Zoning Board of Appeals

James A. Coon Local Government Technical Series

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George E. Pataki
Governor

Alexander F. Treadwell
Secretary of State

New York State Department of State
Division of Local Government Services
41 State Street
Albany, New York 12231
(518)473-3355
http://www.dos.state.ny.us

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Introduction

A zoning law is a community's guide to its future development. That is its purpose. It is not meant to be just another governmental intrusion, another bit of red tape to be untangled before the property owner can go ahead with his plans. The very projections afforded residents and property owners within the community from undesirable development come from the restrictiveness of zoning. Traditionally, zoning is characterized by pre-set regulations contained in the ordinance or local law, and applicable uniformly within each district. A landowner can look at the zoning map and regulations and know that if he follows them, he has a right to use his land in a certain way, and that neighboring property is subject to the same restrictions. But, because all land in the district is subject to the same rules, and because no two parcels of land are precisely the same, problems can arise.

When the first zoning ordinance in this country was passed in New York City in 1916, there was grave doubt that the courts would uphold its constitutionality, since it was a new and, at that time, radical system of landuse control. Various "safety valves" were included in that first ordinance; therefore, in an attempt to relieve the pressure of too rigid enforcement of the zoning ordinance and any attendant hardship, and also to attempt to ensure judicial approval of the new concept. Foremost among these devices was the concept of an administrative body that would stand as a buffer between the property owner and the court, designed "to interpret, to perfect, and to ensure the validity of zoning." (Anderson, Zoning Law and Practice in New York State, 3d ed. section 22.08). That administrative body is the board of appeals, sometimes referred to as a board of adjustment.

That the concept of zoning received judicial approval is history (*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365). The "safety valve" aspect of boards of appeals was recognized by the courts of New York State as early as 1927, when a court discussed the fact that zoning regulations limit the freedom of action of an owner in dealing with his/her property and, by their very nature, raise constitutional questions as to whether an individual's rights are violated. The court found:

> "The creation of a board of appeals, with discretionary powers to meet specific cases of

> hardship or specific instances of improper classification, is not to destroy zoning as a policy, but to save it. The property of citizens cannot and ought not to be placed within a strait-jacket. Not only may there be grievous injury caused by the immediate act of zoning, but time itself works changes which require adjustment. What might be reasonable today might not be reasonable tomorrow" (*People v. Kerner,* 125 Misc. 526).

These observations concerning the importance of boards of appeals will be relevant as long as zoning exists. They should be engraved on the door of the meeting room of each board of appeals and recited by board members along with their oath of office. However, the quote should not be taken to mean that boards of appeals have a blank check to relieve every hardship caused by zoning ordinances or local laws. Great care must be taken to ensure that the purpose and intent of the ordinance or local law is carried out, lest too many changes without proper foundation destroy the zoning itself.

The Court of Appeals, New York State's highest court, has recognized the necessity for and the value of boards of appeals as a "safety valve" to prevent the oppressive operation of zoning laws in particular instances, when the zoning restrictions are otherwise generally reasonable (*Otto v. Steinhilber,* 282 N.Y. 71). And each municipal attorney, property owner and judge will agree with Justice Cardozo's observation that:

> "There has been confided to the board a delicate jurisdiction and one easily abused" (*People v. Walsh,* 244 N.Y. 280).

This section discusses the board of appeals - its composition, powers, duties and limitations. Some of its important functions, such as the granting of area and use variances, and the procedure governing such boards and those that appear before them, are covered in separate sections because of their length and complexity.

Creation, Function, Powers and Duties

Composition of the board

The Town Law, section 267(2) and Village Law, section 7-712(2) provide that the town board and village board, respectively, shall provide for the appointment of a board of appeals. This should be done in the zoning ordinance or local law itself. The appointment is not discretionary, as in the case of a planning board, but must be made. Effective July 1, 1994, this requirement is applicable in cities as well (General City Law, section 81).

In both towns and villages the statute provides for a board of three or five members. Effective July 1, 1994, the same membership rule will apply in cities. (Prior to July 1, 1992, the Town Law provision authorized creation of five or seven-member boards; accordingly, many seven-member boards continue to exist in towns. Such boards may continue to function after July 1, 1992 until such time as the town board reduces the membership to three or five (Town Law, section 267(7)).) (Until July 1, 1994, the General City Law also authorizes five or seven-member boards, which may similarly continue to function after that date until reduced to three or five members by the legislative body (General City Law, section 81)). The Town Law and Village Law provide for staggered terms of three years for three-member boards and five years for five-member boards. To provide uniformity in board member terms, amendments to the Town Law and Village Law, effective July 1, 1992, provide that the terms of board members in office on that date which do not expire at the end of a year are automatically extended to the end of the year. Their successors are appointed for three or five-year terms, depending on the size of the board (see Town Law, section 267(5); Village Law, section 7-712(5)). Effective July 1, 1994, amendments to the General City Law make similar provisions for terms equal in years to the number of board members; however, seven-member boards which continue to function as such beyond that date would appear to be bound by the existing statutory three-year terms (General City Law, section 81(3), (4), (6)).

It should be noted that pursuant to section 10 of the

Municipal Home Rule Law, villages and towns, by local law, may supersede or modify any provisions of the Village Law and Town Law, respectively, in their application to a particular village or town. This means that, by local law, a village or town may vary the requirements set forth in the Village Law or Town Law, relating to the number of members on the Board of Appeals and their terms of office.

In towns and villages, the chairperson of the board of appeals is designated by the legislative body (Town Law, section 267(2); Village Law, section 7-712(2)). Effective July 1, 1994, General City Law, section 81(1) provides that the mayor (or city manager in a city having a city manager) shall designate the chairperson of the board of appeals. The chairperson is given the power to call meetings, administer oaths and compel the attendance of witnesses.

The Town Law and Village Law further provide that the town board and village mayor may remove any member of the board of appeals, for cause, after a public hearing. Both sections provide how vacancies shall be filled. Effective July 1, 1994, the same powers are granted by the General City Law to a mayor or city manager, as the case may be.

Finally, the meetings of the board of appeals, in both towns and villages, must be open to the public, as required by the Public Officers Law, and minutes of the proceedings must be taken (Town Law, section 267-a(1); Village Law, section 7-712-a(1)). In both towns and villages, every rule, regulation, every amendment of repeal thereof and every order, requirement, decision, or determination of the board shall immediately be filed in the office of the town or village clerk. Effective July 1, 1994, General City Law, section 81-a makes the same provisions for city boards of appeals.

It is important to note that both the Town Law, section 267(3), and the Village Law, section 7-712(3) specifically state that no member of the town board or village board of trustees shall be eligible for membership on the board of appeals. Effective July 1, 1994, General City Law, section 81(2) similarly prohibits legislative body members from serving on the board of appeals.

Powers and duties of the board

The powers and duties of the zoning board of appeals are quite specifically set forth in the statutes. However, as is usually the case in the area of planning and zoning, this does not mean that there has not been extensive litigation and judicial interpretation of these provisions. There are very few, if any, fields of law that have generated more litigation than that dealing with boards of appeals.

All zoning boards of appeals are directly given appellate jurisdiction by State law. Appellate jurisdiction is the power to hear and decide appeals from decisions of those officials charged with the administration and enforcement of the zoning ordinance or local law. This is the primary function and purpose of a zoning board of appeals in zoning administration, and encompasses the power (if an appeal is properly taken to the board) to interpret the zoning ordinance or local law and to grant variances.

The Town Law and Village Law (and, effective July 1, 1994, the General City Law as well) provide that boards of appeals are limited to appellate jurisdiction "unless otherwise provided by local law or ordinance". Where a zoning ordinance or local law gives a zoning board of appeals powers that are in addition to its appellate powers, the additional powers are referred to as "original jurisdiction". Matters involving original jurisdiction may be granted to a zoning board of appeals by the zoning law or ordinance, but do not have to be. Examples of original jurisdiction include the power to grant special permits (also known as conditional use permits), and the power to approve site plans. There is nothing in the statutes that specifically provides for these powers to be exercised by zoning boards of appeals. If they are given to such boards it will be because the municipal zoning ordinance or local law so provides.

As noted above, the board of appeals is an appellate body primarily; the statutes say it must be. Unless specifically granted to it, it has no original jurisdiction. Thus, in a case in which the parties to a dispute appeared before a board of appeals for its interpretation of the terms of a zoning ordinance, without having applied for a permit, been denied said permit and then appealed same, the court declared the findings of the board null and void (*Kaufman, City of Glen Cove,* 45 N.Y.S.2d 53). The court found that the provisions of the ordinance involved and section 81 of the General City Law clearly indicate that the board of

appeals is vested only with the appellate power of review and revision of the enforcement officer's decisions. The court stated:

> "In other words, in the absence of an application to the building inspector for a building permit or certificate of occupancy, in the absence of a denial of such application by him on the ground that the proposed use violates the Zone Ordinance, and in the absence of an appeal from such decision to the board of appeals, the board has no jurisdiction or power to make any ruling or declaratory judgment as to the meaning of any provision of the ordinance."

The same reasoning would hold true for the issuance of a variance. That, too, is an appellate power. In general, a property owner cannot simply appear at the board of appeals office and ask for a variance. While it is true that only the board of appeals can issue a variance, it is equally true that it cannot issue a variance except on an appeal from a decision made by the zoning enforcement officer (*Scott v. Quittmeyer,* 200 N.Y.S.2D 886; *Balsam v. Jagger,* 231 N.Y.S.2d 450; *Plotinsky v. Gardner,* 206 N.Y.S.2d 611). It is only on such appeals - and then only when the applicant can show that he meets the legal requirements for a variance - that the board of appeals can issue one.

In a case where a board of appeals granted a variance (originally, not as a result of an appeal from the determination of the zoning enforcement officer), the court annulled the board's action, and set forth the general rule that:

> "The Board was without jurisdiction to act upon the application in the first instance in the absence of a reference to it pursuant to ordinance." Village Law, section 179-b [Now Village Law, section 7-712-b] (*Von Elm v. Zoning Board of Appeals of Incorporated Village of Hempstead,* 17 N.Y.S.2d 548).

Note, however, that we stated "in general" above. There are particular exceptions which apply in cases where area variances are necessary in the course of subdivision, site plan and special use permit applications. In such cases, the relevant statutes allow an applicant to apply directly to the board of appeals for an area variance without having to first apply to the enforcement officer for a permit.

As has been pointed out above, a board of appeals may exercise original jurisdiction if the local law or ordinance gives it this jurisdiction. An example of the type of original jurisdiction delegated to zoning boards of appeals is the special permit. Here, no appeal is contemplated. The special permit is a means to permit certain types of uses only after an administrative decision, based on conditions fully set forth in the zoning law. The conditions are the sort that insure that the use will properly relate to its surroundings. For example, a law might permit gasoline stations in commercial districts, but only by special permit - which is to be issued upon a showing that the proposed facility will have X type of landscaping, Y type of signing, and Z type of fencing. The board of appeals can be the body authorized to issue special permits upon a showing by the developer that she/he meets these conditions. As can be seen, no appeal is involved in such an instance.

In exercising this original jurisdiction (in the case of special permits), it should be noted that the board of appeals is only an administrative body; it has no power to legislate. While the functions delegated to it by the local legislative body do not have to spell out standards and conditions for the issuance of special permits in detail down to the last nail, suitable standards do have to be set forth in the zoning law to guide the board. In one case, it was held that a village ordinance which provided that a particular use was permissible in a certain district - "upon furnishing of suitable automobile parking facilities, the extent of which is to be determined by the board of appeals, upon application, and upon due consideration of the public interest in respect of traffic congestion" - was not to be construed as a delegation of legislative authority to an administrative agency without suitable standards to control the exercise of authority (*Mirschel v. Weissenberger,* 277 App. Div. 1039). In another case (*Schmitt v. Plonski,* 215 N.Y.S.2d 170), it was claimed that a section of a town zoning ordinance requiring "adequate" parking facilities for proposed construction was unconstitutional, because it failed to establish any standard to guide the board of appeals in the exercise of its discretion. The court upheld the validity of the section on the ground that, although stated in general terms, it was capable of reasonable application and sufficient to limit

and define the board's discretionary powers.

Usually, we think of the zoning board of appeals as part of the zoning mechanism of the community, and the discussion above has attempted to deal with it in that context. However, the zoning board of appeals is given several functions that do not relate to the zoning law, and since these functions are directly granted to boards of appeals by State enabling legislation, it is important that they be understood.

The first of these nonzoning functions concerns the official map. An official map is a police power device to implement a community's plans for development by protecting the rights-of-way for future streets, drainage systems and parks. These are shown on an official map, but remain private ownership until the community is ready to purchase them. Certain restrictions are imposed on the landowner's use of the land in the interim, the idea being to save the community the greater cost of acquiring improved land or resorting to an undesirable adjustment in the facility. The statutes authorizing the establishment and amendment of official maps are General City Law, sections 26,29; Town Law, sections 270, 273; and Village Law, section 7-724. The statutes provide a procedure whereby an owner whose land is shown on a map can obtain a permit to build on it. It is here that the zoning board of appeals has a role to play.

General City Law, section 35; Town Law, section 280; and Village Law, section 7-734 all provide that if the land within a mapped street or highway is not yielding a fair return on its value to the owner, the board of appeals - or other similar board in any city, town or village which has established such a board having power to make variances or exceptions in zoning regulations - shall have the power to grant a building permit. The vote of a majority of the board's membership is required and a hearing must be held, at which the parties in interest and others must be given the opportunity to be heard. In cities, 15 days' notice of hearing is required; in towns, 10 days' notice is needed, and notice must be published in a newspaper of general circulation in the municipality. The Village Law does not specify how such notice is to be given.

The second "nonzoning ordinance" area of zoning board of appeals responsibility concerns a prohibition contained in the statutes against issuance of building permits unless streets giving access to the structure exist (or a performance bond covering their construction has been furnished). The prohibition is contained in General City Law, section 36; Town Law, section 280-a; and Village Law, section 7-736. As in the case of official maps, the statutes give the zoning board of appeals the power to make reasonable exceptions to the prohibition, if a landowner appeals to it from an adverse decision of the administrative official in charge of issuance of permits. The procedure for such an appeal is the same as in the cases of appeals on zoning regulations (General City Law, section 36; Town Law, section 280-a; Village Law, section 7-736).

The third area of board power outside the zoning framework has to do with county official maps. Under General Municipal Law, sections 239-g through 239-k, procedures are established for county official maps which are similar to the local official maps described above. As in the case of the local maps, a procedure is set forth for the issuance of building permits in land shown on a county official map. General Municipal Law, section 239-j gives this function to local zoning boards of appeals. However, when issuing permits for buildings in lands shown on a county map, the board of appeals must do so by a two-thirds vote of its membership (it will be remembered that permits for building in land shown on a local official map may be issued by a majority vote). A hearing is required, on 10 days' notice. The statute specifically provides that if no zoning ordinance exists, or there is no board of appeals, a municipality may establish one for the purposes of section 239-j

A fourth nonzoning area of board jurisdiction concerns the issuance of building permits where a proposed structure has frontage on or access to a county road or other site shown on a county official map. Section 239-k establishes a procedure that municipalities must follow before issuing such a permit. The municipality must notify the county planning board and superintendent of highways (or commissioner of public works) of an application for such a permit. The latter has 10 working days to report back to the municipality his/her approval or disapproval. The building permit may then be issued only in accordance with this report - unless the local zoning board of appeals varies the report's requirements. To do so, it must act by a two-thirds vote, and after a hearing on 10 days' notice, and the landowner must show practical difficulties or

unnecessary hardship that would result if the report were obeyed.

The last area of jurisdiction given the zoning board of appeals by statute concerns airport approach regulations. Municipalities are authorized by General Municipal Law, section 356 to adopt such regulations, which would govern development in airport hazard areas, as defined in that section. The section provides that persons aggrieved by decisions of administrative officials charged with the enforcement of these regulations may appeal to the local zoning board of appeals.

Limitations on the board's powers

At this point in the discussion, having seen what boards of appeals may do, we need to clarify what they cannot do. Though it is ordinarily preferable to set forth a subject in positive terms, the functions of a board of appeals can be seen better if they are contrasted with the limitations on those functions.

First, bear in mind that a board of appeals is an administrative body, not a legislative body. It does not have any legislative functions; these are in the sole province of the city council, the town board and the village board of trustees. That the board of appeals did not have any legislative powers was recognized in early litigation involving the powers of the board:

> "No power has been conferred upon the Board of Standards and Appeals (the board of appeals in New York City) to review the legislative general rules regulating the use of land (cite). The board does not exercise legislative powers. It may not determine what restrictions should be imposed upon property in a particular district. It may not review the legislative general rules regulating the use of land. It may not amend such general rules or change the boundaries of the districts where they are applicable. Its function is primarily administrative" (*Levy v. Board of Standards and Appeals*, 267 N.Y. 347).

The above quote contains an excellent capsule review of the "thou shalt nots" which govern the action of a board of appeals. First, the board of appeals may not itself impose zoning. This is the function of the local legislative body when it adopts or amends the zoning law. In an interesting discussion of this point, the State Comptroller observed that:

> "We are satisfied that no authority exists in the General City Law or elsewhere for the delegation of the law-making powers of a legislative body to a purely administrative board, such as a board of zoning appeals" (Op. St. compt. 65-770).

What about special permits? Doesn't the authority that may be delegated to the board to issue special permits sound somewhat like a legislative power? The answer is that it is not; it is a purely administrative function, requiring that standards be set out in the zoning law to guide the board of appeals in passing upon such permits. Even if such standards are general, courts will look to see that they have been obeyed.

Nor can a board of appeals review the general rules laid down by the legislative body respecting the use of land. It has no power to set aside a law on the ground that its terms are arbitrary, unreasonable and unconstitutional (*Cherry v. Brumbaugh*, 255 App. Div. 880).

Also, the board of appeals does not have the authority to amend the zoning regulations or change the boundaries of the districts where they are applicable. Understandably, the distinction between the power possessed by a board of appeals to grant variances, and the power to amend a zoning law, which the board of appeals clearly does not possess, may be a very fine distinction indeed. A leading authority states:

> "It is necessary to distinguish sharply between a variance which may be granted by a board of zoning appeals, and an amendment which can be adopted only by the legislative authority of the municipality. A variance is, of course, a use of land authorized by a board of zoning appeals upon a showing of circumstances previously required by the legislative authority. It does not alter the zoning regulations" (Anderson, 3d ed. Zoning Law and Practice in New York State, section 23.59).

Against this background, the State Comptroller has examined a number of cases in which the purported

granting of a variance was held to be rather an attempt by the board of appeals to amend the zoning ordinance. Rather than attempt to paraphrase this part of the excellent opinion referred to above, we will quote at length:

> "Perhaps illustrations will be more helpful than explanations. In *Schmitt v. Plonski* (215 N.Y.S.2d 170), a board of zoning appeals had granted a variance to construct a motel in a district where motels were prohibited. When the owner sought a permit to construct a theater on the plot, he was refused and this refusal was upheld by the court on the ground that the variance originally granted did not alter the classification of the land so as to permit of other uses equal with a motel. The variance had simply permitted the motel-use of the land; it had in no way amended the zoning ordinance or reclassified the land.
>
> "As Anderson (supra, section 18.54 p. 604) points out, `Most variances involve a single lot or at least a small parcel of land. Where a variance granted by a board of zoning appeals purports to permit the use of a large tract of land for a proscribed purpose, there is a strong possibility that the purported variance will be called an amendment....'

Accordingly, in each of the following instances, the court upheld a refusal by a board of zoning appeals to grant a so-called variance, on the ground that the transfer of a large tract from one classification to another really constituted a zoning ordinance amendment:

1. Reclassifying as commercial a 5 1/2 acre tract which constituted an entire residential district (Re Northampton Colony, Inc., 30 Misc.2d 469, 219 N.Y.S.2d 292, aff'd 16 App. Div.2d 830, 230 N.Y.S.2d 668 (1961)).

2. Reclassifying into one-acre building lots a 40-acre area zoned for two-acre residential lots (Hess v. Zoning Board of Appeals, 17 Misc.2d 22, 188 N.Y.S.2d 1028 (1955)).

We think that all the foregoing renders conclusive the principle that a board of zoning appeals may not be delegated the power to amend a zoning ordinance or to legislate with respect thereto. Its powers in this regard are limited to the granting of variances within the meaning of that term as hereinbefore discussed" (Op. St. Compt. 65-770).

Another recognized authority in the field of zoning states that a board of appeals may grant a variance only under the strict conditions laid down in the enabling act; otherwise, it is legislating (see Rathkopf, The Law of Zoning and Planning, 4th ed., Section 37.02).

The board of appeals, then, is an administrative body, of limited jurisdiction and powers, designed to function as a "safety valve" to relieve the pressure of rigid and inflexible provisions of zoning regulations. However limited the jurisdiction of boards of appeals, they are still vitally important. The legislative body of a municipality cannot take care of the details which come before the board of appeals, nor should it. It is predictable that a zoning law will work some hardship on some people, because of its very purpose of applying restrictions on land use in various districts in the community. The board of appeals serves an essential role examining those restrictions in the individual matters that are brought before it, with the power to vary these restrictions if the circumstances show the need and essential legal criteria are met.

Interpretations

The State statutes specifically give zoning boards of appeals the power to hear appeals seeking interpretations of provisions of the zoning ordinance or local law. Town Law, section 267-a(4); Village Law, section 7-712-a(4); and, effective July 1, 1994, General City Law, section 81-a(4) all provide boards of appeals with the power to hear and decide appeals from decisions of the administrative official who is responsible for the enforcement of the zoning regulations. The Town Law and Village Law specifically allow the board to reverse or affirm, wholly or partly, or to modify the decisions appealed to it (Town Law, section 267-b(1); Village Law, section 7-712-b(1)). Similar authority is found in General City Law, section 81-b(2) effective July 1, 1994.

This interpretation power is part of the appellate jurisdiction of the board of appeals. The statutes just referred to all list the power as part of the board's power to hear appeals, and the courts have repeatedly held that an appeal is necessary in order for the board of appeals to interpret the zoning regulations. Thus, for example, it was held in *Kaufman v. City of Glen cove,* 180 Misc. 349; aff'd 266 App. Div. 870, that a board of appeals cannot issue an opinion concerning the meaning of a zoning ordinance provision unless there is a decision of the enforcement official which is appealed to it.

In its simplest terms, an appeal seeking an interpretation is an appeal to the board of appeals claiming that the decision of the enforcement official was incorrect.

For example, if an applicant for a building permit receives a decision from the zoning enforcement official denying the permit, and if the applicant believes that the permit should have been granted under the terms of the zoning, the applicant may appeal from the denial to the board of appeals. The appeal would claim that the denial of the permit was incorrect, and would ask the board of appeals to reverse the decision of the enforcement official. Thus, in *Hinna v. Board of Appeals,* 11 Misc. 2d 349, the applicant had applied to the building inspector for a permit to build a motel. The application was denied, since it was not clear that motels were allowed in the zoning district. The applicant appealed from that denial to the board of appeals, seeking a decision interpreting the zoning ordinance in her favor. The board of appeals upheld the denial of the permit, and the court agreed, after reviewing the language of the zoning ordinance and its history.

The appeal could also be from a decision of the enforcement official citing a violation of the zoning ordinances. Thus, in *Matter of Levine v. Buxenbaum,* 19 Misc. 2d 504, the court held that the board of appeals has the power to hear an appeal from a notice of violation where the landowner claimed that there was in fact no violation because the property was a valid non-conforming use.

An appeal may also be taken to the zoning board of appeals from a decision of the enforcement official *issuing* a permit. Thus, where a permit has been issued, a neighbor may file an appeal with the board of appeals claiming that the issuance was incorrect, and asking the board to interpret the zoning regulations and reverse the decision of the enforcement official (*Anagnos v. Lesica,* 134 App. Div. 2d 425). Thus, in *Pansa v. Damiano,* 14 N.Y. 2d 356, petitioners, who owned residential property, were able to appeal to the board of appeals from the issuance of a permit for a structure on property adjacent to theirs. They claimed that the permit had been issued for a use which was prohibited in the zoning district and that the setback requirements were violated.

In both types of appeals - those from permit denials and those from the issuance of permits - the board of appeals may interpret the language of the zoning ordinance, apply it to the facts before it and render a decision. The statutes provide that the board shall make such order, decision or determination "as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement" of the zoning regulations.

Variances

What is a variance?

As was noted in the introduction, various "safety valves" were built into the original zoning ordinance in 1916; these include nonconforming uses and variances.

It was thought that nonconforming uses would eventually wither on the vine and die. But this has not been the case. Neither has the procedure of granting variances been an unqualified success. In fact, considerable doubt exists as to whether it has been a success at all. A leading writer in the field of zoning has observed:

> "Although the variance remains in most of our zoning ordinances, its crude use to grant and deny favors was subjected to substantial criticism, not only from the courts but from the professional writers as well. The indictment has been that, far from being a safety valve, the variance is a handy gimmick to permit `leakage' from the certainty provided by the concept of districting" (Babcock, the Zoning Game(1966)).

Whether the variance has indeed proved to be a safety valve, permitting relief where strict interpretation of the provisions of a zoning law create a positive hardship, or whether it is just a "handy gimmick" used to circumvent such laws for any - or no - reason, is open to question. The answer probably is both. Since the laws relating to zoning affect individuals to a greater extent than perhaps any other field of law, and are administered by fellow citizens and neighbors, such administration is naturally more prone to human error and failings. It is the purpose of the following portion of this memorandum to examine the variance procedure in New York State, with the hope that such examination can help lift the veil of the uncertainty surrounding the role of the variance in the general scheme of zoning.

In essence, a variance is permission granted by the zoning board of appeals so that property may be used in a manner not allowed by the zoning. It is *only* the zoning board of appeals that has the power to provide for such exceptions from the zoning. And since zoning is meant to implement the municipality's development objectives and protect the health, safety and general welfare of the people, it follows that there are strict rules governing when exceptions may be provided.

There are two types of variances - use and area - and we will take them up separately since the rules for each are different.

The use variance

The use variance has been defined as:

> "... one which permits a use of land which is proscribed by the zoning regulations. Thus, a variance which permits a commercial use in a residential district, which permits a multiple dwelling in a district limited to single-family homes, or which permits an industrial use in a district limited to commercial uses, is a use variance" (Anderson, Zoning Law and Practice in New York State, 3d. section 23.05)

The Town Law and Village Law specifically incorporate this concept into the language of the statutes. Town Law, section 267(1) and Village Law, section 7-712(1) provide as follows:

> "'Use variance' shall mean the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations."

Effective July 1, 1994, General City Law, section 81-b(1)(a) sets forth identical language applicable to cities.

Early cases in New York State recognized, without defining terms, that a zoning board of appeals had an important function in the granting of variances. In the case of *Fordham Manor Reformed Church v. Walsh* (244 N.Y. 280), the court observed:

> "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 privileges established."

Subsequent judicial decisions interpreting "practical

difficulty and unnecessary hardship" noted that "... the hardship and its occasion must be exhibited fully and at large," and that a variance may be granted "... where the burden of a general restriction creates a special hardship upon a particular owner (and) the grant of a special privilege to him [can] in truth, promote equal justice" (*Young Women's Hebrew Association v. Board of Standards and Appeals of City of New York* (266 N.Y. 270); *Levy v. Board of Standards and Appeals of City of New York* (267 N.Y. 347)).

Thus the courts, up until 1939, had discussed general criteria for the granting of variances. Although these early decisions recognized the importance of the variance procedure and its inherent limitations, it was in that year that the landmark case of *Otto v. Steinhilber* (282 N.Y. 71) was decided, and laid down specific rules governing the finding of unnecessary hardship in the granting of use variances. In that case, the owner of a parcel of property which was located in both a residential and commercial zone applied for a variance enabling him to use the entre parcel for a skating rink, which was permitted commercial use. The lower court upheld the granting of the variance, which ruling was affirmed by the Appellate Division. The Court of Appeals, the highest court in the State, reversed these holdings and in doing so, set forth the definitive rules that are still followed today. Indeed, now, these rules are codified in the State statutes.

The court found that the object of a variance in favor of property owners suffering unnecessary hardship in the operation of a zoning law "... is to afford relief to an individual property owner laboring under restrictions to which no valid general objection may be made." After a discussion of the role of the zoning board of appeals in the granting of variances, the court found that a board could grant a variance only under certain specified findings:

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

These rules have since become known by almost all practitioners as the "*Otto*" rules for granting use variances.

The court found that the petitioner was not entitled to the variance sought, because the three grounds cited above had not been proven. Of greater importance is the fact that once the court had enunciated these rules, a great element of certainty had been injected into this field of law. Cases since *Otto* have defined the necessary elements, such as "reasonable return," "unique circumstances" and "essential character of the locality" as discussed below, but hardly a court decision in this area has since been handed down that has not cited the rules formulated in the *Otto* case.

Town Law, section 267-b(2)(b); Village Law, section 7-712-b(2)(b); and, effective July 1, 1994, General City Law, section 81-b(3)(b) essentially codify the *Otto* rules, and those of cases following *Otto*, specifically regarding the issuance of use variances in towns and villages:

(b) No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located,

> (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
> (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
> (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and
> (4) that the alleged hardship has not been self-created.

It will be noted that the overall statutory test for the issuance of use variances remains "unnecessary hardship"

as the Court of Appeals held in the *Otto* case. the statutes now define that term, using the three criteria based upon the *Otto* case, as they have been refined by court decisions over the years. The fourth requirement in the above language is based upon court decisions after the *Otto* case, which held that a use variance cannot be granted where the unnecessary hardship was created by the applicant.

The *Otto* rules have been refined by court decisions over the years. In towns and villages, the statutory rules for granting use variances in towns and villages reflect these decisions. The best way to understand the rules is to examine each in its turn, together with the court decisions that shaped them.

Reasonable return

The *Otto* case held that the first test for the issuance of a use variance was that the applicant must show to the board of appeals that "the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone." It is clear that this means that there must be a demonstration that the zoning regulations impose requirements so severe that they amount to a "confiscation" of the property in question (See Rathkopf, *The Law of Zoning and Planning*, 4th Edition, section 38.02; *Williams v. Town of Oyster Bay*, 32 N.Y. 2d 78).

The mere fact that the property owner may suffer a reduction in the value of property because of the zoning regulations, or the fact that another permitted use may allow the sale of the property for a better price, or permit a larger profit, does not justify the granting of a variance on the grounds of unnecessary hardship (*Rochester Transit Corp. v. Crowley* (205 Misc. 933) citing *Young Women's Hebrew Association v. Board of Standards of City of New York* (266 N.Y. 270); *Thomas v. Board of Standards and Appeals of City of New York* (290 N.Y. 109)).

It has been held that only by actual "dollars and cents proof" can lack of reasonable return be shown. In the case of *Everhart v. Johnston* (30 App.Div.2d 608), a variance was granted to the owner of a property in a residential zone to enable him to house an insurance and real estate agency. A State Supreme Court annulled the granting of the variance, which determination was affirmed by the Appellate Division, which found "a complete lack of the requisite proof as to the first requirement." (The land in question cannot yield a reasonable return if used only for a purpose allowed in that zone.) The court explained its findings as follows:

> "a mere showing of present loss is not enough. In order to establish a lack of `reasonable return', the applicant must demonstrate that the return from the property would not be reasonable for each and every permitted use under the ordinance" (*Matter of Forrest v. Evershed*, 7 N.Y. 2d 256). Moreover, an applicant can sustain his burden of proving lack of reasonable return, from permitted uses only by "dollars and cents proof" ....(Id.).

The "dollars and cents proof" rule was again enunciated in a Court of Appeals case which held that "a landowner who seeks a use variance must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses" (*Fayetteville v. Jarrold*, 53 N.Y.2d 254).

Nor, the cases have held, does the fact that an individual desires to use the property for other, more profitable purposes constitute a hardship (*Goldstein v. Board of Appeals of Oyster Bay*, 102 N.Y.S.2d 922) or that a different use may be more profitable. The salient inquiry is whether the use allowed by the zoning ordinance is yielding a reasonable return (*Crossroads Recreation v. Broz*, 4 N.Y.2d 39).

Town Law, section 267-b(2)(b); Village Law, section 7-712-b(2)(b); and, effective July 1, 1994, General City Law, section 81-b(3)(b), provide that the first test for the issuance of a use variance is that the applicant must demonstrate to the board of appeals that:

> "the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence."

In essence, this is a restatement, in the State statute, of the rules just discussed that have been established by the courts over the years since the *Otto* case was decided.

At this point, it would be good to mention briefly a property use that is especially hard hit by the reasonable

return requirement. That is a nonconforming use, upon which an especially heavy burden falls when it must be shown that the user cannot derive a reasonable return from any permitted use. An applicant who maintains a nonconforming use must not only show that all permitted uses will be unprofitable, but also that the nonconforming use itself cannot yield a reasonable return. In a case in which the owner of a nonconforming gasoline station applied for a variance, the court pointed out this additional burden.

> "In order to demonstrate hardship, the petitioners had the burden of showing that 'the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone.' Since the operation of their gasoline station, as it presently exists, was a nonconforming use which was suffered to continue because it had been devoted to such a use before the prohibitory zoning ordinance took effect, it was a use which was allowed in that zone.' Business 'A' uses, such as retail stores generally, real estate offices, etc., were also, of course, 'allowed in that zone.' Hence, the petitioners had the burden of proving that their property could not yield a 'reasonable return' if used for a gasoline station (as it presently exists) or for any business 'A' use (retail stores generally, real estate offices, etc.)" (*Crossroads Recreation v. Broz*, 4 N.Y.2d 39).

Unique circumstances

The second test that an applicant for a use variance must adhere to under the *Otto* rule, is that his plight is due to unique circumstances and not to general neighborhood conditions. As a leading text writer has observed:

> "Difficulties or hardships shared with others go to the reasonableness of the ordinance generally and will not support a variance relating to one parcel upon the ground of hardship" (Rathkopf, The Law of Planning and Zoning, 4th ed. pg. 38-33).

The Court of Appeals, in the early case of *Arverne Bay Construction Co. v. Thatcher* (278 N.Y. 222), had before it a case involving the owner of land in a district classified as residential, in an area almost completely undeveloped, who sought a variance enabling him to operate a gasoline station. The Court of Appeals held a variance should not have been granted. The court stated:

> "Here the application of the plaintiff for any variation was properly refused, for the conditions which render the plaintiff's property unsuitable for residential use are general and not confined to plaintiff's property. In such case, we have held that the general hardship should be remedied by revision of the general regulation, not by granting the special privilege of a variation to single owners."

This finding of "uniqueness" has also been referred to by the Court of Appeals as that of "singular disadvantage" by the virtue of a zoning ordinance. In the case of *Hickox v. Griffin* (298 N.Y. 365), the court stated:

> "There must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation before a variance thereof can be allowed on the ground of `unnecessary hardship'."

In the recent case of *Douglaston Civic Association, Inc. v. Klein* (51 N.Y.2d 963), the Court of Appeals discussed the "unique circumstances" requirement and held that the property was indeed unique, justifying the grant of the variance:

> "Uniqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship.... What is required is that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed. What is involved, therefore, is a comparison between the entire district and the similarly situated land."

A use variance was properly granted in *Douglaston* where the land in question was shown to be swampy, even though other land in the vicinity shared that characteristic. The uniqueness requirement must be addressed in the context of the nature of the zone in general. Such a relationship makes sense when it is remembered that a variance should not be used in lieu of a legislative act. A parcel for which a variance has been granted, therefore, need not have physical features which are peculiar to that parcel alone (as required in *Hickox*, above). On the other hand, the hardship caused by physical features cannot prevail throughout the zone to such an extent that the problem should be addressed by legislative action, such as a rezoning.

This second test of "uniqueness" is now part of the State statutes governing the grant of use variances by town and village zoning boards of appeals, Town Law, section 267-b(2)(b); Village Law, section 7-712-b(2)(b); and, effective July 1, 1994, General City Law, section 81-b(3)(b) provide that the second test that an applicant must meet is to demonstrate to the board:

> "that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood."

This is a restatement of the rule enunciated by the Court of Appeals in the *Otto* case, as later refined in the *Douglaston* case discussed above.

Essential character of locality

The third test that must be met pursuant to the *Otto* rule before a variance may properly be granted, is that the use to be authorized by the variance will not alter the essential character of the locality. Because one of the basic purposes of zoning is to adopt reasonable regulations in accordance with a comprehensive plan, it follows that changes which would disrupt or alter the character of a neighborhood, or a district, would be at odds with the very purpose of the zoning ordinance itself. Thus, in the case of *Sepulchre Cemetery v. Board of Appeals of Town of Greece* (271 App. Div. 33), a nonprofit cemetery corporation sought a variance to enable it to establish a cemetery where such use was not provided for in the applicable zoning ordinance. The court conceded the fact that the area surrounding the property in question was sparsely settled and practically undeveloped, but upheld the action of the board denying the variance sought. The court recognized the right of the zoning board of appeals to take notice of the fact that a residential building boom could reasonably be expected in a few years, and that the proposed cemetery could quite possibly interfere with the residential development of the section.

In another case, a transit corporation sought to lease land in a residential zone, used as a bus loop, to an oil company, which planned to erect a gasoline station. The court found that the zoning board of appeals properly refused to grant a variance, because the variance, if granted, would interfere with the zoning plan and the rights of owners of other property, and that the evidence before the board was sufficient to sustain its findings that the requested use, if permitted, "... would alter the essential residential character of the neighborhood" (*Rochester Transit Corp. v. Crowley*, 205 Misc. 933).

In the case of *Matter of Style Rite Homes, Inc. v. Zoning Board of Appeals of the Town of Chili* (54 Misc.2d 866), the plaintiff corporation owned property in a one-family residential district, part of which was appropriated by the State for highway purposes. The plaintiff then applied for a variance permitting it to use its remaining land for a garden apartment development. In upholding the decision of the zoning board of appeals denying the variance, the court held that:

> "Finally, it seems clear that the plaintiff's proposed use of the property for a 60-family multiple dwelling complex is incompatible with the over-all plan and policy for development of the town and would create conditions distinctly different from those existing in the locality by

> adding problems incident to an increase in population density as well as unquestionably altering the essential character of an otherwise residential neighborhood developed in reliance on the stability of the ordinance."

This third test is now part of the State statutes. Town Law, section 267-b(2)(b); Village Law, section 7-712-b(2)(b); and, effective July 1, 1994, General City Law, section 81-b(3)(b), provide that the third test for the issuance of a use variance is that the applicant must demonstrate to the board:

> "that the requested use variance, if granted, will not alter the essential character of the neighborhood;".

This codifies the third test required by the *Otto* case.

Self-created hardship

While it was not a factor in the *Otto* decision, there is one more important consideration that must be noted before leaving the discussion of use variances. That is the so-called rule of "self-created hardship." It is well settled that a use variance cannot be granted where the "unnecessary hardship" complained of has been created by the applicant, or where she/he acquired the property knowing of the existence of the condition he now complains of. In the case of *Clark v. Board of Zoning Appeals* (301 N.Y. 86), the Court of Appeals, before proceeding to discuss the grounds necessary for the granting of a variance, noted that the property in question was purchased to be used as a funeral home in a district where such use was not permitted under the zoning ordinance. The court observed that:

> "Nevertheless [plaintiff]...purchased the lot, then applied for the variance. We could end this opinion at this point by saying that one who thus knowingly acquires land for a prohibited use, cannot thereafter have a variance on the ground of `special hardship'." (For similar holdings see *Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece*, 271 App. Div. 33; *Thomas v. Board of Standards and Appeals of City of New York*, 290 N.Y. 109; *Everhart v. Johnstown*, 30 App. Div.2d 608; *Henry Steers, Inc. v. Rembaugh*, 284 N.Y. 621).

The self-created hardship rule has now been codified in Town Law, section 267-b(2)(b); Village Law, section 7-712-b(2)(b); and effective July 1, 1994, in General City Law, section 81-b(3)(b).

A final word on use variances

The rules laid down by the *Otto* case (and the rules set forth in the statutes as discussed above) are *requirements*. They *must* be used by zoning boards of appeals in reviewing applications for use variances. Furthermore, the board must find that *each* of the tests has been met by the applicant.

The board must also consider the effect of the variance on the zoning law itself. As one court said,

> "Thus, the statute makes plain that both the general purpose and intent of the ordinance, reflecting the policy of the legislative body, and the special case of the individual property owner, reflecting a practical difficulty or unnecessary hardship, must be considered by the board of appeals in varying the application of the ordinance" (*Van Deusen v. Jackson*, 35 App. Div. 2d 58, aff'd 28 N.Y.2d 608).

The statutes all provide that in granting variances, boards must grant the minimum variance necessary and must at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community (Town Law, section 267-b(3)(c); Village Law, section 7-712-b(3)(c); and General City Law, section 81-b(3)(c).

In addition, the statutes expressly allow boards of appeals to impose reasonable conditions when granting variances. Such conditions must be directly related to and incidental to the proposed use of the property, or the period of time the variance is to be in effect. The conditions must be "consistent with the spirit and intent" of the zoning regulations, and would be imposed for the purpose of minimizing any adverse impact which the granting of the variance might have on the neighborhood or the community. (Town Law, section 267-b(4); Village Law,

section 7-712-b(4); General City Law, section 81-b(5).)

This power to impose conditions is a codification of the well-settled rule that boards of appeals have the inherent power, when granting variances, to impose appropriate and reasonable conditions to protect the neighborhood (*Matter of St. Onge v. Donovan*, 71 N.Y.2d 507; *Pearson v. Shoemaker*, 25 Misc. 2d 591).

The area variance

The area variance has been defined as one where:

> "the owner still must comply with the zoning ordinance's limitations on use of the land but is allowed to build or maintain physical improvements which deviate from the zoning ordinance's nonuse limitations." (Rathkopf, The Law of Planning and Zoning, (4th ed) section 38.01(4).)

Area variances are thus, as a practical matter, distinguished from use variances in that a use variance applies to the use to which a parcel of land or a structure thereon is put, and an area variance applies to the land itself. In most cases, the difference is clear-cut. If an applicant for a variance wishes to use his property in a residential district for a funeral home, he obviously wants a use variance; if, however, he wishes to build an extra room on his house, and it would violate a sideyard restriction, an area variance is just as obviously called for.

Prior to July 1, 1992, the standard for the issuance of all area variances was that of "practical difficulty". This term had appeared in the statute for many years and had been interpreted by the courts in a great number of cases significant to its understanding. Since July 1, 1992, however, the Town Law and the Village Law no longer employ this standard, and, as of July 1, 1994, the term will no longer be applicable in cities. The historic cases interpreting "practical difficulty" will, therefore, not be discussed here. Suffice it to say that the term retains importance only in the relatively minor instances where variances are requested from the access requirements set forth for building permits in General City Law, section 36, Town Law, section 280-a, and Village Law, section 7-736. The rules for the issuance of area variances in all municipalities have changed dramatically.

First, the statute now defines area variances. Town Law, section 267(1); Village Law, section 7-712(1); and, effective July 1, 1994, General City Law, section 81-b(1)(b), provide as follows:

> " 'Area variance' shall mean the authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations."

Second, the statute now specifically sets forth the rules for the granting of area variances (see Town Law, section 267-b(3); Village Law, section 7-712-b(3); and, effective July 1, 1994, General City Law, section 81-b(4). The rules have changed significantly.

Probably the most important change is that the statute no longer refers to or includes the term "practical difficulty" as a consideration for granting area variances. Indeed, there is no overall "test" as such that has to be met by an applicant for an area variance. (Compare this with *use* variances, where, as discussed above, the overall test of "unnecessary hardship" still applies.)

Instead of showing "practical difficulty", or, for that matter, compliance with any particular test, an applicant would simply apply for the area variance desired. The statute provides that in making its determination on an application for an area variance, the board of appeals must consider two basic things: the benefit to the applicant if the variance is granted, and the detriment to the health, safety and general welfare of the neighborhood or community that would occur if the variance were to be granted. This is in essence a "balancing" approach, in which the board weighs these two interests and makes its determination.

The statute provides that in balancing the interests of the applicant and those of the neighborhood or community, the board of appeals must consider the following five factors:

1. whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
2. whether the benefit sought by the applicant can

be achieved by some method, feasible for the applicant to pursue, other than an area variance;

3. whether the requested area variance is substantial;
4. whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
5. whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

Finally, carrying the "balancing" concept further, the statute provides that when granting area variances, the board of appeals "shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community." (Town Law, section 267-b(3)(c); Village Law, section 7-712-b(3)(c); and, General City Law, section 81-b(4)(c).

As discussed above in connection with use variances, boards of appeals have the power to impose reasonable conditions when granting area variances. This power has been codified in Town Law, section 267-b(4); Village Law, section 7-712-b(4); and, effective July 1, 1994, General City Law, section 81-b(5).

Procedure by and Before the Board

Procedure by and before the zoning board of appeals sounds like a topic to curl up with in front of the fireplace, in a comfortable leather armchair, dog at side, pipe and tobacco at hand, on a rainy Sunday afternoon. Procedural matters are rarely the most exciting aspect of anything, whether it is getting a driver's license, buying a house, or getting married. Procedural matters concerning the zoning board of appeals appear even less so.

Yet they are of singular importance in the administration and enforcement of the community's zoning law - that investment in its future development. This is because when something comes up before a zoning board of appeals it means -- it always means -- a potential lawsuit because someone is bound to be displeased by what happens. This section surveys the issues most frequently causing problems for zoning boards of appeals, and those who must deal with them. It discusses the problem of proper parties in proceedings before these boards, general procedural matters (including the notice and hearing requirements and how a hearing should be conducted), and what constitutes a proper decision.

Who are proper parties before the board?

As discussed above, zoning boards of appeals are provided with appellate jurisdiction directly by state statute. This, of course, envisions appeals to the board from decisions of the administrative official charged with enforcement of the zoning. Indeed, the statutes so provide (General City Law, section 81-b(2), (3)(a) and (4)a, effective July 1, 1994; Town Law, section 267-b(1), (2)(a) and (3)(a); Village Law, section 7-712-b(1), (2)(a) and (3)(a). The appeals may be seeking interpretations, use variances or area variances.

As of July 1, 1994, the statutes will be uniform in limiting boards of appeals to appellate jurisdictions "unless otherwise provided by local law or ordinance." This "unless otherwise provided" language evidences the legislative intent that municipal zoning ordinances and local laws may continue to vest boards of appeals with

original jurisdiction over such approvals as special use permits.

We are dealing, then, with two types of parties - who are appealing from decisions made by the enforcement officer (under strict application of the regulations), and those who are seeking a decision by the zoning board of appeals on some matter over which it has original jurisdiction. An example of the latter would be a person seeking a special permit where the zoning law assigns the power to issue these to the zoning board of appeals. In the latter instance, the jurisdiction of the board of appeals is not appellate, and thus the parties would merely be those seeking the permit.

In dealing with parties who are appealing to the zoning board of appeals, we are concerned with two types of parties. First, the person who applied to the zoning enforcement officer for a building permit and was refused is (or may be) aggrieved by the refusal. Second, the person who lives next door or nearby may be aggrieved by the issuance of a building permit to someone else. Since the right to appeal to the board of appeals does not extend to everyone, it is necessary to understand the concept of the "person aggrieved" who has sufficient standing to be able to properly appeal to the board.

The question which presents itself, then, is what is a "person aggrieved"? To find the answer, we must turn to case law, since the statutes do not provide guidance.

A good starting point would be *Matter of Hilbert v. Haas* (54 Misc.2d 777), in which an appeal was made to a zoning board of appeals after the refusal of the building inspector to make any decision at all. The court noted that since no decision had been made by the building inspector, the zoning board of appeals had no right to hear and decide any appeal. The first requisite to there being any parties would appear to be a decision by the building inspector. Without that, the appropriate remedy for someone who seeks a decision would have to be an Article 78 mandamus proceeding against the building inspector, and not an appeal to the zoning board of appeals.

To examine some cases on this issue, we shall start with a situation directly involving a landowner. Clearly he/she is a party entitled to appeal to a zoning board of appeals if his/her land is substantially affected. This would include the owner of land whose own application for a permit has been denied; his/her interest is direct. There is also authority for extension of this to include a lessee under a long-term lease. In *S.S. Kresge Co. v. City of New York* (87 N.Y.S.2d 313, aff'd 92 N.Y.S.2d 414), the lessee had the right to demolish and erect buildings under a lease which had over 30 years to run, and the court said that in such an instance, the lessee "... stands in the shoes of, and is entitled to the same rights and privileges as, the owner."

Very few cases exist that define persons aggrieved for purposes of appeals to boards of appeals. However, the great number of cases defining persons aggrieved for purposes of appeals from boards of appeals are of value since the issues are essentially the same. Certainly, if a person is found to be aggrieved so that he may appeal to a court from a zoning board of appeals decision, someone just like him would be entitled to appeal to the board of appeals.

The leading case of *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead*, 69 N.Y.2d 406 contains a good discussion of standing in the context of appeals to the courts. It provides some help, therefore, in determining who may properly appeal to a board of appeals. The Court of Appeals stated as follows:

> "While something more than the interest of the public at large is required to entitle a person to seek judicial review - the petitioning party must have a legally cognizable interest that is or will be affected by the zoning determination - proof of special damage or in-fact injury is not required in every instance to establish that the value or enjoyment of one's property is adversely affected... it is reasonable to assume that, when the use is changed, a person with property located in the immediate vicinity of the subject property will be adversely affected in a way different from the community at large; loss of value of individual property may be presumed from depreciation of the character of the immediate neighborhood. Thus, an allegation of close proximity alone may give rise to an inference of damage or injury that enables a nearby owner to challenge a zoning board decision without proof of actual injury..." (69 N.Y.2d 406, 413-414)

Now let us examine some of the cases addressing the question of who is a "person aggrieved".

The case of *Eckerman v. Murdock* (276 App. Div. 927) held that a mortgagee has sufficient economic interest to be a "person aggrieved." In the case of *Henry Norman Associates, Inc. v. Ketler* (183 N.Y.S.2d 875) an applicant for a variance had a contract with the owner of the land involved under which he, the prospective purchaser, would be obligated to purchase only if the variance were granted. The court held 1) that the contract vendee (buyer) under this conditional sales contract was a person aggrieved for purposes of appealing to the zoning board of appeals for a variance, and 2) the owner of the land -- the vendor (seller) under the same contract -- was a person aggrieved for purposes of appealing from the board of appeals decision to the court. To the same effect is *Slater v. Toohill* (276 App. Div. 850), in which the court held that the conditional sales contract vendee may be deemed the agent of the owner of the property for which a variance was sought.

Moving on, we find that nearby landowners may also be "persons aggrieved" who may appeal from a decision concerning land not their own. In *Steers Sand & Gravel Corp. v. Brunn* (116 N.Y.S.2d 879) nearby residents whose property stood to be materially depreciated in value were held to be "persons aggrieved." See also *Mueller v. Anderson* (303 N.Y.S.2d 143). In *Matter of Bettman v. Michaelis* (27 Misc.2d 1010), nearby homeowners were found by the court to be "persons aggrieved" by an application for a permit to build a parking garage because their streets might have been used by overflow parkers when the garage was filled. Nearby tenants may also be aggrieved persons if the contested uses "devaluate living conditions" (*Lavere v. Board of Zoning Appeals*, 39 App. Div.2d 639, 331 N.Y.S.2d 141). The case of *Matter of Horan v. Board of Appeals* (6 Misc.2d 571) held that "persons aggrieved" for purposes of appeals to a zoning board of appeals must be liberally construed, and need not stop at adjoining landowners. The court said:

> "Neighboring owners,' 'nearby residents,' as well as 'closely adjacent owners' have the status of 'persons aggrieved' within the spirit and intent of section 179-b of the Village Law [now, section 7-712-a(4)] insofar as it refers to the taking of an appeal to the Board of Zoning Appeals from 'any order, requirement, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted' pursuant to the Village Law. The spirit and intent of zoning, combined with justice itself, requires that under section 179-b of the Village Law the broadest possible interpretation should be given to the words 'Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the village."

Neighborhood associations may, in certain instances, have standing as aggrieved party. See *Douglaston Civic Association, Inc. v. Klein* (51 N.Y.2d 963).

Although the rule is liberal, there is a limit. In *Blumberg v. Hill*, 119 N.Y.S.2d 855, residents of a town who lived one and one half miles from a proposed guest house were held not to be persons aggrieved. The court found no special effects of the guest house on the property of the challengers, and stated that the fact that they "particularly advocate zoning principles and stand for the district enforcement of zoning ordinances" was of no relevance. The court placed on the term "persons aggrieved" the requirement that there be some special injury or damage to their personal or property rights. And in *Village of Russell Gardens v. Board of Zoning and Appeals* (30 Misc.2d 392), the court stated that even close proximity to the property involved in a variance proceeding was insufficient to make a person aggrieved, unless there were some showing of detrimental effect on the property of those contesting a variance. In addition, one property owner whose land was nearby, but in an adjoining village, was held to be incapable of an "aggrieved" status simply because the land was in another municipality. The court also applied this reasoning to the adjoining village itself, saying that it had no standing whatever to challenge a variance granted by an adjacent town. In another case on this same point, *Matter of Wood v. Freeman* (43 Misc.2d 616, aff'd 24 App. div. 2d 704), property owners whose land was located in the town were held not to be aggrieved for purposes of challenging a village board of appeals action, even though the land for which the variance was granted was adjacent to theirs. The neighbor's land was over the village line.

Often, a competitor may wish to challenge a proposed action by the zoning board of appeals. Unless she/he can

prove some element of damage aside from an increase in competition, she/he will not be an aggrieved person (*Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead*, 69 B,Y.2d 406; *Paolangeli v. Stevens*, 19 App. Div.2d 763). In *Cord Meyer Dev. Co. v. Bell Bay Drugs*, 20 N.Y.2d 211, the Court of Appeals held that a pharmacist located in a commercial zone could not enjoin another pharmacist -- a competitor -- located in a residential zone, the court said:

> "If the value of the plaintiffs' real property had been reduced, without regard to business competition, for example, by the operation nearby of a junkyard or slaughter house, it might well be that this would constitute such special damage as would entitle plaintiffs to injunctive relief. Even if the violator of the ordinance were conducting a similar business, it may well be, although we are not called upon to decide, that plaintiffs would be entitled to sue to restrain the violation if they could prove that the value of their property was decreased due to some offensive manner in which the business was conducted without relation to any competitive aspect." (Emphasis added.)

The same result was reached in the *Sun-Brite* case cited above.

The rule, then, appears to be that the fact an aggrieved party is a competitor is irrelevant to his being "aggrieved."

Can the municipality be aggrieved by the action of its own building inspector? The statute permits an appeal to the zoning board of appeals by any officer, department, board or bureau of the municipality. While there are few reported cases in which such an appeal has been taken, the statute is quite clear and is in furtherance of the theory that a municipality would always be "aggrieved" by administration of its zoning ordinance.

In *Matter of Marshall v. Quinones* (43 App. Div.2d 436), the petitioner brought an Article 78 proceeding to review the grant of a variance. The petitioner was a city alderman who had been authorized, by resolution of the City Common Council, to challenge the zoning board of appeals. The court concluded that the alderman had statutorily provided standing under section 82(1) of the General City Law, both in his own right as an officer of the city, and on behalf of the Common Council.

As general rule, any person whose legal rights or interests or property would be detrimentally affected by an action taken by the building inspector or zoning enforcement officer is properly an "aggrieved person," no matter how distant his/her property may be, as long as it is within the municipality affected.

What happens when someone who is not a "person aggrieved" tries to appeal to the zoning board of appeals? The board has two choices - it can disregard any objection and let him appeal, or it can hold a hearing to determine whether he is a person aggrieved.

In *Edward A. Lashins, Inc. v. Griffin* (132 N.Y.S.2d 896), a board of appeals had followed the first course of action. It had assumed jurisdiction over an appeal presented to it. A building permit had been granted, and an adjacent property owner appealed to the zoning board of appeals. The holder of the permit complained to the board that the property owner was not a "person aggrieved." The board of appeals, however, went on to consider the appeal on its merits anyway. The court approved, saying the determination of the board of appeals to entertain the appeal would not be interfered with unless shown to be arbitrary or unreasonable.

The rule apparently applies otherwise when a person who wants to appeal is determined by the board not to be a "person aggrieved." The case of *Horan v. Board of Appeals, Village of Scarsdale* (164 N.Y.S.2d 543) concerned an appeal by persons living within 500 feet of premises for which a building permit had been issued. They wished to appeal the issuance of the permit. The board of appeals had asked for written evidence from these persons that would show they were "persons aggrieved." The requested evidence had been submitted, but no hearing was afforded the claimants; the board simply decided against the appellants. The court held this to be improper. It stated that the board's determination, without a hearing, was arbitrary and without legal basis.

How an appeal is taken to the board

Town Law, section 267-a(5); Village Law, section 7-712-a(5); and, effective July 1, 1994, General City Law, section 81-a(5), require that appeals to a zoning board of

appeals must be taken within 60 days after the filing of the decision or determination which is being appealed.

In cases which arose under the former statutes requiring the board of appeals to establish by rule a time for taking an appeal, there are indications that the courts may permit appeals beyond that time if the person appealing objects within a reasonable time after the decision. The leading case is *Pansa v. Damiano* (14 N.Y.2D 356), which involved a rule requiring appeals to the zoning board of appeals within 30 days of the decision. The appellant in that case objected to the issuance of a building permit for land adjacent to his. He participated in several meetings with the permit holder, the city planning board and the corporation counsel - all within the 30 day limit. At the last such meeting, he was advised that he would be informed of the decision on the matter. He was informed after the 30 days had expired. He then attempted to appeal to the zoning board of appeals to object to the permit. The board dismissed his appeal as untimely. The Court of Appeals reversed the decision, stating that to strictly interpret the 30-day requirement might in some situations be reasonable, but that on the facts outlined, it was not. The court stated:

> "Strictly applied, it might prevent any appeal at all since the neighbors might not learn till long afterward of the issuance of a building permit. As applied to an applicant denied a permit the proposed construction might be fair and sensible. But one who demands revocation of a permit issued to another is in no position to appeal or at least should not be required to take his appeal until his demand for revocation has been rejected with some formality and finality. It is the duty of the courts to construe statutes reasonably and so as not to deprive citizens of important rights." The 30 days in this fact situation, the court said, would not begin until the petitioner's objections had been overruled in a "decision" of which he had notice. The objections, of course, would still have to be put forth in a reasonable time.

The subsequent case of *Highway Displays, Inc. v. Zoning Board of Appeals of the Town of Wappinger* (32 App. Div.2d 668) cited the *Pansa* case and applied its rule. There, the zoning board of appeals by-laws required appeals to be taken within 30 days after receipt of the building inspector's decision. The court held that an appeal taken within 30 days after actual notice was received of a permit issued (to someone else) is sufficient to satisfy the rule. The court noted that the aggrieved person was not guilty of any undue delay after he actually received the notice. The rule, then, appears to have the following dimensions:

1. The time limits provided will be strictly construed against anyone who applies for a permit and is refused. If one wishes to appeal that refusal, the cases indicate that the time for appeal specified in the board's rule will apply.
2. As to someone other than a permit applicant, the rule appears to be that the time for appeal will begin to run when one becomes reasonably chargeable with notice that the permit she/he objects to was issued - unless she/he unreasonably delays the appeal.

Both the *Pansa* and the *Highway Displays* cases involved situations where the building inspector had given a written decision issuing a permit. Both cases spoke of the rights of an aggrieved person to appeal the issuance of a permit. But what about the other side of the coin - the person who applies for a permit and is refused? We have already seen that the time specified for appeal will be strictly construed against that person. But often a denial of the permit will not be in the form of a formal, written decision. What does one do, then, about appealing such a "nondecision" to a zoning board of appeals? In the case of *Hunter v. Board of Appeals* (4 App. Div.2d 961), a building inspector told an applicant for a building permit that he could not issue a permit without a variance. The court found this sufficient to constitute a decision from which an appeal could be taken.

An appeal must be initiated in the manner prescribed by statute, that is:

> "by filing with [the officer from whom the appeal is taken] and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought. The administrative official from whom the appeal is taken shall forthwith transmit to the board of appeals all the papers constituting the record upon which the action appealed from was taken (General City Law, section 81-a(5),

effective July 1, 1994; Town Law, section 267-a(5); and Village Law, section 7-712(5) are similar.)

At least one court in New York has interpreted this requirement liberally. In the case of *Matter of Lapham v. Roulan* (10 Misc.2d 152), the city superintendent of buildings rejected an application for a building permit, and then presented this application to the zoning board of appeals, which proceeded to entertain the application as an appeal. Although clearly in violation of the letter of the statute, the court upheld this procedure. It stated that the object of the statutory requirement for a notice of appeal to the officer whose decision is being appealed is so that he may transmit the record to the board of appeals. Because this was accomplished here by the informal procedure, and because neither the superintendent of buildings nor the board of appeals was prejudiced by the procedure, or objected to it, the court upheld the informality. It did note, however, that the local ordinance did not require the formal procedure.

Many municipalities supply forms to those who wish to come before the board of appeals, which serve to guide the petitioner to state clearly what it is she/he wants (Anderson, Zoning Law and Practice in New York State, 3d ed. section 32.13). There is one case which holds that an applicant need not use the official forms for his/her appeal, even if the board of appeals by-laws require him/her to, as long as the proceeding and its object are communicated to the local officials involved (*Highway Displays, Inc. v. Zoning Board of Appeals of the Town of Wappinger*, cited above).

It should be noted that appeal to the zoning board of appeals stays all proceedings in the matter appealed, except in certain emergency situations. Effective July 1, 1994, the General City Law, section 81-a(6) reads as follows:

> "An appeal shall stay all proceedings in furtherance of the action appealed from, unless the administrative official charged with the enforcement of such ordinance or local law, from whom the appeal is taken, certifies to the board of appeals, after the notice of appeal shall have been filed with the administrative official, that by reason of facts stated in the certificate a stay would, in his or her opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by a court of record on application, on notice to the administrative official from whom the appeal is taken and on due cause shown."

The Town Law, section 267-a(6) and Village Law, section 7-712-a(6) contain provisions which are almost identical.

Very few reported cases deal with this statutory language, and those that do are less than clear. In *Blum v. O'Connor* (6 Misc.2d 641), the petitioners had filed an appeal to the zoning board of appeals because of the issuance of a building permit to their neighbor. The court interpreted the above statutory language to mean that the status quo was to be maintained pending the appeal. It said this meant that the issuance of the contested building permit was stayed. As a practical matter, this would mean that any construction under the stayed permit would violate the zoning law. And that would mean that the usual legal remedies for enforcing the zoning law would be available.

Consistent holdings are found in *Linder v. Village of Freeport* (61 Misc.2d 667), and *Brunschwig v. Long Is. R.R. Co.* (41 Misc.2d 24). In *Linder*, a permit had been issued, but the building inspector revoked it some time later, claiming that it had been issued in error. The plaintiff permit holder appealed the revocation to the zoning board of appeals and claimed the right to continue construction during the appeal. The court agreed, saying that what was stayed was the revocation of a permit, since the appeal resulted from the revocation.

In *Brunschwig*, a permit had been issued, and the petitioners asked the zoning enforcement officer to revoke it; he refused. The petitioners appealed to the zoning board of appeals over the refusal of their request. The court held that no stay of construction was available.

Clearly, these cases are consistent in interpreting a "stay" to mean a return to the status quo as it was before the action appealed was taken. This being so, it is not possible to flatly say that construction under a permit will be allowed to proceed during an appeal. It might be allowed to proceed. It depends on what action is appealed. If it is the issuance of the building permit, then the appeal

requires a return to the status quo before the permit was issued. Construction under such circumstances could well violate the zoning ordinance. If the appeal is over revocation of a permit, a return to the status quo before the revocation could mean that construction may continue.

While the interpretation above appears rational, there is one aberration in the cases (*Barnathan v. Garden City Prk. Water Dist.*, 21 App. Div.2d 832) decided by the Appellate Division, Second Department in 1964. That case held that the taking of an appeal against the issuance of a building permit by abutting property owners did not operate as a stay of construction under the statute. No rationale was given for this conclusion, because the case was a memorandum decision. Unless the court meant that the statute does not automatically require a stay of construction in an appeal to a zoning board of appeals, there is no way to reconcile this case with the reasoning of the lower courts.

Referral to a planning agency

The statutes require that certain applications for variances and special permits be referred to a county, metropolitan or regional planning board. The requirement has proved troublesome to many municipalities and municipal attorneys. This is not because the statutory provisions are difficult or obscure, but due to the unfortunate fact that such notice is provided for in section 239-m of the General Municipal Law, but did not for many years, appear in the Town Law, Village Law, or General City Law.

General Municipal Law, section 239-m requires that any city, town or village located in a county which has a county planning board, or within the jurisdiction of a metropolitan or regional planning agency, shall -- before adopting or amending certain zoning regulations or issuing certain permits or granting certain variances -- refer them to the planning board or agency.

The matters covered by this section include any variance, site plan or special permit applying to real property lying within a distance of 500 feet of the boundary of a city, town or village, or from the boundary of any existing or proposed county or state park, or from the right-of-way of any existing or proposed county or state parkway or thruway, expressway or highway, or from the existing or proposed right-of-way of any stream or drainage channel owned by the county, or from county- or state-owned land on which a public building or institution is located. (Also covered are zoning regulations or amendments which would change the district classification of real property within such a 500-foot distance.)

The municipality and the county (or regional or metropolitan agency) may agree that certain matters are of local concern only and need not be referred to the planning agency.

The planning board or agency has 30 days to report its recommendation, and, in the event of its failure to do so, the municipal body (in our case, the zoning board of appeals) may act without such a report. If the planning board or agency disapproves the proposal, or recommends modification, the municipal body having jurisdiction can only act contrary to such disapproval or modification by a vote of a majority plus one of all of its members (not merely of members present) and after the adoption of a resolution fully setting forth the reasons for such contrary action.

Within seven days after any such final action by the municipal body, it must file a report of the final action it has taken, with the county, metropolitan or regional planning agency.

This referral requirement is mandatory. Failure to follow it will result in a major procedural defect. In *Weinstein v. Nicosia* (223 N.Y.S.2d 187, aff'd 18 App. Div.2d 881) (which involved a zoning board of appeals) the court held that failure to follow the provisions of section 239-m creates a jurisdictional defect, because its provisions are a condition to the acquiring of jurisdiction, and failure to follow them renders the municipal body powerless. Another case reaching the same conclusion is *Asma v. Curcione* (31 App. Div.2d 883), which involved the issuance by a zoning board of appeals of a special permit. In addition, failure to comply with the voting requirements in section 239-m will render the local decision invalid.

In towns, villages, and (effective July 1, 1994) in cities, referral to the planning agency having jurisdiction must be at least five days before the board of appeals public hearing.

Time and notice for the board's hearing

All three statutes require a hearing before a board of appeals may grant a variance or rule on an appeal or decide any other matter referred to it under the ordinance or local law (General City Law, section 81-a(7), effective July 1, 1994; Town Law, section 267-a(7); Village Law, section 7-712-a(7).) The reference to "any other matter" means that, for example, if it is allowed to approve special permits by the zoning law, the board must hold a hearing.

The notice requirements for a hearing will be considered below. But there is another important procedural detail - the requirement that a board fix "a reasonable time" for the hearing. This means that after an appeal is taken to the board, or an application is submitted for any other approval it has power to grant, the board of appeals must fix a date in the reasonable future for the required hearing. In the case of *Blum v. Zoning Board of Appeals* (149 N.Y.S.2d 5), this statutory requirement was held to mean that the board of appeals as a body must fix the hearing date. Because no formal action of the board set the date for the hearing, the variance which was granted was invalidated. The lesson is that courts will construe this requirement strictly. The board should adopt a formal resolution fixing the date for the hearing on any matter coming before it. Once that is done, the notice of the hearing can be given.

Notice of the hearing is also required by the statutes, and this requires particular caution. Notice of the public hearing must be timely, clear and directed to the proper persons.

The statutes also require at least five days' notice of the public hearing to be provided to the parties, to the county, metropolitan or regional planning agency pursuant to General Municipal Law, section 239-m (see above) and to the regional state park commission having jurisdiction over any state park or parkway within five hundred feet of the property affected by the appeal (Town Law, section 267-a(10); Village Law, section 7-712-a(10); General City Law, section 81-a(10), effective July 1, 1994).

Publication of notice is also required, in a newspaper of general circulation at least five days before the hearing (Town Law, section 267-a(7); Village Law, section 7-712-a(7); General City Law, section 81-a(7), effective July 1, 1994).

Generally, courts are strict about interpreting these notice requirements. In the case of *Briscoe v. Bruenn* (216 N.Y.S.2d 799), a village ordinance required 10 days' notice of zoning board of appeals hearings. The court invalidated a variance which had been granted after a public hearing which was preceded by seven days' notice; it stated that the requirement was jurisdictional, and failure to give the required notice rendered the board of appeals powerless to proceed.

However, there are cases when courts have made efforts to rationalize late notice, especially if the parties appear and do not claim to be hurt by it. In *Gerling v. Board of Appeals* (11 Misc.2d 84), the newspaper containing the notice of the public hearing on a variance bore a date four days in advance of the hearing. However, the court found that the paper was actually distributed to newsstands for sale to the public the previous afternoon, and found the five-day statutory requirement had been met. This holding would have disposed of the matter, but the court went on to say that a defect in the time of publication of notice was not jurisdictional and was waived by appearance and participation of the petitioners at the hearing.

Thus, we have two cases, one which says the time of notice requirement is jurisdictional and one which says it isn't. Obviously, the safest course to follow is to assume that it is jurisdictional and to rigidly adhere to the time period required.

What should the notice of the hearing say? While there is no statutory form for it, it should be clear and unambiguous enough so that the general public will know what property is affected by the board's action and what the nature of the hearing will be. Obviously, the notice must also state time and place for the hearing.

Conduct of the hearing

The purpose of the hearing is to determine the facts involved in the application. Variances may be granted only under certain circumstances, and special permits may be granted if the requirements of the zoning law are met. The purpose of the hearing is to determine whether the

applicant is entitled to what he is asking for.

While courts generally approve informal hearings, they will not approve a conclusion or a decision for which no evidence appears on a record. In the case of *Galvin v. Murphy* (11 App. Div.2d 900), the court, while not disapproving informality, did say that the hearing should be adequate and that all interested persons should be given an opportunity to be heard. Not only was the expression of views by opponents of the special permit discouraged in the hearing of that case, but there was no evidence shown in a record which would support the board of appeals' determination. The matter was remanded for a new hearing. Without a proper record and evidence to support a board of appeals determination, courts will order a new hearing; in fact, the court may very well use words such as "arbitrary" and "capricious" to describe the faulty board's action being appealed. The important point to remember is that the hearing should concern itself with evidence. This is because courts must have enough information before them to make a reasoned determination in case of appeals. *Kenyon v. Quinones* (43 App. div.2d 125) reaffirms this outlook. Despite allowing "the greatest amount of latitude in the admission of informal proof," the record still did not substantiate the findings of the board.

What about personal knowledge of the area? Board of appeals members are often people who know the community well, and thus cannot really act in the fashion of totally detached persons. Several decisions hold that it is permissible to use personal knowledge as "evidence" to support a board decision, but it must be written down as part of the record. If it is not, and a court finds that it was relied on, it may declare the board's action invalid (*Galvin v. Murphy*, cited above; *Community Synagogue v. Bates*, 1 N.Y.2d 445). The same rule applies to personal inspections of the premises by board members; a personal inspection is perfectly all right, but if something learned in such an inspection is relied upon, it should be included in the record.

Planning board information, reports and recommendations may also be considered by the board of appeals. Indeed, as a practical matter, they should be evidence of some importance, but they are not determinative. The board of appeals is not bound to follow advice it may receive from a planning board or any other municipal agency. It is the function of the board of zoning appeals to listen to and consider all evidence that may bear upon the issue it is deciding.

Cross-examination of witnesses at board of appeals hearings may be done by the board itself, and the parties also have this right. The nature of a board of appeals hearing is such that the right to cross-examination should be limited to relevant points; it is all too easy to permit a hearing to get out of hand and degenerate into a name-calling recrimination session. A leading authority has noted:

> "...[I]n some jurisdictions, the board is under a duty to permit relevant cross-examination on material issues. Members of a zoning board, at least in small communities, are usually neighbors of parties interested in one side or the other. A natural reluctance to alienate segments of the community renders the decision even more difficult....
>
> "It takes an experienced, firm and wise chairman to steer the hearing between Scylla of an unfair hearing of one kind and the Charibdis of an unfair hearing of the opposite kind." (Rathkopf, The Law of Zoning and Planning, 4th ed., p. 37-108).

This brings up the touchy point of the so-called "executive session" - a closed meeting of the board of appeals to toss the evidence about among themselves in a quiet room away from a sometimes emotional public. The Town Law, section 267-a(1) and Village Law, section 7-712-a(1) require zoning board of appeals meetings to be open to the public in accordance with the Open Meetings Law. The General City Law section 81-a(1), effective July 1, 1994 contains a like provision. Under the Open Meetings Law, meetings may be closed to the public, but only to conduct certain limited types of business (Public Officers Law, section 105). Otherwise, they too must be open to the public (Public Officers Law, section 103(a)).

In the case of *Blum v. Zoning Board of Appeals*, 1 Misc.2d 668, the court defined executive session as one "from which the public is excluded and at which only such selected persons as the board may invite are permitted to be present." The court went on to hold that any official action taken at such a session was illegal and void. This

would mean that no evidence should be received, no witnesses heard, and no decision taken except at a meeting open to the public.

Two other points relate to the conduct of hearings. First, witnesses need not be sworn in as they are in a court (*VonKohorn v. Morrell*, 9 N.Y.2d 27; *People ex rel. Fordham Manor Reformed Church v. Walsh*, 244 N.Y.280). Second, although a factual record of the testimony is of major importance, it need not be a verbatim transcript. It may instead be in narrative form (*Hunter v. Board of Appeals*, 4 App. Div.2d 961; *Kenyon v. Quinones*, 43 App. Div.2d 125).

The Decision

Sooner or later, of course, the board will have to render its decision. The statutes now uniformly provide that, the board has 62 days from the final hearing on the matter to render its decision (General City Law, section 81-a(8), effective July 1, 1994, Town Law, section 267-a(8); Village Law, section 7-712-a(8)).

As for the decision itself, the zoning board of appeals must make findings of fact to support the final decision. It is no exaggeration to say that everything a board of appeals decides is a potential lawsuit. Board of appeals actions are one of the most litigated fields of law. In the event of court review, there will have to be a record, with findings, to enable the court to determine whether the decision was supported by substantial evidence on the record. There are many cases in which the entire matter was remanded to the board of appeals for a redetermination because of an inadequate record; or, even where an adequate record of evidence existed, because there was no statement of the findings of fact which supported the final decision.

In the case of *Gill v. O'Neil* (21 App. Div.2d 718), a zoning board of appeals granted a variance merely by adopting a resolution. No factual findings were made, nor was a reason for its action given. The court stated that the absence of findings prevented an intelligent review of the board's determination, and sent back the matter for reconsideration and proper findings.

A decision, of course, would be a "variance granted" or "special permit denied." Findings would have to contain reasons for the decision. But a mere restatement of the statutory or ordinance requirements will not constitute findings sufficient for court review. Thus, when a board of appeals granted a variance and supported its decision with "findings" that "adequate parking facilities were available within certain specified distances from the site" and "if the variance were denied it would involve great practical difficulties and unnecessary hardship" the court found these were not sufficient (*Gilbert v. Stevens*, 135 N.Y.S.2d 357). The court wanted to know why these requirements had been satisfied, and not only that they had been satisfied. The court said:

> "Findings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination .... There is nothing in the record upon which to base a determination that adequate and existing parking areas are available" (135 N.Y.S.2d at 359). See also discussion above regarding "dollars and cents proof"; *Cohalan v. Schermerhorn*, 77 Misc.2d 23; *215 East 72nd Street Corp. v. Klein*, 58 App. Div.2d 751.

What were really stated in the *Gilbert* case were the conclusions of the board of appeals. These are perfectly all right as long as the decision also includes findings of fact - from the evidence which appears on the record - to support its conclusions. The evidence relied upon should be specifically stated.

The final decision must be supported by the concurring vote of a majority of the members of the board (Town Law, section 267-a(4); Village Law, section 7-712-a(4); General City Law, section 81-a(4), effective July 1, 1994). Thus, a simple majority of those voting on the question won't suffice. For example, if there is a five-member board, three must agree in order to reach a decision; a vote of two out of three members present is not sufficient. As was pointed out, certain board of appeals actions must be referred to the county or regional planning board before final action is taken. After receipt of its recommendations, the board of appeals may overrule a recommended disapproval or modification by such planning board only by a majority plus one vote of its membership. Another point to remember about votes: the statutes require that the zoning board of appeals keep minutes of its meetings,

showing the vote of each member on every question, and, if absent or failing to vote, showing those facts.

The statutes also require that every decision or determination made by the board of appeals shall be filed in the municipal clerk's office within five business days after the day it is rendered (a copy must also be mailed to the applicant). These filing requirements are of a major importance as a practical matter, because the appeal time of a board of appeals decision begins to run from the date of the filing of the board's decision. (See Town Law, section 267-a(9); Village Law, section 7-712-a(9); General City Law, section 81-a(9), effective July 1, 1994).

Conclusion

Too often, the procedure by and before the zoning board of appeals is informal to a point where its actions may be invalid. Procedural matters are inherently dull. But there is a reason for them - and courts will uphold them. Informality is fine, up to a point. Board of appeals actions affect property rights of individuals, and the procedural requirements of the statutes are meant to protect these rights as well as those of the community. It should really be no more trouble to obey the procedures noted in this legal guide than it would be to proceed heedless of the law.