# Zoning Board of Appeals

JAMES A. COON LOCAL GOVERNMENT TECHNICAL SERIES

**Includes All Statutory Changes Through the 2005 Legislative Session**


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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 protections 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 land use control. Various "safety valves" were, therefore, included in that first ordinance, 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."[1] 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.[2] The "safety valve" aspect of boards of appeals was recognized by the courts of New York State as early as 1925, 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."[3]

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.[4] And each municipal attorney, property owner

and judge will agree with Chief Judge Cardozo's observation that:

> "There has been confided to the Board a delicate jurisdiction and one easily abused."[5]

The first section of this publication 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 subsequent sections.

A note regarding semantics: zoning may be adopted in cities, towns and villages by local law. Cities and towns also retain the alternative of adopting zoning by ordinance. This choice does not affect the functions and power of boards of appeals in cities or towns in any way. The terms "zoning law" and "zoning ordinance" are thus used interchangeably in this publication.

# Creation, Function, Powers and Duties

## Composition of the board

The statutes[6] provide that the governing board shall provide for the appointment of a board of appeals. This must 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 in any municipality which has adopted zoning.

The statutes provide for a board of three or five members. Prior to July 1, 1992, the Town Law, and prior to July 1, 1994, the General City Law, authorized creation of five or seven-member boards; accordingly, many seven-member boards continue to exist in towns and cities. Such boards may continue to function until the governing board reduces the membership to three or five.[7] The statutes provide for staggered terms of three years for three-member boards and five years for five-member boards. Their successors are appointed for three or five-year terms, depending on the size of the board.[8]

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. City charters may also set forth particular requirements that vary from those of the General City Law. In fact, since the sections of the General City Law that affect boards of appeals are not applicable to all cities, any city may adopt local law provisions that supersede the General City Law provisions as they may relate to its board of appeals. Anyone wishing to gain a full understanding of the structure and powers of a particular city's zoning board of appeals should, therefore, consult both the city charter and its relevant local laws.

General City Law provides that the mayor (or city manager in a city having a city manager) shall appoint the members of the board of appeals and designate its chairperson.[9] In towns, both the appointment of members as well as the designation of the chairperson are made by the town board.[10] In villages, owing to a 1996 amendment to the Village Law, both the appointment of members and the designation of the chairperson are made by the mayor, subject to the approval of the board of trustees.[11] In cities and towns, any appointment to fill a

vacancy occurring during a term of office is made in the same manner as for full terms described above. In villages, however, an appointment to fill a vacancy occurring during a term of office is made by the mayor unilaterally, without the need for approval by the trustees. In all municipalities, 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. The same powers are granted by the General City Law to a mayor or city manager, as the case may be. Examples of "cause" might be: the member's persistent failure to attend meetings; or to attend training requirements set by the municipality; or his violation of the municipality's code of ethics. But it should be clear that mere dissatisfaction with the member's votes do *not* constitute "cause."

It is important to note that the statutes specifically state that no member of the governing board shall be eligible for membership on the board of appeals.[12]

An important amendment to the statutes, which took effect in 1998, provides that a municipality may adopt a local law providing for the appointment of any number of alternate members of the board of appeals, to serve in place of regular members who are unable to participate in a particular matter due to a conflict of interest.[13] When appointed, alternate members serve at the call of the chairperson of the board. Whereas the terms of office of regular members are set by state law, the terms of office of alternate members must be set by the governing board in its zoning law. Towns and villages may also supersede the above provisions to provide for the appointment of alternates to serve in the case of absences caused by reasons other than a conflict of interest.[14]

Whether a person is a regular or an alternate, a board of appeals member is a public officer, and is, therefore, subject to the requirements of the Public Officers Law relating to the basic qualifications for office (age, residence and citizenship) set forth in that statute. Additionally, he or she must take and file the constitutional oath of office at the beginning of each of his or her terms of office on the board.

Lastly, the statutes allow the local governing board to establish training and education requirements as a qualification for continuing service on the board of appeals.[15]

## Powers and duties of the board

The powers and duties of the zoning board of appeals are specifically set forth in the statutes. As is usually the case in planning and zoning, however, 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 General City Law, Town Law and Village Law 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 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. It is limited to "hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation or determination made by the administrative official charged with enforcement of any [zoning ordinance or local law]." 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 the permit and then appealed it, the court declared the findings of the board null and void.[16] 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."[17]

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.[18] 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.

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 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.[19]

In its exercise of the appellate power, it has been held that it is not the board's function merely to decide whether the enforcement officer's action was "arbitrary and capricious." Rather, the board of appeals must conduct a *de novo* review; that is, it must review all of the facts which formed the basis of the officer's decision, and must decide the case as though it were the enforcement officer.[20] In this context, it becomes easier to appreciate the following words of the enabling statutes:

"The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken."[21]

## Original jurisdiction

As has been pointed out, 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 use permit. The special use permit is a means to permit certain types of uses only after an administrative decision, based on requirements fully set forth in the zoning law. The conditions are the sort that ensure that the use will properly relate to its surroundings. For example, a zoning law might permit gasoline stations in commercial districts, but only by special use permit - which is to be issued upon a showing that the proposed facility will have X type of landscaping, Y type of signage, and Z type of fencing. The board of appeals can be the body authorized to issue special use permits upon a showing by the developer that she/he meets these requirements. As can be seen, no appeal is involved in such an instance.

In exercising this original jurisdiction (in the case of special use 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 governing body do not have to spell out standards and conditions for the issuance of special use 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[22], 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 non-zoning functions concerns the local 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 in 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 and 29, Town Law, sections 270 and 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 "non-zoning" 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, or grant an area variance, if an applicant appeals to it from an adverse decision of the administrative official in charge of issuance of permits. A 1996 amendment to the above statutes removed an obsolete reference to "practical difficulty or unnecessary hardship." In granting an area variance from the access requirements of these statutes, the board of appeals now must apply the same criteria as are otherwise applicable to area variances (see discussion of area variances, *infra*). The procedure for such an appeal is the same as in the cases of appeals on zoning regulations .

The third area of board power outside the zoning framework has to do with county official maps. Under General Municipal Law, section 239-e, 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-e(7) gives this function to the local zoning board of appeals "or other board established by the municipality . . . to issue variances or make exceptions in zoning regulations." 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.

A fourth non-zoning 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. General Municipal Law, section 239-f 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 working days' notice.

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 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

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.

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."[23]

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."[24]

What about special use permits? Doesn't the authority that may be delegated to the board to

issue special use 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 applications for 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 zoning law on the ground that its terms are arbitrary, unreasonable and unconstitutional.[25]

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. But it is an important distinction. An amendment to zoning requires legislative action by the governing board. The change thus enacted should be supported by the municipality's comprehensive plan, but requires no proof of hardship or any showing of facts relating to a specific parcel of land.

Against this background, the State Comptroller, in Opinion No. 65-770, examined a number of cases in which the purported granting of a variance was held to be instead an attempt by the board of appeals to amend the zoning regulations. Rather than attempt to paraphrase this part of the excellent opinion, 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 . . .' [Ed. note: the foregoing discussion by Anderson is now substantially found in Salkin, *New York Zoning Law and Practice*, §29:51.]
>
> 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 ½ 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."

That the board of appeals is limited in its power to grant variances by the criteria specified in the enabling statutes has been made clear by the Court of Appeals.[26]

# Interpretations

## What is an interpretation?

The zoning enabling statutes provide boards of appeals with the power to hear and decide appeals from and review decisions of the administrative official responsible for the enforcement of the zoning regulations.[27] The statutes specifically allow the board to reverse or affirm, wholly or partly, or to modify the decisions appealed to it.[28] This general statement of the board's appellate jurisdiction allows the board to interpret the municipality's zoning regulations.

The interpretation power is part of the appellate jurisdiction of the board of appeals, and cannot lawfully be exercised unless an appeal has been taken from an enforcement officer's decision.[29] 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 law, 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*[30], 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 agreed with the building inspector's interpretation that the zoning district regulations did not permit motels. The board of appeals' decision was subsequently sustained by a court.

The appeal could also be from a decision of the enforcement official citing a violation of the zoning regulations. Thus, in *Matter of Levine v. Buxenbaum*[31], 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.[32] Thus, in *Pansa v.*

*Damiano*[33], 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.

Regardless of the type of action appealed from, the board of appeals may interpret the language of the zoning regulations, 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.

### The basis of an interpretation

The Court of Appeals has held that a zoning board of appeals performs a "quasi-judicial" function when it renders an interpretation of a zoning provision, and, as such, should act according to its own precedent.[34] Thus, where a board of appeals has interpreted a particular provision of the municipal zoning law in a prior case, it should follow that precedent. This requirement points up the essentiality of good record-keeping, and of maintaining easy reference to prior decisions. The ideal system will cross-reference the filing of case records according to several parameters, such as: zoning law provision interpreted; location of property; name of appealing party(ies); as well as by simple chronology.

Where there are no prior decisions to rely on, the board of appeals should attempt to determine the governing board's original intent in enacting the provision in question. In arriving at this determination the board should consider prior documentation such as: minutes of governing board meetings; testimony of local officials; and planning advisory documents which may have accompanied the enactment. Case law may also furnish guidance. Although the substance of zoning is generally a local matter, courts have on occasion applied broad interpretive principles in particular zoning contexts, for example, where the question concerns a customary accessory use. In a recent decision, the Appellate Division upheld a city's board of appeals in its determination that a "beaming" (or hair-removal) operation was not a customary accessory use to a leather finishing facility, where the facility had been in business for many years as a lawful nonconforming use, without performing "beaming," and where the "beaming" would have introduced chemical processes not theretofore employed at the facility.[35]

Finally, where the case calls for the board of appeals to interpret the meaning of a term, and there is no precedent to guide the board, it may desire to refer to one or more of the various zoning treatises containing standard definitions of terms, or even to the dictionary.

## Variances

### What is a variance?

As noted in the introduction, various "safety valves" were built into the original New York City zoning ordinance in 1916, the most important of which is the zoning board of appeals' power to grant variances.

It is the purpose of the following sections to examine 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 variances 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.

One point should be emphasized at the outset. Though it is not a legislated change in zoning, a variance is essentially a change in the zoning law as it applies to the subject parcel of land. It therefore applies to the land itself, and not merely to the owner who happens to have applied for it. While a variance may be conditioned so as to be temporary where the nature of the use will be temporary (e.g., a construction trailer), the typical variance must instead "run with the land." It cannot be made to apply only to the current owner.

> "It is basic that a variance runs with the land and, 'absent a specific time limitation, it continues until properly revoked' . . ."[36]

## 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."[37]

As the use variance grants permission to the owner to do what the use regulations prohibit, this power of the board of appeals must be exercised very carefully lest there be serious conflict with the overall zoning scheme for the community. The showing required for entitlement to a use variance is therefore intended to be a difficult one.

The General City Law, Town Law and Village Law specifically incorporate this concept into the language of the statutes. The statutes[38] 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."

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. 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*, *supra*, 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 entire parcel for a skating rink, which was a permitted commercial use. The lower court upheld the granting of the use 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 use 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 use 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."[39]

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. Hardly a court decision in this area has since been handed down that has not cited the rules formulated in the *Otto* case.

The statutes[40] essentially codify the *Otto* rules, and those of cases following *Otto*, specifically regarding the issuance of use variances in cities, 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 cities, towns and villages, the statutory rules for granting use variances 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 statutes[41] 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 first prong of the *Otto* test.

The salient inquiry is whether the use allowed by the zoning law is yielding a reasonable return.[42] An applicant must prove that he or she cannot realize a reasonable return from each of the uses permitted in the zoning district. 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[43], does not justify the granting of a variance on the grounds of unnecessary hardship.[44]

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*[45], 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 (i.e., that 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."[46]

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.)."[47]

### *Unique circumstances*

The second test that an applicant for a use variance must adhere to under the state statutes, is that the property's plight is due to unique circumstances and not to general neighborhood conditions.

The statutes[48] provide that an applicant must 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."

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."[49]

The Court of Appeals, in the early case of *Arverne Bay Construction Co. v. Thatcher*[50], 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*[51], 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 *Douglaston Civic Association, Inc. v. Klein*[52], 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.

The uniqueness relates, therefore, to the hardship, which in turn relates to the land, and not to the personal circumstances of the owner. In *Congregation Beth El of Rochester v. Crowley*[53], a religious organization whose synagogue had burned down applied for a use variance so that it could sell the now-vacant property for construction of a gasoline service station. The organization argued that the uniqueness standard was satisfied in that it was financially impracticable to rebuild a synagogue on the site. The court instead held that "It is not the uniqueness of the plight of the owner, but uniqueness of the land causing the plight, which is the criterion."

## *Essential character of the neighborhood*

The third test that must be met pursuant to state statutes[54] before a use variance may properly be granted, is that

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

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 regulation itself. Thus, in the case of *Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece*[55], 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 use 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 the use 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."[56]

In the case of *Matter of Style Rite Homes, Inc. v. Zoning Board of Appeals of the Town of Chili*[57], 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 use 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 use 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."

One court has held that the applicant will fail this third test if it is shown that the proposed project would "stimulate a process which in time would completely divert . . .[the neighborhood's] . . . complexion." In other words, the proposed project need not *in and of itself* alter the character of the neighborhood if it is shown that the project would set a pattern for future development that would, in time, alter the neighborhood's character.[58]

### *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." The self-created hardship rule has now been codified in the statutes.[59]

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 she/he now complains of. In *Carriage Works Enterprises, Ltd. v. Siegel*[60], in addressing self-created hardship, the court stated "The courts should not be placed in the position of having to guarantee the investments of careless land buyers." The same advice should apply to zoning boards of appeals.

In the case of *Clark v. Board of Zoning Appeals*[61], the Court of Appeals, before proceeding to discuss the grounds necessary for the granting of a use 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 . . .[ the owner] . . . purchased the lot, then applied for a 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' . . ."[62]

Note, however, that a contract vendee – i.e., a person who enters into an agreement with the owner to purchase the property contingent on the grant of a variance – is a legitimate "person aggrieved" (see "Who are proper parties before the board," below). Since the contract vendee has yet to purchase the property, he/she cannot be said to present self-created hardship, but must rely on the circumstances of the owner with whom he/she has a contract.

## A final word on use variances

The rules laid down in the statutes and in the applicable cases 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 elements of the test has been met by the applicant.

The board must also consider the effect of the grant of the use variance on the zoning law itself. The Court of Appeals pointed out in the *Clark* decision, *supra*,

> ". . . no administrative body may destroy the general scheme of a zoning law by [granting variances indiscriminately] . . ."

## The Area variance

The statutes[63] define an area variance 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."

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 side yard restriction, an area variance is just as obviously called for.

The rules for the issuance of area variances in all municipalities have changed dramatically since 1992. 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, since July 1, 1994, the term is no longer applicable in cities. The historic cases interpreting "practical difficulty" will, therefore, not be discussed here.

The statutes now specifically set forth the rules for the granting of area variances.[64] They provide that in making its determination on an application for an area variance, the board of appeals must balance the benefit to be realized by the applicant against the potential detriment to the health, safety and general welfare of the neighborhood or community if the variance were to be granted. In balancing these interests, 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.

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.

The best way to understand the rules is to examine each in its turn, together with the court decisions that rely on them.

### *Undesirable change in the neighborhood*

The board must consider whether the dimensional alteration being proposed will result in a structure or a configuration that will be seriously out of place in the neighborhood. In *Pecoraro v. Board of Appeals of the Town of Hempstead*[65], the Court of Appeals upheld the denial of an area variance that would have reduced the minimum lot size from 6,000 square feet to 4,000, and would have reduced the required frontage from 55 feet to 40. The court held that the board of appeals could rationally conclude that the proposal would seriously compromise the character of the neighborhood, which consisted overwhelmingly of parcels which met the required minimums.

### *Alternative to variance*

Here, the board should consider alternatives open to the applicant that are lawful under the zoning. Perhaps, for example, a proposed addition can be constructed in a different location on the property, where a variance would not be needed. Or, as one court recently observed, the applicant should have at least explored the possibility, either of acquiring adjoining vacant property, or of selling his substandard unimproved lot to an adjoining neighbor.[66]

### *Substantiality*

It is difficult to quantify "substantiality." The board should, however, make a reasoned judgment as to whether the nonconformity being proposed is too great, as compared to the lawful dimensions allowed by the zoning law. Some courts have looked favorably upon a board's application of a simple mathematical analysis. In *Heitzman v. Town of Lake George Zoning Board of Appeals*[67], the court upheld the denial of a variance based in part on the showing that construction would have exceeded the allowable lot coverage by 15%.

### *Impact on environment*

Here, the board of appeals should weigh the proposal's potential impact on such factors as drainage, traffic circulation, dust, noise, odor, and impact on emergency services, among others. In one case, a court upheld the grant of a height variance allowing construction of a fence which would screen several exhaust fans installed at the rear of a diner. The court held that substantial evidence supported the board's decision that the fence would protect the aesthetics of the diner, which had unique design, that installation of a grease reservoir would prevent grease from dripping to the ground, and that the fence would keep grease and fumes from neighboring property.[68]

### *Self-created difficulty*

One court[69] shed light on the possible scenarios constituting self-created difficulty as follows:

> "Where the lot was substandard and nonconforming at the time it was purchased . . . , or where construction occurred due to contractor's error . . . , or without the benefit of a building permit . . , or where an applicant seeks

> to construct three homes on a parcel zoned for one house."

On the other hand, said the same court, when an owner builds on a lot he does not thereby preclude himself from obtaining a variance for additional construction in the future. Thus, the board of appeals should not

> "require homeowners to anticipate all future needs and property uses before one constructs a home, otherwise all subsequent nonconforming desires would be rejected as self-created."[70]

But perhaps the most important point we can make here is that self-created difficulty, as it relates to an area variance application, is not the same as self-created *hardship,* as set forth above with respect to the use variance. Even if present, it constitutes only one factor to be considered by the board of appeals; it does not, in and of itself, act as a bar to the grant of an area variance.

Several significant cases have been decided by the courts since the revised area variance standards went into effect in the early 1990's. In *Sasso v. Osgood*[71], the Court of Appeals reversed a decision of the Appellate Division, which had applied the "practical difficulty" test despite its recent disappearance from the statute. The Court of Appeals held that:

> ". . . the legislation was enacted to aid nlaypersons–both applicants and lay members of Zoning Boards of Appeal--in understanding and implementing the existing case law . . .
>
> . . . .
>
> "We conclude Town Law § 267-b(3)(b) requires the Zoning Board to engage in a balancing test, weighing 'the benefit to the applicant' against 'the detriment to the health, safety and welfare of the neighborhood or community' if the area variance is granted, and that an applicant need not show 'practical difficulties' as that test was formerly applied."

In *Cohen v. Board of Appeals of the Village of Saddle Rock*[72], the Court of Appeals struck down a village's local zoning law to the extent that it applied standards for the grant of an area variance which went beyond those found in Village Law § 7-712(b)(3). In fact, the village's own law required adherence to the old "practical difficulty" standard. The Court held:

> "faced with the turmoil and uncertainty that had plagued the law in this area, the Legislature intended to occupy the field and thus preempt local supersession authority.
>
> . . . .
>
> "A uniform standard for area variance review . . . has clear advantages. Property owners and zoning practitioners around the state will benefit from a better understanding of the standards for a variance, notwithstanding the unique zoning requirements of each individual locality . . . And far from being an encroachment on local zoning authority, the application of a uniform standard ensures that each locality's zoning decisions will be reviewed consistently by the courts without being subject to the vagaries of a standard elusive of easy definition or clear application . . ."

## Minimum variance necessary

The statutes[73] codify what the courts had previously held: When granting either a use or an area variance, a zoning board of appeals

must grant the *minimum* variance that it deems necessary and adequate, while at the same time preserving and protecting the character of the neighborhood and the health, safety and welfare of the community. Thus, the board need not grant to an applicant everything he/she has asked for. Rather, the board is required to grant only the approval that is absolutely necessary to afford relief.

To illustrate this point, in *Nardone v. Zoning Board of Appeals of the Town of Lloyd*[74], the applicant requested variances to locate 12 one-bedroom and three two-bedroom apartments on one parcel, and six two-bedroom apartments on another parcel. The board instead granted a variance allowing only the construction of 12 one-bedroom apartments on one parcel, and five two-bedroom apartments on the other. The court held that the board had acted rationally and within its scope of discretion in granting a modified approval that, on the facts presented, would afford adequate relief to the owner.

## Conditions

The statutes[75] empower the board of appeals, when granting a use or area variance, to impose "such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property." While the statutes now expressly authorize the setting of conditions, the courts long ago held that boards of appeals have the inherent power to impose reasonable conditions to protect the neighborhood.[76]

We should clearly distinguish conditions from alternatives. While an alternative is a different version of relief – or, perhaps, a way to avoid the need for relief – conditions are instead requirements placed on the enjoyment of the relief that the board actually grants. Conditions are meant to mitigate the impacts of the approved project on both the neighborhood and on the integrity of the zoning law.

Conditions must relate solely to the particular land that is the subject of the application, and must not concern unrelated land or other issues. In *Gordon v. Zoning Board of Appeals of the Town of Clarkstown*[77], the court struck down a condition requiring an owner, as a condition of the grant of a side-yard variance, to dedicate a strip of her front yard for a future road-widening project.

Further, the conditions must relate to the land and may not be personal to the owner. In *St. Onge v. Donovan*[78] the Court of Appeals struck down a condition placed on the grant of a use variance for a real estate office. The condition restricted the variance to use by the then-current owner only. Similarly, the courts have held that conditions applied to any land use approval must relate to the legitimate objectives of zoning, and not to matters related solely to the operation of a business. The decision in *Matter of Summit School v. Neugent*[79], is practically a primer on this point. In the *Summit School* case, a village zoning board of appeals had placed a number of conditions on the grant of a special use permit and a variance to operate a private school for children with learning disabilities. The conditions related to ages of students, months, days and hours of operation of the school, number of students enrolled, teacher-to-student ratio, and degree of supervision of the students. The court struck down all of the conditions, stating:

> "The power of a board of appeals to impose conditions . . . is not unlimited. The conditions so established must relate directly to, and be incidental to, the proposed *use* of the real property and not to the manner of the operation of the particular enterprise conducted on the premises . . ."

# 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.

Yet proper procedure is of singular importance in the administration and enforcement of the community's zoning law - that investment in its future development. Quite aside from protecting the board against legal challenges, its adherence to procedural requisites should ensure evenhandedness and due process for all parties. 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.[80] The appeals may be seeking interpretations, use variances or area variances.

It should be emphasized that the board of appeals has jurisdiction only over appeals that involve *zoning* decisions of the enforcement officer. Decisions involving enforcement of the New York State Uniform Fire Prevention and Building Code are not appealed to the local zoning board of appeals. They are instead appealed to the regional Uniform Code Review Board having jurisdiction over the locality.

As of July 1, 1994, the statutes have been uniform in limiting boards of appeals to appellate jurisdiction "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: those who are appealing from decisions made by the enforcement officer (under strict application of the regulations), on the one hand, and those who are seeking a decision by the zoning board of appeals on some matter over which it has original jurisdiction, on the other. An example of the latter would be a person seeking a special use permit where the zoning law assigns the power to issue these to the zoning board of appeals. In this 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 filing appeals with the zoning board of appeals, we are concerned with several categories of parties. First, the person who applied to the zoning enforcement officer for a zoning permit and was refused is (or may be) aggrieved by the refusal. Second, the person who was cited for a zoning violation may be aggrieved. Third, the person

who lives next door or nearby may be aggrieved by the issuance of a zoning 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*[81], 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*[82], 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. The great number of cases defining persons aggrieved for purposes of appeals *from* boards of appeals are, however, 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*[83] 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 . . ."[84]

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

The case of *Eckerman v. Murdock*[85] held that a mortgagee has sufficient economic interest to be a "person aggrieved." In the case of *Henry Norman Associates, Inc. v. Ketler*[86] 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*[87] 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*[88] nearby residents whose property stood to be materially depreciated in value were held to be "persons aggrieved"[89], 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."[90] The decision in *Matter of Horan v. Board of Appeals*[91] 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.[92]

Although the rule is liberal, there is a limit. In *Blumberg v. Hill*[93], 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 . . . 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*[94], 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*[95], 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.[96] In *Cord Meyer Development Co. v. Bell Bay Drugs, Inc.*[97], 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."

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 zoning enforcement officer? 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 law. [98]

In *Matter of Marshall v. Quinones*[99], 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.[100]

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*[101], 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 *Horan* case, *supra,* 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 accorded 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

The statutes require all determinations of the zoning enforcement officer to be filed in his or her office within five business days of the day it is rendered. Alternatively, the governing board may adopt a resolution providing that such filing must instead be done in the municipal clerk's office. The statutes further require that any appeal to the board of appeals must be taken within 60 days after the filing of the determination.[102]

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, supra*, 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.

In *Farina v. Zoning Board of Appeals of the City of New Rochelle*[103], the petitioners filed an appeal of the City's issuance of a building permit to a neighboring property owner. They filed the appeal within a month of receiving notice that their neighbors had commenced development on the lot in question, but more than 60 days beyond the issuance of the permit. The Appellate Division ruled that the neighbor's appeal was timely. Citing the *Pansa* decision, the court stated:

> "It is settled law, however, that where a party seeks revocation of a building permit issued to another, the prescriptive period should be computed from the date such party received notice that his objections to the permit had been overruled [cite omitted]. We find that the petitioners in this case are not chargeable with knowledge of the issuance of the building permit until March 2000. Thus, the appeal of the issuance of the building permit, taken on March 27, 2000, was timely . . ."

Both the *Pansa* and the *Farina* 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*[104] 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); 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*[105], 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. Properly crafted, such forms can serve to guide the petitioner to state clearly what it is she/he wants. There is at least one case, however, 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.[106]

It should be noted that an appeal to the zoning board of appeals stays all proceedings in the matter appealed from, except in certain emergency situations. 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*[107], 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*[108]. 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 Park Water Dist.*[109] 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.

We note that the statutes apply the stay against "all proceedings in furtherance of the action appealed from." In a recent case, the court held that the stay applies to the issuance of an appearance ticket as well as to administrative enforcement actions such as the issuance of a notice of violation. In *People v. Bell Atlantic*[110], the court held:

> "The purpose of the stay is to obtain a definitive ruling from the Zoning Board of Appeals before moving to a judicial determination. If, for instance, without a stay, a jury were to find Bell Atlantic guilty of the alleged violations, the Zoning Board of Appeals could later find Bell Atlantic in compliance, thus, in effect, reversing the jury's decision. The Village should first await the exhaustion of administrative interpretations and then proceed with its case in this Court if the Zoning Board of Appeals sustains the Village's position."

## Referral to a planning agency

A board of appeals will often find itself in the position of having to refer certain matters elsewhere for recommendation before making a final decision. General Municipal Law, section 239-m requires that in any city, town or village located in a county which has a county planning agency, or within the jurisdiction of a metropolitan or regional planning council, any board charged with taking certain zoning or planning actions shall – before taking such action – refer them to that county, metropolitan or regional planning agency or council. General City Law, section 81-a(10), Town Law, section 267-a(10) and Village Law, section 7-712-a(10) all require that such referral must occur at least five days prior to the board of appeals' public hearing on the proposed action.

The matters covered by this section include any variance, site plan or special use 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, or (except for area variances) from the boundary of a farm operation located in an agricultural district, as defined by Article 25-AA of the Agriculture and Markets Law. (Also covered are zoning regulations or amendments which would change the district classification of real property within such a 500-foot distance.) Matters which only require an interpretation of the local zoning law are, however, exempted from such referral.

The referring body and the county (or regional) agency may agree that certain matters are of local concern only and need not be referred to the planning agency.[111]

The referral requirement is mandatory. In *Weinstein v. Nicosia*[112], the court held that a board of appeals' failure to follow the provisions of section 239-m creates a jurisdictional defect, because its provisions are a pre- condition to the acquiring of jurisdiction. The board's failure to follow them therefore renders its decision void. Another case reaching the same conclusion is *Asthma v. Curcione*[113], which involved the issuance by a zoning board of appeals of a special permit.

The county, metropolitan or regional planning agency has 30 days to report its recommendation. In the event the planning agency fails to do so, the board of appeals may act without such a report. If the planning agency recommends disapproval or modification, the board of appeals can only act contrary to the recommendation 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 the contrary action. Failure to comply with the voting requirements in section 239-m could render the local decision invalid if challenged in court.

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

## Environmental quality review

Any appeal to a board of appeals will require a decision that constitutes an exercise of discretion by the board, thereby invoking application of the State Environmental Quality Review Act, better known as "SEQRA" (Environmental Conservation Law, Article 8) and its implementing regulations, which are found in Title 6, New York Code of Rules and Regulations, Part 617.

If the board of appeals is the lead agency, the first SEQRA decision it will have to make, based on review of the Environmental Assessment Form (EAF) is whether to classify the matter before it as a Type I, Type II, or Unlisted action under SEQRA. To guide its decision the board should refer to the lists of actions found in Part 617. Some decisions appear on a predetermined list of types of actions, called Type II Actions, which have already been determined <u>not</u> to have a significant adverse impact on the environment. If the board finds that the matter is Type II, it should document that finding, whereupon its SEQRA function is complete.

It should be noted that certain matters that commonly come before a board of appeals are listed as Type II. Among these are interpretations of the zoning regulations, as well as the granting of all setback and lot-line variances, and all area variances for one-, two-, and three-family residences.

While there are several other actions on the Type II list that may often come before a board of appeals, many matters, including most use variances, will probably be either Type I or Unlisted Actions, thus requiring the board of appeals to make a "determination of Significance" (i.e., a decision whether or not to require an environmental impact statement, or EIS).

With respect to use variance applications, there is an overlap between the statutory criteria for granting the variance, on the one hand, and the criteria under Part 617 for determining whether to require an EIS. For example, to be granted a

use variance the applicant must show, among other factors, that the variance, if granted, will not alter the essential character of the neighborhood. Moreover, in granting the use variance the municipality is directed to preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

Closely akin to the above factors, SEQRA requires the board (if lead agency) to consider community character and aesthetics in making its Determination of Significance. Even where the board decides not to require an EIS – it has issued a "negative determination" – it must nonetheless apply these same factors in its later review of the merits of the application.

But if the board decides to require an EIS based in part on the potential impact on neighborhood character, then it will inevitably perform a thorough review of this issue within the EIS process. This should shorten and expedite the board's eventual review of this same factor during its later application of the statutory variance criteria.

Another practical problem is the potential for redundant SEQRA reviews where, once the use variance is granted, the board of appeals must also issue a special use permit. This subsequent review often requires SEQRA review in itself. Thus, there may result needless repetition of the same SEQRA issues that were addressed during the variance application. To avoid such repetition, the board should perform SEQRA review of the entire potential project at an initial stage, and then apply that review to any subsequent permits or approvals that are necessary.

## 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.[114] The reference to "any other matter" means that, for example, if the board is delegated the power to review and approve site plans, the board must hold a hearing before rendering its decision, even though the site plan statutes themselves do not require 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*[115], 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.[116]

A new statute requires zoning boards of appeals, when holding a hearing on the granting of a use variance on property that is within five hundred feet of an adjacent municipality, to give notice to the clerk of the adjacent municipality at least ten days prior to the hearing. The notice may be given by mail or by electronic transmission . Representatives from the adjacent municipality may appear at the hearing and be heard.[117]

Publication of notice is also required, in a newspaper of general circulation at least five days before the hearing.[118]

Generally, courts are strict about interpreting these notice requirements. In the case of *Briscoe v. Bruenn*[119], 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.

There are, however, 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*[120], 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 use 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 or she 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*[121], 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 use 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*[122] 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.[123] 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." [124]

Although the board of appeals is a "quasi-judicial body," it is nonetheless subject to the state's Open Meetings Law (Public Officers Law, Article 7). All meetings of the board of appeals must, therefore, be open to the public. This requirement of openness will almost always include all of the board's discussions and votes.[125]

This brings up the touchy point of the so-called "executive session" - a closed meeting of the board of appeals. As noted above, the statutes require zoning board of appeals meetings to be open to the public in accordance with the Open Meetings Law. Under the Open Meetings Law, executive sessions may be held only to conduct certain limited types of business[126]. Otherwise, they must be open to the public.[127] As applied

to boards of appeals proceedings, this means 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.[128] 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.[129]

# 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 conclusion of the hearing on the matter to render its decision.[130] This period may, however, be extended by mutual consent of the applicant and the board of appeals. The statutes also require that the 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.[131]

The principles which form the basis of the board of appeals' decision are found in the criteria, discussed above, for making interpretations or for the granting of use or area variances. Where the decision instead involves an exercise of original jurisdiction, the principles will be found in the standards of review contained in the local special use permit, site plan, or other provisions under which the application has been made.

However the board arrives at its decision, the decision itself must be supported by findings which constitute "substantial evidence."[132] In other words, findings of fact and/or testimony must be placed on the record which adequately support the 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*[133], 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 worded something like "stop-work order affirmed," "variance granted" or "special use 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 in *Gilbert v. Stevens* found these were not sufficient.[134] 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]

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.

In a use variance case, for example, the findings of fact may well focus on whether or not the applicant has presented sufficient "dollars and cents" proof of his hardship. (See the discussion of use variances, *supra.*)

As was stated above in the context of interpretations, the courts have held that a board of appeals should follow its own prior precedent. How does this work when the matter instead involves a variance, special use permit, or other form of project approval? Does it mean that if the board grants a variance to one owner to, say, build a hardware store in a residentially-zoned district, that it must thereafter grant similar permission to any other owner in that district who asks for the same relief? No, it does not mean that at all. Unlike interpretations, where the only question involves the uniform application of the words of the zoning law, variances and use permits instead concern the appropriateness of project proposals on particular parcels of land, each having their own unique characteristics. Thus, the facts of each case will differ from those of all others. The impact of the holding in *Knight v. Amelkin*, *supra*, as applied to variances and special use permits, should be such that the board apply a *generally consistent approach* to its consideration of the standards as they apply to the facts of each case, not that all results will be identical.

Where the board of appeals is exercising original jurisdiction (for example, on approving a special use permit), the final decision must be supported by an affirmative vote of a majority of the members of the board.[136] 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. This requirement applies both to approvals and disapprovals: an absolute majority must favor the action taken.

Where the matter instead involves an *appeal*, the rule is different, as governed by a revision to the statutes that took effect in 2003. The State Legislature made this revision in response to the decision of the Court of Appeals in *Tall Trees Construction Corp. v. Zoning Board of Appeals of the Town of Huntington*.[137] The statutes[138] now uniformly provide that an affirmative vote of a majority of the full membership of the board of appeals--counting vacancies, absences and abstentions--is necessary on a motion to reverse a determination of the enforcement officer or to grant a variance.

What if the board, upon conclusion of the original hearing of an appeal, conducts a vote that fails to result in a majority in favor of granting the applicant the relief requested? This will of course result in a default denial. But the statutes also provide that the board may amend the failed motion and vote on the amendment, within the 62-day period after the close of the public hearing. This will *not* require the board to follow the statutory rehearing process, described below.[139]

# Rehearing

The statutes[140] provide for the rehearing of a matter upon which the board of appeals has once made a decision. The rehearing may only occur following the unanimous vote of those members present. Where such a unanimous vote occurs, the board would then rehear the case in its entirety and make a new decision. In order to effectively change its original decision, another unanimous vote of those members then present is required. In addition (and regardless of a unanimous concurring vote), no new decision of the board may be made if the board finds that it would prejudice the rights of any persons who acted in good faith reliance on the original decision.

# Filing the Decision

The statutes[141] provide that every rule, regulation, every amendment or repeal thereof and every order, requirement, decision, or determination of the board shall be filed in the office of the municipal clerk within five business days after the day it is rendered (a copy must also be mailed to the applicant). These filing requirements are of major importance as a practical matter, because the 30-day period to appeal a board of appeals decision to the courts begins to run from the date of the filing of the board's decision.[142]

# 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, but board of appeals actions affect the property rights of individuals, and the procedural requirements of the statutes are meant to protect these rights as well as the welfare of the community. It is hoped that the procedures noted herein, as well as the substantive rules governing both interpretations and variances, will be of assistance to boards of appeals throughout the State of New York.

# ENDNOTES

1. Salkin, *New York Zoning Law and Practice*, 4th Ed., §27.08.

2. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

3. *People v. Kerner,* 125 Misc. 526, 533 (Sup. Ct., Oneida Co., 1925.

4. *Otto v. Steinhilber,* 282 N.Y. 71 (1939).

5. *People v. Walsh,* 244 N.Y. 280, 290 (1927).

6. General City Law, section 81(1), Town Law, section 267(2) and Village Law, section 7-712(2).

7. Town Law, section 267(7));General City Law, section 81.

8. General City Law, section 81(4); Town Law, section 267(5); Village Law, section 7-712(5).

9. General City Law, section 81(1).

10. Town Law, section 267(2).

11. Village Law, section 7-712(2).

12. General City Law, section 81(2), Town Law, section 267(3), and Village Law, section 7-712(3).

13. General City Law section 81(11), Town Law section 267(11), Village Law section 7-712(11).

14. See *Op. Atty. Gen. (Inf.) No. 86-20.*

15. General City Law section 81(1), Town Law section 267(2), Village Law section 7-712(2).

16. *Kaufman v. City of Glen Cove,* 180 Misc. 349 (Sup. Ct., Nassau Co., 1943), aff'd 266 A.D. 870 (2d Dept., 1943).

17. See *Kaufman, supra.*

18. *Scott v. Quittmeyer,* 200 N.Y.S.2d 886 (Sup. Ct., Nassau Co., 1960); *Balsam v. Jagger,* 231 N.Y.S.2d 450 (Sup. Ct., Suffolk Co., 1962); *Plotinsky v. Gardner,* 27 Misc.2d 681 (Sup. Ct., Westchester Co., 1960); *Von Elm v. Zoning Board of Appeals of Incorporated Village of Hempstead,* 258 A.D. 989 (2nd Dept., 1940).

19. General City Law sections 27-a(3), 27-b(3) and 33(6); Town Law sections 274-a(3), 274-b(3) and 277(6); Village Law sections 7-725-a(3), 7-725-b(3) and 7-730(6).

20. See *Cerame v. Town of Perinton*, 6 A.D. 3d 1091 (4th Dept., 2004).

21. General City Law section 81-b(2), Town Law section 267-b(1), and Village Law section 7-712-b(1).

22. *Schmitt v. Plonski,* 215 N.Y.S.2d 170 (Sup. Ct., Suffolk Co., 1961).

23. Levy v. Board of Standards and Appeals, 267 N.Y. 347 (1935).

24. Op. St. Comptr. 65-770.

25. *Cherry v. Brumbaugh,* 255 A.D. 880 (2nd Dept., 1938).

26. See *Cohen v. Board of Appeals of the Village of Saddle Rock,* 100 N.Y.2d 395 (2003), discussed at length *infra.*

27. General City Law section 81-a(4), Town Law section 267-a(4), and Village Law section 7-712-a(4).

28. General City Law section 81-b(2), Town Law section 267-b(1), and Village Law, section 7-712-b(1).

29. See *Kaufman, supra.*

30. *Hinna v. Board of Appeals*, 11 Misc.2d 349 (Sup. Ct., Nassau Co., 1957).

31. *Matter of Levine v. Buxenbaum*, 19 Misc.2d 504 (Sup. Ct., Nassau Co., 1959).

32. Anagnos v. Lesica, 134 A.D.2d 425 (2nd Dept., 1987).

33. *Pansa v. Damiano*, 14 N.Y.2d 356 (1964).

34. See *Knight v. Amelkin*, 68 N.Y.2d 975 (1986).

35. See *Androme Leather v. City of Gloversville*, 1 A.D.3d 654 (3rd Dept., 2003).

36. See *St. Onge v. Donovan*, 71 N.Y.2d 507, 527 N.Y.S.2d 721 (1988).

37. Salkin, *supra*, §29.05.

38. General City Law section 81(b)(1)(a), Town Law section 267(1), and Village Law section 7-712(1).

39. See *Otto v. Steinhilber, supra.*

40. General City Law, section 81-b(3)(b), Town Law, section 267-b(2)(b) and Village Law, section 7-712-b(2)(b).

41. General City Law section 81-b(3)(b), Town Law section 267-b(2)(b), and Village Law section 7-712-b(2)(b).

42. *Crossroads Recreation v. Broz*, 4 N.Y.2d 39 (1958).

43. *Goldstein v. Board of Appeals of Oyster Bay*, 102 N.Y.S.2d 922 (Sup. Ct., Nassau Co., 1951).

44. *Rochester Transit Corp. v. Crowley*, 205 Misc. 933 (Sup. Ct., Monroe Co., 1954), citing *Young Women's Hebrew Association v. Board of Standards and Appeals*, *supra*; *Thomas v. Board of Standards and Appeals of City of New York*, 290 N.Y. 109 (1943).

45. *Everhart v. Johnston*, 30 A.D.2d 608 (3rd Dept., 1968).

46. *Fayetteville v. Jarrold*, 53 N.Y.2d 254 (1981).

47. *Crossroads Recreation v. Broz*, 44).

48. General City Law section 81-b(3)(b), Town Law section 267-b(2)(b), and Village Law section 7-712-b(2)(b).

49. Rathkopf, *The Law of Zoning and Planning, §58:11.*

50. *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222 (1938).

51. *Hickox v. Griffin*, 298 N.Y. 365 (1949).

52. *Douglaston Civic Association, Inc. v. Klein*, 51 N.Y.2d 963 (1980).

53. *Congregation Beth El of Rochester v. Crowley*, 30 Misc.2d 90, 217 N.Y.S.2d 937 (Sup. Ct., Monroe Co., 1961).

54. General City Law section 81-b(3)(b), Town Law section 267-b(2)(b), and Village Law section 7-712-b(2)(b).

55. *Holy Sepulchre Cemetery*, 271 A.D. 33 (4th Dept., 1946).

56. *Rochester Transit Corp. v. Crowley, supra.*

57. *Matter of Style Rite Homes, Inc. v. Zoning Board of Appeals of the Town of Chili*, 54 Misc.2d 866 (Sup. Ct., Monroe Co., 1967).

58. See *Congregation Beth El of Rochester v. Crowley, supra.*

59. General City Law section 81-b(3)(b), Town Law section 267-b(2)(b), and Village Law, section 7-712-b(2)(b).

60. *Carriage Works Enterprises, Ltd. v. Siegel*, 118 A.D.2d 568, 499 N.Y.S.2d 439 (2nd Dept., 1986).

61. *Clark v. Board of Zoning Appeals*, 301 N.Y. 86 (1950).

62. For similar holdings see *Holy Sepulchre Cemetery v. Board of Appeals*, *supra*; *Thomas v. Board of Standards and Appeals* supra; *Everhart v. Johnston*, supra; *Henry Steers, Inc. v. Rembaugh*, 284 N.Y. 621 (1940).

63. General City Law section 81-b(1)(b), Town Law section 267(1)(b), and Village Law section 7-712(1)(b).

64. General City Law section 81-b(4), Town Law section 267-b(3), Village Law section 7-712-b(3).

65. *Pecoraro v. Board of Appeals of the Town of Hempstead*, 2 N.Y.3d 608, 781 N.Y.S.2d 234 (2004).

66. See *Chandler Property, Inc. v. Trotta*, 9 A.D.3d 408, 780 N.Y.S.2d 163 (2nd Dept., 2004).

67. *Heitzman v. Town of Lake George Zoning Board of Appeals*, 309 A.D.2d 1126, 766 N.Y.S.2d 452 (3rd Dept., 2003).

68. See *Coco v. City of Rochester Zoning Board of Appeals*, 236 A.D.2d 826, 653 N.Y.S.2d 769 (4th Dept., 1997).

69. See *Casey v. Goehringer*, N.Y.L.J., March 27, 2002 (Sup. Ct., Suffolk Co., 2002).

70. See *Casey, supra.*

71. *Sasso v. Osgood*, 86 N.Y.2d 395 (1995).

72. *Cohen v. Board of Appeals of the Village of Saddle Rock*, 100 N.Y.2d 395 (2003).

73. General City Law section 81-b(3)(c) and (4)(c), Town Law section 267-b(3)(c), and Village Law section 7-712-b(3)(c).

74. *Nardone v. Zoning Board of Appeals of the Town of Lloyd*, 144 A.D.2d 807, 534 N.Y.S.2d 771 (3rd Dept., 1988).

75. General City Law section 81-b(5), Town Law section 267-b(4), and Village Law section 7-712-b(4).

76. See *Hopkins v. Board of Appeals of City of Rochester*, 179 Misc. 325, 39 N.Y.S.2d 167 (Sup. Ct., Monroe Co., 1942).

77. *Gordon v. Zoning Board of Appeals of the Town of Clarkstown,* 126 Misc.2d 75, 481 N.Y.S.2d 275 (Sup. Ct., Rockland Co., 1984).

78. *St. Onge v. Donovan*, 71 N.Y.2d 507, 527 N.Y.S.2d 721 (1988).

79. *Matter of Summit School v. Neugent*, 82 A.D.2d 463, 442 N.Y.S.2d 73 (2nd Dept., 1981).

80. General City Law section 81-b(2), (3)(a) and (4)(a); Town Law section 267-b(1), (2)(a) and (3)(a); Village Law section 7-712-b(1), (2)(a) and (3)(a).

81. *Matter of Hilbert v. Haas*, 54 Misc.2d 777 (Sup. Ct., Suffolk Co., 1967).

82. *S.S. Kresge Co. v. City of New York*, 194 Misc. 645 (Sup. Ct., New York Co., 1949), aff'd 275 A.D. 1036 (1st Dept., 1949).

83. *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead*, 69 N.Y.2d 406 (1987).

84. *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead* ,69 N.Y.2d 406, 413-414.

85. *Eckerman v. Murdock* , 276 A.D. 927 (2nd Dept., 1950).

86. *Henry Norman Associates, Inc. v. Ketler*, 16 Misc. 2d 764 (Sup. Ct., Nassau Co., 1959).

87. *Slater v. Toohill* ,276 A.D. 850 (2nd Dept., 1949).

88. *Steers Sand & Gravel Corp. v. Brunn*, 116 N.Y.S.2d 879 (Sup. Ct., Suffolk Co., 1952).

89. See also *Mueller v. Anderson,* ( 60 Misc. 2d 568 (Sup. Ct., Monroe Co., 1969)). In *Matter of Bettman v. Michaelis*, 27 Misc.2d 1010 (Sup. Ct., Nassau Co., 1961).

90. *Lavere v. Board of Zoning Appeals* (39 A.D.2d 639 (4th Dept., 1972), aff'd 33 N.Y. 2d 873 (1973).

91. *Matter of Horan v. Board of Appeals,* 6 Misc.2d 571 (Sup. Ct., Westchester Co., 1957).

92. See *Douglaston Civic Association, Inc. v. Klein, supra.*

93. 119 N.Y.S.2d 855 (Sup. Ct., Westchester Co., 1953).

94. *Village of Russell Gardens v. Board of Zoning and Appeals*, 30 Misc.2d 392 (Sup. Ct., Nassau Co., 1961).

95. *Matter of Wood v. Freeman*, 43 Misc.2d 616 (Sup. Ct., Nassau Co., 1964), aff'd 24 A.D.2d 704(2nd Dept., 1965).

96. *Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead supra*; *Paolangeli v. Stevens*, 19 A.D.2d 763 (3rd Dept., 1963).

97. *Cord Meyer Development Co. v. Bell Bay Drugs, Inc.*, 20 N.Y.2d 211 (1967).

98. See *Bowman v. Squillace*, 74 A.D. 2d 887 (2d Dept., 1980), but see *Gaylord Disposal Svce., Inc. v. Zoning Bd. of Appeals*, 175 A.D. 2d 543 (3d Dept., 1991), which held that a building inspector was not an official "aggrieved" by his own decision.

99. *Matter of Marshall v. Quinones*, 43 A.D.2d 436 (4th Dept., 1974).

100. See also *Innet v. Liberman*, 155 N.Y.S.2d 383 (Sup. Ct., Westchester Co., 1956).

101. *Edward A. Lashins, Inc. v. Griffin*, 132 N.Y.S.2d 896 (Sup. Ct., Westchester Co., 1954).

102. General City Law, section 81-a(5); Town Law, section 267-a(5); Village Law, section 7-712-a(5).

103. *Farina v. Zoning Board of Appeals of the City of New Rochelle*, 294 A.D. 2d 499 (2d Dept., 2002).

104. *Hunter v. Board of Appeals*, 4 A.D.2d 961 (2nd Dept., 1957).

105. *Matter of Lapham v. Roulan*, 10 Misc.2d 152 (Sup. Ct., Ontario Co., 1957).

106. *Highway Displays, Inc. v. Zoning Board of Appeals of the Town of Wappinger*, 32 A. D.2d 668.

107. *Blum v. O'Connor*, 6 Misc.2d 641 (Sup. Ct., Nassau Co., 1957).

108. *Linder v. Village of Freeport*, 61 Misc.2d 667 (Sup. Ct., Nassau Co., 1969), and *Brunschwig v. Long Is. R.R. Co.*, 41 Misc.2d 24 (Sup. Ct., Queens Co., 1963).

109. *Barnathan v. Garden City Park. Water Dist.*, 21 A.D.2d 832, 251 N.Y.S.2d 706 (2nd Dept., 1964).

110. *People v. Bell Atlantic*, 183 Misc. 2d 61 (Justice Ct., Vil. of Tuckahoe, 2000).

111. General Municipal Law, section 239-m(3)(c).

112. *Weinstein v. Nicosia*, 32 Misc. 2d 246 (Sup. Ct., Erie Co., 1962), aff'd 18 A.D.2d 881 (4th Dept., 1963).

113. *Asthma v. Curcione*, 31 A.D.2d 883 (4th Dept., 1969).

114. General City Law section 81-a(7), Town Law section 267-a(7), and Village Law section 7-712-a(7).

115. *Blum v. Zoning Board of Appeals*, 1 Misc.2d 668 (Sup. Ct., Nassau Co., 1956).

116. General City Law section 81-a(10), Town Law section 267-a(10), and Village Law section 7-712-a(10).

117. Chapter 687 of the Laws of 2005, effective July 1, 2006. An "adjacent municipality" is a city, except a city having a population in excess of one million, town or village which has a portion of its boundary that is contiguous with another municipality.

118. Town Law section 267-a(7), Village Law section 7-712-a(7), and General City Law section 81-a(7), effective July 1, 1994.

119. *Briscoe v. Bruenn*, 216 N.Y.S.2d 799 (Sup. Ct., Westchester Co., 1961).

120. *Gerling v. Board of Appeals*, 11 Misc.2d 84 (Sup. Ct., Onondaga Co., 1957).

121. *Galvin v. Murphy*, 11 A.D.2d 900 (4th Dept., 1960).

122. *Kenyon v. Quinones*, 43 A.D.2d 125 (4th Dept., 19730).

123. *Galvin v. Murphy*, *supra*; *Community Synagogue v. Bates*, 1 N.Y.2d 445 (1956).

124. Rathkopf, *supra, §57:65.*

125. General City Law section 81-a(1), Town Law section 267-a(1), and Village Law section 7-712-a(1).

126. Public Officers Law, section 105.

127. Public Officers Law, section 103(a).

128. *VonKohorn v. Morrell*, 9 N.Y.2d 27 (1961); *People ex rel. Fordham Manor Reformed Church v. Walsh*, *supra.*

129. *Hunter v. Board of Appeals*, *supra*; *Kenyon v. Quinones*, *supra.*

130. General City Law section 81-a(8), Town Law section 267-a(8), and Village Law section 7-712-a(8).

131. General City Law section 81-a(1), Town Law section 267-a(1), and Village Law section 7-712-a(1).

132. See *Soho Alliance v. N.Y. City Board of Standards & Appeals*, 95 N.Y.2d 437 (2000).

133. *Gill v. O'Neil*, 21 A.D.2d 718 (3rd Dept., 1964).

134. *Gilbert v. Stevens*, 284 A.D. 1016 (3rd Dept., 1954).

135. See also *Cohalan v. Schermerhorn*, 77 Misc.2d 23 (Sup. Ct., Suffolk Co., 1973); *215 East 72nd Street Corp. v. Klein*, 58 A.D.2d 751 1st Dept., 1977.

136. General City Law section 81-a(13), Town Law section 267-a(13), and Village Law section 7-712-a(13).

137. *Tall Trees Construction Corp. v. Zoning Board of Appeals of the Town of Huntington*, 97 N.Y.2d 86 (2001).

138. General City Law section 81-a(13), Town Law section 267-a(13), and Village Law section 7-712-a(13).

139. General City Law section 81-a(13)(b), Town Law section 267-a(13)(b), and Village Law section 7-712-a(13)(b).

140. General City Law section 81-a(12), Town Law section 267-a(12), and Village Law section 7-712-a(12).

141. General City Law section 81-a (2), Town Law section 267-a(2), and Village Law section 7-712-a(2).

142. See General City Law section 81-a(9), Town Law section 267-a(9), Village Law section 7-712-a(9).