the application of the ordinance causes individual hardship. Another fact that would impress one is the intense earnestness of the pleas and testimony made to the chairman of the board. Zoning protects the homes of individuals who become greatly wrought up at a contemplated invasion of their residential district by injurious uses. One is impressed by the difficult position of the board. It cannot legislate and can, therefore, make no fundamental changes in the ordinance, nevertheless, in framing its decisions so as to keep the question of the constitutionality of zoning out of the courts, the board constantly is faced with the necessity of allowing a use forbidden by the ordinance, but which is conducted in a way that is perfectly harmless in itself.

The board of appeals is a body of experts at compromising. Many decisions are made upon certain conditions, when either the denial or the granting of the petition would be subject to complaint. So successful has been the Chicago board of appeals at compromising with the parties concerned, and at adjusting rival claims, that no case involving the decisions of this board has been reviewed by an appellate court on certiorari, and from the figures

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<tr>
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<td>123</td>
<td>93</td>
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<td>Denied</td>
<td>63</td>
<td>114</td>
<td>202</td>
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<td>Appeals</td>
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<td>Granted on condition</td>
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<td>93</td>
<td>181</td>
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<td>Granted temporarily</td>
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<tr>
<td>Granted partly and partly denied</td>
<td>...</td>
<td>9</td>
<td></td>
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<td>Reversed</td>
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<tr>
<td>Stricken from the docket</td>
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<tr>
<td>Total</td>
<td>226</td>
<td>362</td>
<td>720</td>
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shown above, we find that in spite of the fact that the board decided about twice as many cases in 1925 as in 1924, there were no appeals from the decisions made. 1308 cases have been decided by the Chicago board of appeals and only 29 have been appealed.

It is not easy to select decisions from the hundreds handed down by the Chicago board of appeals to illustrate the work of the board. No two cases are alike and no precedent can be found which can be applied in all other cases of somewhat the same nature. Nevertheless, it is instructive to study the problems found in the following cases. The ordinance provides that where a business building, built on a corner lot, extends back to a residential or apartment lot facing a side street, the rear corner shall be cut off at an angle so as to join the side street lot at the building line rather than at the street line. 31 Obviously such an angle would be unnecessary should there be an alley separating the two lots so it is the practice of the board in such cases to require the rear wall of the building to be finished with pressed brick or to require the alley doors to be closed as a condition precedent to the removing of the rear angle cut-off requirement.

Churches nearly always are allowed to exceed the volume limits if the result will not be harmful to the surrounding property. In one case a factory owner desired to extend his building into a residential district. He was required to put in a vent stack, to buy an adjoining lot, and to preserve the amenities of the neighborhood. Another factory owner was allowed to make an extension on condition that the chimney be raised forty feet and a gas drier be installed. An owner of a lot desired to erect a garage thereon, but his plans were refused because the ordinance required the building to be set back three feet along the alley side, and his plans had made no provision for this requirement. The garage was to be used for storage and since a certain width was necessary to provide for the parking of cars within the building the owner claimed that he could not leave the three foot strip along the alley side. The board allowed that part of the garage which was to be used for storage to extend to the alley line so long as the building remained a one story building. In a neighborhood, zoned commercial, but filled with the lowest grade of manufacturing uses, the board allowed a junk yard to be established upon a two

31Sec. 22 (e).
year permit. At the end of the two years another inspection will be made and if the neighborhood has "cleaned up" the permit will be revoked. Another such case involved a stoneyard, which was allowed as a nonconforming use, the permit being for seven years. This lot was located near a railroad and other non-conforming uses served as a buffer between the stoneyard and the more restricted uses of the neighborhood.

Having made its decision, the board of appeals has no power of enforcement. To many this seems to be a defect in the zoning law, and it has been advocated that the board should be made an arm of the executive in zoning matters. All that can be done at present is through letters to the building department or the legal department of the city. Some will point to the method of amending the ordinance as a defect in the zoning law. There is nothing to prevent a disappointed applicant from bringing his claim to his alderman, who may be induced to propose an amendment. The proposal will be investigated by the committee of the council and may be adopted by the ordinary vote. Notice is not given directly but is published in the official journal and complaint has been made that amendments have been made without the adjoining owners being aware of the situation. The zoning ordinance should be changed only after a public hearing at which the neighborhood is present and this cannot be secured without mailed notices to the owners and householders. The board of appeals cannot block an amendment or compel a two-thirds vote as provided by the enabling act of 1921. The only recourse in the case of an unnecessary amendment is in protest to the mayor in the hope that the contemplated change will be vetoed.

Zoning is yet in the stage of development and in the application and the enforcement of the zoning ordinance we find many defects. At present, it seems that the board of appeals is hampered by the division of powers and the lack of organization common to municipal government. The newness of the zoning movement and the lack of detailed knowledge on the part of the legis-

\[32\] The Proceedings of the City Council shows that the zoning ordinance was amended 109 times between April 21, 1924 and April 1, 1925. Fifteen of these changes were vetoed by the mayor. About three-fourths of the changes were to provide for less restricted regulations. Between October 17, 1924 and June 3, 1925 there were 49 amendments lowering the standards, the property affected having a street frontage of 35.4 miles. Between May 1923 and July 1924 there were 71 amendments lowering the standards, the property affected having a frontage of 53 miles.

\[33\] Ill. Laws 1921, p. 182.
lative and executive departments of the city necessarily hampers enforcement and creates difficulties for the board of appeals, but in spite of that, the board of appeals seems to be doing a very important work in a sane and efficient manner.

III. THE NEW YORK BOARD OF APPEALS

Aside from the limitation of the height of buildings and scattered piecemeal zoning ordinances, we can say that zoning began in New York City. The enabling act was passed in 1914 and two years later the zoning resolution was adopted by the city. Both the enabling act and the zoning resolution have been widely copied and the influence of these acts and the counsel of such men as Edward M. Bassett, Herbert S. Swan, and Frank B. Williams has been of great value in securing the adoption of zoning in other states.

It is interesting to note that the first enabling act made no provision for a board of appeals, the necessity for such a board not being apparent at that time. However, as the zoning resolution was being framed, the zoning commission came to the conclusion that some board of appeals or adjustment was necessary. Instead of seeking statutory authority for the creation of a new board of appeals the zoning commission attempted to make use of a board of appeals which had been provided by the legislature in 1916 with power "to exercise its discretion within limits in granting permits for buildings in exceptional situations and to review the decisions of the building commissioners." The New York City Building Zone Resolution, adopted July 25, 1916, provided that the "Board of Appeals, created by chapter 503 of the laws of 1916, may, in appropriate cases, after public notice and hearing and subject to appropriate conditions and safeguards, determine and vary the application of the use district regulations herein established in harmony with their general purpose and intent as follows."

Then follow subsections (a) to (g) giving specific examples of situations where a variation of the resolution might be

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35 N. Y. Laws 1916, ch. 503 sec. 6. New York Charter secs. 718d, 719-5. The board was composed of the appointed members of the board of standards and appeals and the chief of the uniformed force of the fire department.
36 Bassett, Board of Appeals in Zoning supra p. 9.
37 Art. II, sec. 7.
advisable. Another section allowed variance in cases of "practical difficulties or unnecessary hardship."

The zoning commission which framed the New York ordinance made the above provision under the assumption that this could be done because of the similarity to the powers provided by the act of 1916. This proved to be erroneous as was shown in the case of People ex rel. Beinert v. Miller. Here the court said:

"The board of estimate having been vested by the legislature with the power of framing the regulations and restrictions provided for by the acts of 1914 and 1916 could not, in the absence of express legislative authority, delegate to an inferior board the power to dispense in its discretion with compliance with such regulations. If the board of estimate has such a power to be exercised or not in its discretion, it could not delegate such discretion to a subordinate administrative or ministerial board."

This case illustrates the error of giving the power to vary or adjust the zoning ordinance, which was provided for by statute and had the force of a statute, to a board created by a different statute and for a different purpose. Only the board of estimate and apportionment had the power to pass a zoning ordinance, acting upon the recommendation of the zoning commission, and the board of estimate and apportionment had no authority to invest this board of appeals with the power to vary the ordinance.

The weakness of this board of appeals had been recognized before the decision in the Beinert Case had been handed down, and the legislature had amended sections 242a and 242b of the Greater New York Charter by adding the following:

"Said regulations shall be enforced by the superintendent of buildings of each borough and the tenement house commissioner and the fire commissioner under the rules and regulations of the board of standards and appeals. Said regulations of the board of estimate and apportionment may provide that the board of appeals may determine and vary their application in harmony with their general purpose and intent and in accordance with general and specific rules therein contained."

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38Art. V, sec. 20 (now sec. 21)
41The enabling acts. See note 34.
44N. Y. Laws 1917, ch. 601.
The charter provisions regarding the board of appeals were also amended by adding the following:45

"They 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 and apportionment adopted pursuant to sections two hundred and forty-two-a and two hundred and forty-two-b of this chapter. [This section continues:46] No member of the board shall pass upon any question in which he or any corporation in which he is a stock holder or security holder is interested.

"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."47

"The words board of appeals when used in this chapter refer to said appointed members of the board of standards and appeals and the chief of the uniformed force of the fire department, when acting under the powers conferred by this section."

In 1920 this section was added to by the provision that the chairman may administer oaths and compel the attendance of witnesses.48

The New York board of appeals has become a very important "adjunct" to the zoning plan. The rules which govern the activities of this board have been copied in practically all the states that have provided for the board of appeals. Almost all the reported cases involving the procedure of a board of appeals come from New York and the precedents there laid down have become binding in other jurisdictions. Hence, a review of these cases should be of interest to the legal profession in other states.

IV. Leading Cases

While there are cases in which decisions of the board of appeals have been reversed it is the rule that courts of record uphold the board of appeals on certiorari unless there is a clear violation of the limited powers of the board. By People ex rel. Healy v. Leo49 an order, sustaining a writ of certiorari and annuling the proceedings of the New York board of appeals, was reversed and the decision of the board was affirmed. The court said:50

45Greater New York Charter, sec. 718d.
46The remainder of this section was in N. Y. Laws 1916, ch. 503 sec. 6 (Amd. to the Charter 718d).
47See change in N. Y. Laws 1920, ch. 743 sec. 1.
48N. Y. Laws 1920, ch. 348.
49(1920) 194 App. Div. 973, 185 N. Y. S. 948.
50(1920) 194 App. Div. 973, 185 N. Y. S. 948.
"Applications to vary the zoning regulations in a particular case are addressed largely to the discretion of the board of appeals which will not be interfered with by the court except in clear cases of abuse of such discretion."51

The presumption in favor of the board of appeals is well stated by the court in the case of People ex rel. Werner v. Walsh.52

"While the court has been given express power to review the determination of the board of appeals and to reverse or to affirm wholly or partly, or to modify the decision brought up for review, and may even take additional evidence upon the hearing, there exists, nevertheless, a presumption in favor of the correctness of the determination arrived at by the board of appeals.

"In the present case it does not appear from the record that the board abused its discretion, or acted in bad faith or that its action was unreasonable, arbitrary, discriminatory, or illegal, in refusing to vary the application of the use district regulation; and in such instance we may not substitute the court's determination for that of the duly constituted municipal authority."53

In discussing this presumption in favor of the board of appeals, the court in People ex rel. Ruth v. Leo54 made this statement:

"The hearings before the board of appeals are not intended merely as the first step in an application to the supreme court for a permit, and the supreme court should not upon the hearing of a writ of certiorari reverse a determination of the board of appeals, even though the justice presiding might himself have arrived at a different conclusion, if the application had been submitted to him in the first instance and he had a right to exercise his own untrammeled discretion. . . . Each application must be determined upon its own merits, and persons aggrieved by a decision of the board of appeals have a right to appeal from such a decision, but such decisions in nowise affect property holders in other sections of the city and in nowise bind the board of appeals when new applications are made for similar relief."55


In regard to the reconsideration of decisions made by the board of appeals and the review and modification of its own rulings, *People ex rel. Brennan v. Walsh* holds that 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 the court said:

"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 the courts through a writ of certiorari. But the power to reconsider is not an arbitrary one, and its exercise should be granted only when there is justification and good cause for such action."

*People ex rel. Swedish Hospital v. Leo* holds that there is nothing in the statute which gives the board power to reopen and review its acts. It was declared that:

"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 implies it is an appellate tribunal. It passes upon matters formally brought to its attention much the same as courts. It hears evidence and argument and decides controversies as the evidence dictates. It cannot act without some evidence. The record here shows that it denied the application for good reason and upon sufficient evidence to sustain its conclusion. There was not a scintilla of evidence presented to the board to warrant it in changing its final disposition of this proceeding."

In the case of *McGarry v. Walsh* Judge Manning upheld the ruling quoted above and said:

"The appellants maintain that the board had the power to correct, reverse, or amend its previous decision, and that it was proper in this case, since the owner would have suffered a grave injustice if its action has been permitted to stand, and that if the board has not such power, and 'finality in zone law matters were the policy of the law, the board of appeals would cease to exist,' and that the very essence of the statutes and ordinances is to authorize variations, make changes, and then further changes, in

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56(1922) 195 N. Y. S. 264.
57Ibid., at 266.
58In this case the court held that there was no justification for such review.
the application of the fixed rules, and that the reason for its very existence is to the direct contrary of the legal policy that judgments of courts between private litigants, once legally made, must forever stand. If this is so, the board of appeals is a law unto itself, and I do not know when it could be considered that any action of the board is final, and yet its rules provide for a final determination, which the board says cannot curtail powers given by the legislature.\(^{63}\)

Although the law seems to be that the board of appeals cannot reconsider a decision upon the same evidence, it was held by *Barker v. Boettger*\(^{64}\) that mere irregularities or informalities may be corrected or altered by the board without violation of the above rule.

The Rhode Island enabling act\(^ {65}\) authorizes appeals to a board of appeals and requires the board to fix a reasonable time for hearing the appeal, to give notice to parties interested, and to decide the appeal within a reasonable time. It was held in the case of *Richard v. Board of Review of Woonsocket*\(^ {66}\) that this statute did not authorize the board of appeals to table, for an indefinite time, an appeal from the action of the city building inspector in issuing a certain permit. This ruling seems to be a reasonable one because one of the chief reasons for the existence of a board of appeals is that it is able to act promptly and settle questions without the delay which would inevitably result if the question were left to the city council.

The enabling act for New York City\(^ {67}\) provides that hearings on appeals are to be before at least five members of the board of appeals, and that "the concurring vote of five members of the board of appeals shall be necessary to a decision." This provision of the statute was "clumsily drawn" and a number of questions were raised as to its real meaning. For example, suppose that five members meet and four are in favor of the appellant and one is opposed to him. Obviously a decision favorable to the appellant, at that time, is impossible, but does it follow that failure to decide in his favor is to be interpreted as a decision against him? This question was discussed in the cases of *People ex rel.\(^ {68}\)"

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\(^{66}\)(R. I. 1925) 129 Atl. 736.

Fortunately the criticism of this section has secured the provision in the General City Law of the state of New York\(^6\) that the "concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant (on) any matter upon which they are required to pass under any such ordinance or to effect any variation in such ordinance." This provision was copied into the Standard State Zoning Enabling Act\(^7\) and has been generally followed by other states.\(^8\)

The board of appeals may grant relief subject to conditions and by this method obtain results which could not be obtained in any other way. The board may make aesthetic requirements, as when it compels the alteration of the plans of a business building to conform to the amenities of the residential neighborhood before granting a permit for its extension into a residential zone. Sometimes the conditions are to preserve the quiet and comfort of the residence district "as when the permit requires the business structure to have its entrances all on the business street, thus to some extent keeping employees and customers off the residential street."\(^9\)

\textit{People ex rel. Helvetia Realty Co. v. Leo} \(^{10}\) was a review by certiorari of a decision of the New York board of appeals. A building had been constructed in 1905 of four stories, with plans to raise it to nine stories at a later time. After the zoning law went into effect the owner desired to build the addition and there arose the question as to the space to be left in the rear between the intervenor's building and the relator's building which abuts it in the rear. The board of appeals allowed the intervenor (owner) to carry the old wall up straight instead of being set back "on condition that the additional portion of the rear wall of the structure shall be faced with cream or white glazed brick and that the upper sash of any windows placed in said wall shall be glazed with prism glass." The board had found that the petitioner's wall was in the shadow of its own building and could not in any event...

\(^{70}\)Gen. City Law ch. 483 sec. 81-1.
\(^{71}\)Standard Act supra, sec. 7, p. 11.
\(^{72}\)For example Ill. Laws 1923, p. 269.
\(^{73}\)Williams, Law of City Planning and Zoning 572, note 52.
receive sunlight directly from the south and the only light the windows could have must be reflected light from the north, hence under the conditions imposed would have better light than if the owner's building wall were set back but made of ordinary brick. This was held to be a proper exercise of the board's discretion.

In *People ex rel. Beinert v. Miller*\(^7\) we find that the New York board of appeals had reversed the determination of the superintendent of buildings that a riding academy could not be constructed in a certain district of New York City. This decision was made upon certain conditions as to the location and construction of the proposed academy. The lower court held that the board was limited to action upon the plans before it and since those plans were not acceptable, the board should have affirmed the refusal of the superintendent of buildings. The court said:\(^7\)

"Its decision was in effect to promise in advance of any application by the owner of the property for approval of new plans which should meet the objection, that the board would approve such new plans upon appeal, whatever might be the attitude of the superintendent in respect thereof, so far as this question was concerned."

Upon appeal\(^7\) Judge Blackmar made the following statement: \(^7\)

"In doing this we think the board of appeals did not alter or modify the zoning resolution. . . . In this case the board made the investigation; it prescribed, as a condition for the protection of the adjacent residential district, that the buildings should be limited to the business district and that solid walls, without openings, should be built on the side toward the residential district. All this seems in harmony with and not in derogation of the resolution. . . . In fine, the function of the board of appeals in this respect is not to vary the resolution but to 'determine and vary the application of the use district regulations . . . in harmony with their general purpose and intent.' We think the board of appeals had jurisdiction to make the determination that was annulled at Special Term."

As we have stated before one of the chief services of the board of appeals is in preventing the question of the constitutionality of zoning ordinances from arising in the courts in every case of hardship. Nearly all of the hardship cases are settled in the hearing before the board but the individual is given his appeal from such

\(^7\)(1919) 188 App. Div. 113, 176 N. Y. S. 378.
decisions by way of certiorari. It is generally provided in the state enabling acts that persons aggrieved by a decision of the board of appeals may present to a court of record a petition, duly verified, setting forth that such decision is illegal and specifying the grounds of that illegality. Upon the presentation of this petition the court may allow a writ of certiorari to review the decision. The board of appeals is given at least ten days for a return, using copies of the papers acted upon by it, and this return is to show the grounds of the decision appealed from. The court can take testimony and may then "reverse or affirm, wholly or partly, or may modify the decision brought up for review." Upon appeal by certiorari the court will review the "official or judicial action" of the board, but if a mandamus issued often we would find the court compelling the local official to issue a building permit in spite of the zoning ordinances.

In New York it has been held that relief by way of mandamus will be denied when the petitioner has not sought relief by appealing to the board of appeals. In People ex rel. Broadway Realty Co. v. Walsh the court said:

"As the relator failed at first to exhaust its remedy by appeal to the board of appeals it was not in a position to apply to the court for relief by way of mandamus, and its motion for a final order for a peremptory writ was properly denied."

In People ex rel. Sondern v. Walsh we find a similar ruling, the court saying:

"But since the remedy of revocation lies, too, with the board of appeals, 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. Therefore, the writ itself is refused, although the construction asked for is given."

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70 Standard Act supra, sec. 7, p. 11.
80 38 C. J. 545.
81 As is regularly done in New Jersey. See Baker, Zoning Legislation (February, 1926) 11 Cornell Law Quarterly 164.
86 It is very generally held that except in so far as changes have been introduced by special statutory provisions, the writ of mandamus, being an extraordinary writ, will not issue where there is another plain, speedy, and adequate remedy available in the ordinary course of law. According to well established principles it is not the office of the court to establish a right but to define and impose a duty; it does not supersede, but rather supplies the want of legal remedies." 38 C. J. 558 and cases cited. See
In regard to the injunctive power of the courts the decision in *Wivitridge v. Park, Calestock, et al.* contained this statement:

"The injunctive power of this court is therefore not available in behalf of a private individual upon the theory that the business use of a building in a residence district established under the zoning statute constitutes a nuisance... Moreover, the resolution of the board of estimate and apportionment prescribes the remedies for its enforcement and the legal procedure and penalties in case of violation thereof, and it may well be argued that the remedies prescribed by the resolution are exclusive."

If the board of appeals has been applied to and the petitioner's request is not granted it is unlikely that a court will allow him a mandamus or an injunction. As Mr. Bassett says:

"The court trying the case would say that an expert body especially constituted under the law of the state and appointed by the city had given him this day in court and had found that his application was not meritorious. His legal counsel would probably advise him against mandamus and would apply for a writ of certiorari to review the action of the board of appeals. This review is usually predicated on the constitutionality of the ordinance. In the five years of the operation of the zoning resolution of the city of New York not a single writ of mandamus under it against any one of the borough building superintendents has come up for trial."

In New Jersey we find a great deal of confusion in the cases involving zoning. *Lutz v. Kaltenbach* holds that under the New Jersey statute remedy by appeal to the board of appeals must be pursued before resort to mandamus. However, other cases have held that it is not necessary to apply to the board of appeals before recourse to mandamus.

The New Jersey courts have ignored the statute providing for appeal from decisions of the board of appeals by way of certiorari and have made a number of decisions reversing the ruling of the board and issuing a writ of mandamus to compel the issuance of a building permit in violation of the zoning ordinance. *Falco v.*

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88(1917) 165 N. Y. S. at 642.

89Board of Appeals in Zoning, supra, p. 6.

90(N. J. 1925) 128 Atl. 421.

91N. J. Laws 1924, ch. 146.


Kaltenbach\textsuperscript{94} was a case of this nature and in answer to the respondent’s argument that mandamus is not a proper remedy to review the proceedings of a statutory tribunal, the court said:\textsuperscript{95}

“The answer to this is that the present proceeding does not contemplate a review of the action and proceedings of the board of adjustment, but seeks the assistance of this court’s prerogative writ to compel the building inspector to perform an administrative act which it is asserted he in law and fact should have performed, namely, issue the permit applied for. ‘The fact that another remedy may exist for reaching the evil complained of will not avail to prevent the resort of mandamus, unless such other remedy is specific and adequate.’\textsuperscript{96} We have already pointed out that certiorari is unavailing and inadequate, therefore, resort to mandamus is proper. We think the fact of this case makes the finding in \textit{Ignaciunas v. Risley}\textsuperscript{97} controlling.”\textsuperscript{98}

In considering these cases we should remember that New Jersey courts have rendered a number of decisions against the constitutionality of zoning ordinances. The enabling acts of New Jersey have not been condemned directly but the courts of that state have refused to consider zoning ordinances as proper application of the police power.\textsuperscript{99} It is doubtful if these cases will have much effect in the states that have settled the question of constitutionality of zoning.

The New York statute\textsuperscript{100} required that the return of the board on certiorari “must concisely set forth such other facts as may be pertinent and material and to show the grounds of the decision.” It was held by \textit{People ex rel. Parry v. Walsh}\textsuperscript{101} that a return by the board that the reason for denying the relator’s application was “the best interests of the community” and to prevent the “desecration of the community” failed to satisfy the require-

\begin{itemize}
\item \textsuperscript{94} (N.J. 1925) 128 Atl. 394.
\item \textsuperscript{95} Ibid, at 395.
\item \textsuperscript{96} Citing Lay v. Hoboken, (1907) 75 N. J. L. 315, 67 Atl. 1024 and cases therein cited.
\item \textsuperscript{97} (1923) 98 N. J. L. 712, 121 Atl. 783. This is the leading New Jersey case which holds zoning unconstitutional.
\item \textsuperscript{99} See Baker, Constitutionality of Zoning Laws, supra p. 231.
\item \textsuperscript{100} N. Y. Laws 1916, ch. 503 sec. 719a.
\item \textsuperscript{101} (1923) 121 Misc. Rep. 631, 202 N. Y. S. 48.
\end{itemize}
ments of the statute. In the case of *People ex rel. Kannensohn Holding Corp. v. Walsh*\(^{102}\) we find that the court states that the return to the writ must be more than a general denial of the petition.

"It must concisely set forth such other facts as may be pertinent and material to show the grounds of the decision. The return in this case sets forth the minutes of the proceedings before the board and as its decision a resolution which failed to show that it decided the appeal for any good reason."

Hence, the writ of certiorari was sustained and the board's decision was declared contrary to the weight of the evidence.\(^{103}\)

In the case of *In re Forbes*\(^{104}\) the court made the following statement in regard to appeal from the court reviewing the decision of the board of appeals:\(^{105}\)

"The writ of certiorari authorized by the act\(^{106}\) is a special statutory writ, and the proceedings with respect thereto are controlled by the statute creating the board of appeals and the right to review its decisions. The statute does not authorize a review of the judgment of the court, and, there being no right of review by appeal granted by the statute, no right of appeal exists."\(^{107}\)

This is the only case concerning the board of appeals that has been decided in the state of Illinois by the supreme court and the statute was changed and appeal from the court of review was allowed in 1925.\(^{108}\)

V. LIMITATIONS OF THE BOARD OF APPEALS

The board of appeals is not a legislative body and, therefore, it has no power to change or amend zoning ordinances. However, sometimes it is difficult to draw the line which separates cases deserving "variance" from the zoning ordinance, and cases which can only be solved by amending the ordinance itself.\(^{109}\) The board of appeals is created by legislative enactment and its powers are limited strictly to the statute, but the statutes do little to set

\(^{104}\)(1925) 316 Ill. 141, 146 N. E. 448.
\(^{105}\)(1923) 316 Ill. 141, 142, 146 N. E. 448.
\(^{108}\)Ill. Laws 1925, p. 244.
\(^{109}\)Pond, Another Version of the Leopold Case and its Effect on Zoning supra, p. 10.
definite boundaries to the powers of the board. For illustration, the Standard State Zoning Enabling Act, which has been followed by a score of states gives the board of appeals the power:\[110\]

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

In New York the board of estimate and apportionment adopted the following rule which has the force of a statute:\[111\]

"Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this 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."

The Illinois enabling act makes this provision:\[113\]

"Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the board of appeals shall have the power in passing upon appeals, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done."

Such provisions are bound to raise many questions as to the powers of the board of appeals. What is the meaning of the term "vary?" How far can the board go in "modifying" the ordinance without taking upon itself the legislative powers reserved to the city council? What is "unnecessary hardship?" What standards are to be used in ascertaining the conditions which constitute "practical difficulties?" How far can the board go and still observe the "spirit of the ordinance?" The various answers to these questions bring up once more the question of strict interpretation versus liberal interpretation. Those who criticize the board of appeals and its activities often claim that the board is

\[110\] Standard Act supra, sec. 7, p. 10.
\[111\] New York Zoning Resolution article V, sec. 20 (now sec. 21.)
\[112\] Art. V, sec. 20 and art. II, sec. 7 of the resolution contain a number of definite provisions for the work of the board of appeals, section 7 providing for seven "Use District Exceptions"—sec. 7, subs. (a) to (g).
\[113\] Ill. Laws 1923, p. 268, sec. 3.
\[114\] The General City Law of the State of New York ch. 483, sec. 81-4 has a provision much like the Illinois law except that it does not provide for the variance of the application of the ordinance.
prone to magnify its powers and to consider itself authorized to
decide any and every case in the way that seems most desirable to
the board, which results in the nullification of the ordinance.
These critics will advocate strict limitation of the board's powers.
However, the defenders of the board say that it is impossible for
the city council to make adjustments and that the activities of the
board keep zoning cases out of court and free the ordinance from
cases of individual hardship. They will hold that the board, com-
posed as it is of zoning experts, making a personal inspection, and
being without political ambitions, should be given the benefit of a
liberal interpretation of the statute.

In spite of such discussion over the powers of the board, nearly
all will admit that the board of appeals is a necessary adjunct to
a zoning system. In all of the states that provide for a board of
appeals by statutes, the constitutionality of which are unques-
tioned, the board has proved to be the "safety-valve" or "shock-
absorber" of the zoning plan. But the strongest supporters of
the board will say that its chief weakness is in the lack of definite
limitations upon its powers. Attacks upon the board are in most
cases directed against its tendency to overstep its "lawful func-
tions."

A number of cases have come before the courts involving the
question of the limitations of the board of appeals. In the case of
People ex rel. Beinert v. Miller\footnote{(1919) 188 App. Div. 113, 176 N. Y. S. 398.} the court took a liberal view
of the powers of the board of appeals of New York City and
made this statement:\footnote{(1919) 188 App. Div. 113, 117, 176 N. Y. S. 398.}

"It would be physically impossible for the board of estimate
and apportionment, which in its manifold powers and duties is a
near approach to the commission form of government for a city
that in population, wealth and industries is greater than many
independent states, itself to determine and vary the application
of use district regulations as provided by section 7 of the resolu-
tion. From the necessity of the case, the power must be conferred
on some subordinate body or board. . . . In fine the function of
the board of appeals in this respect is not to vary the resolution but
to 'determine and vary the application of the use district regula-
tions . . . in harmony with their general purpose and intent.'"

In referring to article V, section 20 of the zoning resolution
(quoted above) the court in People ex rel. McAvoy v. Leo\footnote{(1919) 109 Misc. 255, 258, 178 N. Y. S. 513.} said:

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\item \footnote{(1919) 188 App. Div. 113, 176 N. Y. S. 398.}
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\item \footnote{(1919) 109 Misc. 255, 258, 178 N. Y. S. 513.}
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"By this section I think it will clearly appear that the board of appeals possessed the discretionary power to deal with specific exceptional cases, and to vary any provision of the resolution in harmony with its general purpose and intent, so that the public health, safety, and general welfare may be secured and substantial justice done, and evidently it 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, in my opinion, cannot be considered as an illegal official act."

*People ex rel. Smith v. Walsh*118 reviewed the granting by the board of appeals of a permit for a garage at the corner of Prospect avenue and Eleventh avenue in Brooklyn, contrary to the letter of the zoning law. The presence of another garage on Prospect avenue brought the case under a "Use District Exception,"119 but there was no like building on Eleventh avenue so as to bring that side under the exception. The court said:120

"But does it follow that the permit for the erection of this garage cannot be sustained upon any other ground? May not the broad provisions of section 20 be applied to this particular case? I have already pointed out that there was evidence before the board to show that this property was not available for residence or ordinary business purposes, and that so far as the record shows, a public garage was practically the only use available. If, therefore, the intervening appellant be deprived of that use by the strict letter of the Building Zone Resolution, surely practical difficulties and unnecessary hardships will ensue within the meaning of section 20."121

In the case of *People ex rel. Sheldon v. Board of Appeals*122 we find that the New York board of appeals had allowed the erection of a business building in a district zoned residential by the board of estimate and apportionment. The board justified itself by claiming that the case came under the "Use District Exceptions" provided by the Building Zone Resolution123 which gave the board power to permit the extension of an existing building into a more restricted district under such conditions as will safeguard

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119Building Zone Resolution art. II, sec. 7 (e).


123Art. II, sec. 7 (c).
the character of the more restricted district. The court held that the change permitted by the board in allowing a business use in a residential district was fundamental in character and that the action of the board was, therefore, beyond its power. The court made this very interesting statement:124

"The plain intent and purpose, both of the legislature and the board of estimate and apportionment, seems to me to have been merely to permit of the amelioration of the rigors of necessarily general zoning regulations by eliminating the necessity for a slavish adherence to the precise letter of the regulation where, in a given case, little or no good on the one side, and undue hardship on the other would result from a literal enforcement. . . . 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."125

This decision was reversed by the Court of Appeals,126 the court making this statement:127

"If as the result of investigation the board of appeals shall 'determine' as it did in this specific case, that there existed 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 enlarged to 'vary', i.e., to modify or alter in form or substance the application of the regulations of the board of estimate and apportionment in the specific case which it did by permitting the building which the owner 'proposed to erect upon his lots embraced in the business district to be extended so as to cover the lots fronting on Madison avenue."128

In spite of such liberal statements as to the powers of the board of appeals we find that the courts have not been hesitant to prevent the exercise of unwarranted and unreasonable power by the board, when court interference seemed necessary. People ex rel. Cotton v. Leo129 involved a decision of the board of appeals granting a permit for a garage in a residence district. The board claimed that it had power to issue the permit under the zoning resolution130 which permitted the granting of the permit, provid-

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124(1922) 115 Misc. 449, 452, 189 N. Y. S. 772.
126(1923) 234 N. Y. 484, 138 N. E. 416.
127(1923) 234 N. Y. 484, 494, 138 N. E. 416.
130Art. II, sec. 7 (g).
ing the petitioner filed consents of the owners of eighty per cent of the frontage "deemed by the board to be immediately affected by the proposed garage." The court held that the board had not acted in good faith in determining what property was immediately affected and that the board's power in that regard was not arbitrary. Moreover, the court found that there were no other garages or business structures near the location of the proposed garage. Strange as it may seem, that fact appeared to have been the controlling one with the board and its chief reason for varying the ordinance. The board contended that even if it could not grant the permit as a "Use District Exception" that it had power to grant the application under article V section 20, which allowed a variance of the ordinance in cases of "practical difficulties or unnecessary hardships." The court said:

"Apparently the board's contention is that this section gives them the power to do whatever they think is right regardless of the provisions of the statute. But it does not grant any such power. The board cannot wholly disregard the provisions of the statute or of the regulations. It can merely 'vary' them to do 'substantial justice' when the 'strict letter' of the provisions would work hardships."

The case of People ex rel. Gross v. Walsh was very similar to the Cotton case above. Here the board, failing to receive the requisite number of consents as provided by the zoning resolution as necessary for a "Use District Exception," sought to justify its action in granting a permit by claiming that it could do so under article V section 20. The court said:

"What has been done here is not to 'vary', but to appeal and nullify express statutory enactment. If such right exists, then the language of Article II section 7 subdivision (g) providing for the consents and the frontage affected is surplusage, and the board would have the arbitrary right to permit the erection of any garage in a residence district. . . .

"In the instant case the respondents did what the board of estimate and apportionment would be powerless to do, except under certain prescribed conditions."

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122Citing People ex rel. Cockroft v. Miller, (1919) 187 App. Div. 704, 176 N. Y. S. 206. In People ex rel. Swedish Hospital v. Leo, (1923) 120 Misc. Rep. 355, 198 N. Y. S. 397, the court said (p. 359): "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."
124Building Zone Resolution art. II, sec. 7 (g).
Perhaps the best statement as to the limitations of the board under section 20 is found in the case of People ex rel. Brennan v. Walsh. The court declared that if the board of appeals were allowed to grant the permit in question under article V section 20 that there would be no necessity for the rules, regulations, consents, and the like, provided for in the other parts of the resolution. It continued as follows:

"The power would be with the board in all cases. Its judgment, even though arbitrarily exercised, would be final. It was only those situations which presented exceptional and unusual conditions that permit the board to exercise its judgment in order to relieve excessive hardships. It is not unlike similar power given to the superintendent of buildings and other officers to waive the strict letter of the law in the interest of preventing unnecessary hardships in exceptional and difficult cases. To hold otherwise would be to submit the whole operation of the Zoning Law to the arbitrary discretion of the board of appeals. 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."

There are a few other cases which might be used to throw more light upon the subject of the limitations of the board of appeals. People ex rel. Small v. Leo was a certiorari to review the action of the New York board of appeals in reversing the decision of the superintendent of buildings who had refused to issue a building permit for a garage in the business zone of the city. The board claimed that it acted under a "Use District Exception" provided by the Building Zone Resolution. The court held that the board was not correct in its contention because the "alleged existing garage on the south side of President street is 100 feet west of Franklin avenue and is not within the 'business district' zone and, therefore, does not come within the provisions of the section. . . ."

In People ex rel. Wohl v. Leo the relator had built a building before New York City was zoned and had used the second story for temporary living quarters. After the city was zoned he de-

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136(1922) 195 N. Y. S. 264.
137(1922) 195 N. Y. S. 264, 267.
140Building Zone Resolution art. II, sec. 7 (e).
sired to extend his business throughout the entire building but the permit was refused on the ground that his building was located in a residential zone. The board of appeals denied his application for adjustment. The court reviewed the case on certiorari and said:142

"The use of a building designed and constructed for business is for business and its use for business exists, where the plan of the building is not structurally changed, although it may be actually occupied as a dwelling. In such a case the building remains available for business, notwithstanding its temporary use for a purpose for which it was not designed."

The decision of the board of appeals was reversed and the application was granted.

In People ex rel. Hyman v. Leo143 we find that the board of appeals for New York City had granted a permit for a garage under the provisions of the ordinance for "Use District Exceptions,"144 which permitted the granting of a permit for a garage in a street "between two intersecting streets in which portion there exists a garage for more than five motor vehicles, or a stable for more than five horses, at the time of the passage of this resolution." The court found on certiorari that opposite the premises in question there was a partially constructed building intended to be five or six stories high and to be used as a garage, but as yet incomplemented. The court said:145

"In its present condition the structure is unusable as a garage, and, moreover, may never be completed or used for garage purposes. The board of appeals is strictly limited in its powers, and must determine the matter before it upon the conditions as they existed in the block at the time the appeal was taken. It follows that the writ should be sustained with costs, and the resolution of the board of standards and appeals reversed."

The board of appeals is of such recent origin that it is impossible to say definitely what are the limitations upon its powers. Very few cases have been decided upon this question and they are cases which review the decisions of one board of appeals, that of New York City. But from the decisions quoted we may say that the following rules are worthy of notice.

1. Whenever the discretion of the board of appeals is involved, the courts will presume that the board, as an expert body, has decided correctly.

142(1919) 178 N. Y. S. 851, 853.
144Building Zone Resolution art. II, sec. 7 (e).
2. The board of appeals has the right to make a reasonable variation from the application of the zoning ordinance, but—
   (a) The spirit of the ordinance must be observed.
   (b) Practical difficulties and unnecessary hardships must be proved. Only the strict letter of the law may be waived.
   (c) The change cannot be legislative in character and must be confined to specific cases.
   (d) All the rules and regulations provided by the ordinance for specific cases or conditions must be observed before recourse to more general regulations.
   (e) The board, of course, must act in good faith and should it appear that the board acted in bad faith, or was unreasonable, or was incorrect in the application of the ordinance, the board will be overruled on review.

3. The board of appeals has no powers other than those granted by the statute and those powers are open to strict interpretation by the courts.

In conclusion, we can say that the board of appeals has been rendering a valuable service to zoned cities. It has preserved the constitutionality and popularity of the zoning ordinance and, more than that, it has made the law capable of being enforced. The hope for the zoning of the future lies largely in the work of the board of appeals. If it can continue its splendid work but still be restrained to its legal powers, that future seems very bright.