ZONING PRACTICE IN THE NEW YORK REGION

BY
EDWARD M. BASSETT

COMPRISING A SERIES OF AIDS TO THE PRACTICE OF ZONING, A STATEMENT REGARDING THE APPLICATION OF ZONING IN NEW YORK CITY, AND A MODEL STATE ENABLING ACT WITH ANNOTATIONS

REGIONAL PLAN OF NEW YORK AND ITS ENVIRONS
130 East Twenty-second Street
New York City

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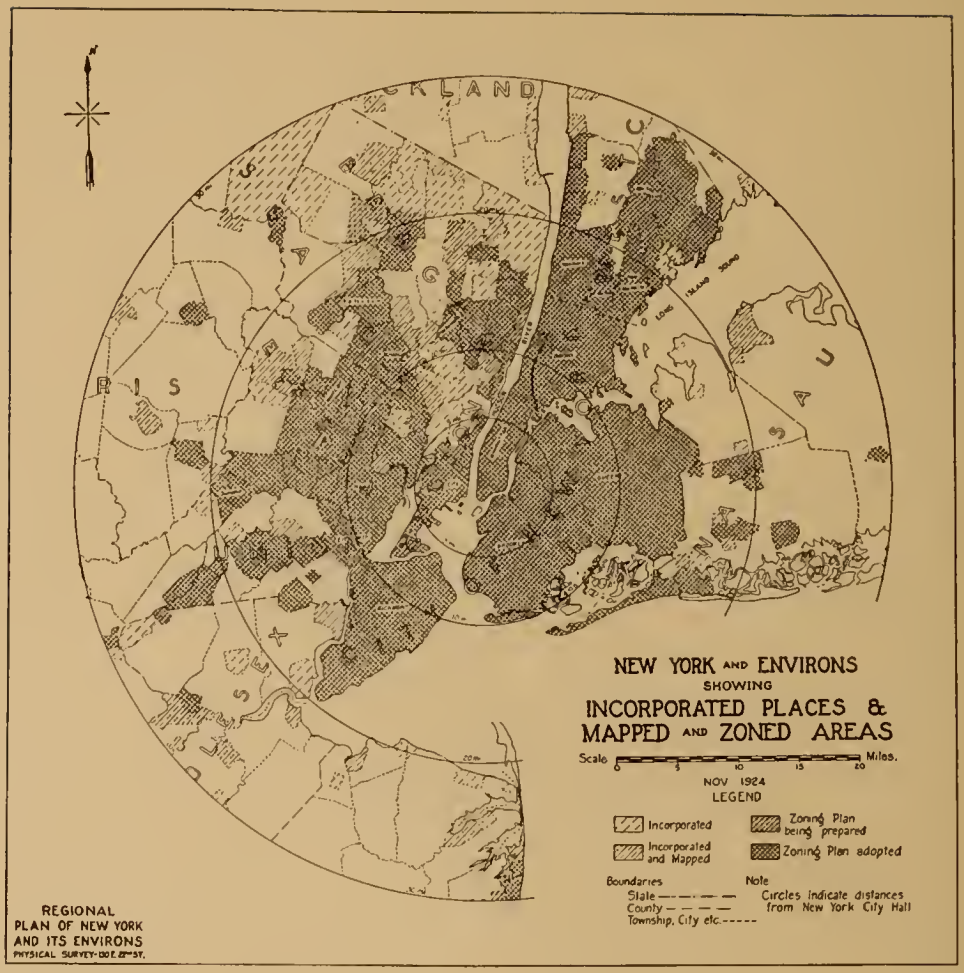

ZONING ORDINANCES ADOPTED

New Jersey

Bayonne
Belleville
Bloomfield
Bogota
Boonton
Bound Brook
Bradley Beach
Caldwell
Cliffside Park
Clifton
Cranford
Cresskill
Deal
Dunellen
East Orange
Elizabeth
Englewood
Fairview
Fanwood
Fort Lee
Garwood
Glen Ridge
Glen Rock
Hackensack
Hawthorne
Haworth
Highland Park
Hillside
Hoboken
Irvington
Jersey City
Kearny
Leonia
Linden
Long Branch
Lyndhurst
Madison
Maplewood
Millburn
Montclair
Newark
North Plainfield
Nutley
Orange
Passaic
Paterson
Plainfield
Pompton Lakes
Rahway
Ridgefield Park
Ridgewood
Riverside
Roselle
Roselle Park
Rutherford
Sea Girt
South Orange
Summit
Teaneck
Tenafly
Totowa
Verona
Weehawken
Westfield
West Hoboken
West New York
West Orange

New York

Brightwaters
Bronxville
Dobbs Ferry
Eastchester Town
Elmsford
Farmingdale
Floral Park
Freeport
Garden City
Great Neck Estates
Greenburgh
Harrison
Hastings
Hempstead
Irvington
Larchmont
Lawrence
Lynbrook
Mamaroneck Town
Mt. Vernon
Newburgh
New Rochelle
New York
North Pelham
Ossining
Pelham
Pelham Manor
Port Chester
Rockville Center
Rye
Scarsdale
Shoreham
Tarrytown
Tuckahoe
White Plains
Yonkers

INTRODUCTION

IN this brochure Mr. Edward M. Bassett deals primarily with the legal phases of zoning, in respect of both the requirements of the law of zoning and its practical application in the New York region. It does not contain any statement of policy regarding the classification of uses and the standards of heights and densities of buildings. These physical aspects of the problem will be a subject for later consideration and treatment. Nor does it deal with the merits of zoning. The principle of zoning has been almost universally accepted as sound when proper methods are employed in its application. This application in a municipality has to be by means of ordinances based on a state enabling act. It is of essential importance that the powers conferred by the state enabling act should be adequate to permit of wise regulation of the uses of land and buildings and of the heights and densities of buildings to be constructed or reconstructed upon the land, and that the ordinances be framed in conformity with the provisions of the enabling act. The purpose of the brochure is to provide helpful information as a guide for action, in the zoning of their areas, by municipal authorities in the New York region.

Part I contains a series of aids to the practice of zoning. In these aids Mr. Bassett has set forth what he conceives to be the leading considerations that should be borne in mind by municipal councils in giving effect to the powers conferred upon them by the state enabling act in New York, New Jersey, or Connecticut.

Part II gives a description of the application of zoning in the City of New York.

Part III consists of a model form of a state enabling act with notes prepared by Mr. Bassett. Acts are in force in all three states, and the statutory improvements needed are referred to in the first section of Part I.

The main purposes of the Committee in publishing this bulletin are, in the first place, to put in the hands of those interested in securing adequate legislation for zoning in the three states, into which the New York region extends, a model that will afford

guidance as to the precise scope and character of the powers that must be conferred by the state upon municipalities, to enable them to prepare and give effect to zoning ordinances in their respective areas. In the second place it desires to be of direct service to the municipalities in showing the limitations under which they must continue to prepare zoning ordinances until the powers contained in existing legislation are extended. These limitations can and should be ascertained by comparison between the model form of Mr. Bassett and the existing acts in New York, New Jersey, and Connecticut. In cases where enabling acts are inadequate, as pointed out by Mr. Bassett, ordinances prepared under them must be inadequate. But it is better that they should be so, pending further powers being obtained, than that municipalities should go beyond what is now authorized and thereby bring about adverse court decisions. Method is of first importance in the application of zoning, for however correct and equitable any zoning regulations may be in principle, they cannot be sustained unless they are in strict alignment with grants of power obtained from the state.

In making the studies necessary to enable the Committee on the Regional Plan to formulate proposals regarding improvements needed in the classification of uses and the standards that should be applied to secure reasonable restriction of heights and densities, consideration is being given to the experience gained in the City of New York during the last eight years, and to the knowledge which has been obtained from the economic and social investigations of the Committee regarding the trends of development and the growth of the evils of congestion in the region. It is desirable to secure some extension or strengthening of the standards now enforced in the zoning resolution which was established in Greater New York in 1916. The time appears to be ripe for making improvements in New York standards even in those places where existing conditions prevent the highest quality of zoning from being obtained. Recent Massachusetts decisions show that the scope of zoning may be considerably extended in the future.

It is recognized, however, as pointed out by Mr. Bassett, that the opportunities for promoting the best quality of zoning are to be found in the suburban or country areas where land is not yet fully developed, or better still, is completely undeveloped. Experience of the application of zoning brings out strikingly the

advantages that can be gained by a combination of zoning and platting regulations in undeveloped areas, such as large portions of Staten Island, which are outside the zoning regulation. In developed or built-upon areas it will usually be found that the necessity of compliance with established conditions prevents adequate standards being obtained by means of a zoning regulation. For instance, a regulation as to density that would be proper and desirable under the police power might be held invalid by the courts in an area already developed, if the owners opposed it as arbitrary and unreasonable. But the same regulation would probably be upheld in any undeveloped districts. Moreover, once a street system has become fixed, it is not possible to obtain the desirable flexibility of arrangement, in adjusting the street plan to the zoning plan, and vice versa, that is necessary for economy. In many cases the fact that large expenditure has been made on local improvements, or, in other cases, that crowded development has already taken place in a neighborhood, prevents a good quality of zoning from being obtained. Moreover, as Mr. Bassett has pointed out elsewhere, "the setting aside of small parks under the police power is practicable only in undeveloped or, better yet, in unplatted districts."

The full advantage of planning undeveloped areas will be obtained only when there are adequate state enabling acts for platting in addition to the enabling acts for zoning. It follows that one of the important duties of the legal advisers of the Regional Plan will be to formulate proposals for obtaining adequate power to deal with the approval of platting. This will be a subject of later recommendations when the legal studies being made on the subject are more advanced.

Therefore it is of importance that this bulletin should not be regarded as a complete statement of policy or practice in connection with zoning in the New York region. As already said, it is a statement of legal requirements and limitations, and of important principles to be followed in connection with the statutory application of zoning. No authority stands so high as Mr. Bassett as an exponent of this subject, not only because of his unique knowledge and experience, but also because of the high judicial qualities which he brings to the consideration of all its problems.

THOMAS ADAMS

November, 1924.

PART I

AIDS TO THE PRACTICE OF ZONING

I. INTRODUCTORY NOTES

WERE it desired to maintain a logical order of presentation, the form of the state enabling act which constitutes (with notes) Part III of this brochure should have preceded the statement in this part dealing with practical problems connected with the application of zoning. But the larger audience for whom the brochure has been prepared consists of those who are engaged in the administration rather than in the making of the law. Although those who comprise this group are interested in both questions, it has seemed best first to bring to their attention the following aids to practice and to follow on with the form of the act.

It should be recognized that zoning has nothing to do with private restrictions. It is the method by which the community protects itself against harmful invasions of buildings and uses under the community power, commonly called the police power, the same as it protects itself against fires by fire laws and disease by health laws. Statutory methods must be developed that will allow the proper zoning of the unincorporated areas without affecting the power of incorporated municipalities to do their own zoning. The suggestion of the recognition of belts one thousand feet wide at the boundaries of cities, villages and unincorporated areas was embodied in the new Nassau County charter. This device is intended to prevent inharmonious zoning at boundary lines. Some such plan should be provided in all the states for zoning along boundary lines.

The principal further needs of the zoning resolution and maps in the City of New York are as follows:

(1) Adequate provisions for penalty actions, injunctions and misdemeanors.

(2) Regulation of density of population. The absence of this regulation is the greatest shortcoming of the zoning plan of New

York City. This probably should be by limitation of number of families per superficial feet of lot space. The proper limitation should be supplied for each area district.

(3) Establishment of a new area district between non-elevator apartment house and the one- and two-family residence districts in case family limitation is not sufficient to bring about a sufficient allowance of light and air in connection with apartment houses.

(4) Prevention of large scale light industry in principal retail and wholesale business streets.

(5) Zoning of Jamaica Bay and parts of Staten Island at present marked "undetermined" on the use map.

The principal mistakes of existing ordinances in parts of the Region outside of New York are the following:

(1) The creation of large residence districts without provision for nearby local business districts.

(2) Regulations in the nature of private restrictions and without regard to police power fundamentals—health, safety, morals and the general welfare.

(3) Unwarranted and excessive prohibition of hospitals and eleemosynary institutions.

(4) Unwarranted and excessive prohibition of industry along railroads and waterways.

(5) Omission of provisions for a functioning board of appeals.

(6) Confusion of the functions of legislative and administrative boards and improper doubling up of functions.

II. STATE ENABLING ACTS

The best zoning ordinances are those that carry out the instructions of the enabling act clearly and briefly.

Whatever the state enabling act declares to be the law need not be repeated in the ordinance. There is no need, for instance, of repeating in the ordinance the words of the enabling act regarding the appellate powers of the board of appeals or the provision of the 20% protest. Some say that it is a good plan to incorporate such matters in the ordinance so that the whole procedure so far as possible shall be before the reader. This view is probably mistaken. The provisions of the state law are too long to be embodied in the ordinance. If part is left out, all may better be left out. This not only makes the ordinance shorter, but in case the state enabling act is amended it does not become necessary to amend the ordinance also.

The zoning of a municipal area affects property owners so intimately that state legislatures have uniformly granted the power to zone to each municipality. Much might be said in favor of county zoning as a method of bringing about wise regional planning. Throughout the Region, however, the smaller administration divisions, such as the city, village or town, have the stronger government and citizens seem to prefer to confine the zoning power to officials inside of their own municipality instead of allowing outsiders to have a hand in the work. Then, too, enabling acts already passed provide for the zoning of nearly all the Region. It is not likely that they will be readily changed to bring about county zoning. For the present at least it looks as though each municipality must be depended upon to zone its own territory wherever the state has given it the power to do so.

New York.—The enabling act for Greater New York is contained in its charter.[1] Other cities in the Region receive power to zone from the general city law.[2] Villages receive power to zone from the village law.[3] The town law outlines an incomplete grant of power for townships, but it is so defective as to be almost unworkable.[4] The best of all these laws is the village law. The poorest is the town law. The main defect of the New York charter and the general city law is the omission of power to regulate density of population.

New Jersey.—This state now has one of the best enabling acts for zoning in the United States. In 1924 the legislature repealed the medley of old enabling acts which had caused considerable confusion and passed a new act for all the municipalities of the state.[5] Consequently any city, borough, village, town or township of this state can now look to the new enabling act and find a simple and effective method of establishing regulations. Municipalities in New Jersey, which had adopted zoning ordinances prior to March 11, 1924, should take the necessary steps to bring their ordinances under this new law. In such cases the repassage of the ordinance is the surest way of accomplishing this.

Connecticut.—An incomplete enabling act for certain cities and towns was passed by the legislature of 1923.[6] Municipalities within the Region to which it gives the power to zone are the

[1] Chapter 470, Laws of 1914.
[2] Chapter 483, Laws of 1917.
[3] Chapter 564, Laws of 1923.
[4] Chapter 322, Laws of 1922.
[5] Chapter 146, Laws of 1924.
[6] Chapter 279, Laws of 1923.

towns of Greenwich and Fairfield, and the cities of Bridgeport and Norwalk. The unusual and doubtful provisions of this act are:

(1) An appointive zoning commission instead of the elected legislative body must adopt the zoning ordinance;

(2) After a written protest the adoption of the original ordinance requires a four-fifths vote;

(3) Appeals to the board of adjustment are not confined to applications for permits;

(4) No rule for the guidance of the board of adjustment in making variances is given.

Notwithstanding these imperfections of the enabling act it is probably better for such municipalities as can do so to adopt zoning ordinances than to suffer the injuries of unregulated building. The courts of this state are liberal in their recognition of the police power.[1] The town of West Hartford has adopted and is enforcing a zoning ordinance under this incomplete state enabling act.

III. SPARSELY SETTLED LOCALITIES

Methods of zoning populous communities have been quite well established, but little has been done in this country in zoning vacant or sparsely settled land. It will be a mistake to zone the settled communities and leave the country districts unprotected, because in that case all kinds of undesirable structures and uses will be pushed out into the country districts. Good city planning means that all districts shall be protected according to their needs. For instance, if cities contain the right spots for slaughter houses or garbage reduction works, such uses should not be pushed off into neighboring country districts which are suitable for farms, open places and residences. Zoning should cover the entire terrain of each state within the Region. The tendency of court decisions is to favor the inclusion of all land in zoning plans if carefully worked out.

In sparsely settled localities it is difficult to segregate business from residence districts and impossible to do so unless where zoning is made part of a comprehensive city plan. Probably the most that can wisely be done is to segregate heavy or nuisance industry from protected localities. In the zoning of Greater New York part of Staten Island was protected against heavy industry by keeping it in the business zone. This allowed the construction

[1] Town of Windsor v. Whitney, 95 Conn. 357 (1920).

of residences, stores, and also structures wherein quarter of the floor space could be used for light industry. Later, as normal development came into these great protected areas marked business zones, they have been further divided into residence and business districts. The main thing to prevent in sparsely settled localities is the sporadic and out-of-place heavy or nuisance industry. Plenty of space should be left for such purposes but this space should be near waterways or railroads and where it will not injure the future development of farms, residences, open spaces and business centers. It is dangerous to zone large areas as residence districts. It might well happen that the owner of a small plot would prepare and offer his building plans for a store or blacksmith shop. Then if under the zoning plan he was prevented from obtaining his permit, he might apply to the court for an order compelling the building commissioner to grant the permit on the ground that there was no store or no blacksmith shop within a mile of his site and that it was unreasonable to make regulations that prevented people from enjoying these facilities within walking distance. If to obviate this trouble both residence and business districts are created before the normal course of development is perceptible, there is danger that the business nuclei will be put in the wrong spots. Of course, if there are natural locations for business where surrounding property is not injured, then there would seem to be no reason why business districts might not be introduced in the midst of residence areas. Where, however, the development of the entire area is inchoate this undoubtedly safer to zone only against heavy industry.

New York.—A different situation obtains in this state which perhaps makes the problem more complex than in either New Jersey or Connecticut. Cities and towns comprise all the terrain. Villages, however, are contained within and constitute part of towns. The sparsely settled localities in this state are in towns outside of villages and cities. The legislature should pass a zoning enabling act applicable to towns outside of the limits of villages and cities therein contained. As village and city residents will be represented on town boards, the town zoning will be done with a recognition of the interests of the village or city embraced therein. There should, of course, be harmonious zoning on both sides of the boundaries of municipalities.

It is perhaps unnecessary to enter into the subject of enlarged county government and the possibility of county zoning in some

of the counties of the Region. The new Nassau County charter was passed by the legislature, but is subject to a referendum vote in 1925.[1] That charter outlines a method of compelling the consent of two zoning authorities along division lines in order to prevent dumping, but it remains to be seen whether this more complex method will work out any better than for cities to do their own zoning under the general city law, villages their own under the village law, and towns outside of the village or city limits their own under a new town law.

New Jersey.—Here this problem is comparatively simple. Municipalities within the purview of the zoning enabling act embrace all the terrain. These are cities, boroughs, villages, towns and townships. Moreover there is no overlapping of municipalities. If every municipality is zoned, then the entire terrain of New Jersey within the Region is zoned. The sparsely settled localities, as well as the settled communities, would all come under the protection of zoning.

Connecticut.—Towns and cities occupy the whole terrain. Cities, however, are within and part of towns. On this account the form of legislation for zoning in Connecticut cannot be so simple as in New Jersey. If Connecticut passed an enabling act granting the power to zone to all the municipalities, there would be immediate conflict between towns, and cities that were within and part of towns. Therefore the Connecticut enabling act above referred to grants the power to zone to the city of Stamford and also to the town of Stamford outside of the limits of the city of Stamford. Sparsely settled localities in Connecticut are in towns outside of cities and in those parts of non-city-containing towns which are distant from the built-up localities. When the legislature passes a general act for zoning, it should grant the power to zone (1) to cities, (2) to towns not containing cities and (3) to towns outside of the limits of cities contained therein.

IV. ONE-FAMILY HOUSE DISTRICTS

The first zoning plan in this country, that of Greater New York,[2] proceeded on the principle that use districts should be few in number and general in character. It was considered that the courts might be critical of attempts to segregate districts accord-

[1] Chapter 863, Article 17, Laws of 1923.

[2] For description of the classification of the New York zoning regulations referred to in this section see Part II.

ing to use and therefore it was thought that broad distinctions clearly based on the police power would carry a strong appeal to the courts, whereas if a multitude of use segregations were made, the courts might, and probably would, fail to perceive that the differences related to the health, safety, morals and general welfare of the community. For instance, some cities in other states have established local business districts for less important business streets in residential localities and commercial districts for the main business centers. The distinction between two such districts is not so clearly brought under the police power as the distinction between business and residence. Accordingly the use maps of New York show only residence, business and unrestricted districts. Inasmuch as the courts had theretofore looked with more favor on regulations of height and area, numerous height and area districts were established in an effort to bring about greater distribution of population in residence districts, especially in the suburbs. In other words, the segregation of open construction from close construction was sought under height and area regulations rather than under use regulations. It was hoped that E area districts in which buildings would not cover more than 30 per cent of the lots would build up with detached one-family houses. High cost of construction, however, brought about a tendency to build small units, and landowners began to build two-family houses in the form of long and narrow structures in E districts, sometimes extending enclosed front porches to the street line. The increase of this practice brought about the establishment of the F area district. The requirements of this district compelled every new building to have a front yard, two side yards and a smaller percentage of cover than the E district. Thus far the requirements of the F district have produced one-family houses. The establishment of the F district was followed by an amendment to the E district provisions requiring a ten-foot front yard.

It can readily be seen, therefore, that the creation of one-family detached house localities even in Greater New York under the area regulations is a matter of some difficulty. In smaller communities it might well be more difficult. If the New York charter had provided for regulation of density of population, the zoning regulations of the area map might have specified limitations of families per acre or of the number of square feet per family or of the street frontage per family. In this manner one-family

detached house localities might be developed with the full approval of the courts. The provision for regulation of density of population was omitted from the first zoning enabling acts of many states although for the last several years it has almost without exception been included in new legislation.

Immediately after the establishment of zoning in New York in 1916 other cities throughout the country cut the Gordian knot by creating a use district requiring one-family detached houses. The people of some cities frankly said that the main reason for zoning was to establish one-family detached house districts. Probably more than half of the zoning ordinances of the country have placed one-family detached house districts on the use map. Every court decision in the country, however, has declared against the legality of one-family detached house districts,[1] and the same may be said of two-family house districts except for two decisions in courts of first resort in the state of Ohio.[2] In all the one-family detached house district cases that have arisen the courts have pointed out that they were unable to see any connection with the health, safety, morals and general welfare of the community. Some opinions have stated that a two- or three-family house surrounded with plenty of open space could not be proved to be less sanitary, safe and moral than the ordinary one-family detached house. It is believed that before long courts generally will recognize a distinction on this score between one-family detached houses on the one side and multi-family houses on the other, and between dwelling house districts allowing either one- or two-family houses on the one side and multi-family house districts providing for three or more families on the other. When this comes about the courts will recognize the two Ohio cases as following the correct line of reasoning. If in the trial of one-family house district and two-family house district cases the city attorney will place before the court by opinion evidence or otherwise the subjects of noise, litter, deliveries of goods, possi-

[1] Handy v. Village of South Orange, 118 Atl. 838 (N. J., 1922).
State ex rel. Vernon v. Mayor & Council of Town of Westfield, 124 Atl. 248 (N. J., 1923).
Miller v. Board of Public Works of Los Angeles, District Court of Appeal, Second Appellate District, Calif., Division Two, Dec. 21, 1923.
Ingersoll v. Village of South Orange, N. J. Adv. Rep., Vol. II, No. 40, p. 882, October 4, 1924.
Jersey Land Co. v. City of East Orange, N. J. Adv. Rep., Vol. II, No. 41, p. 1411, October 11, 1924.

[2] State ex rel. Morris v. East Cleveland, 22 Ohio N. P. (N. S.) 549 (1920).
Kahn Bros. Co. v. Youngstown, 25 Ohio N. P. (N. S.) 31 (1924).

bility of contagion and danger of fire, the courts will be more likely to uphold the segregation under the police power. This outcome is uncertain, however, and it would seem to be the part of wisdom, for the present at least, to establish only one use district for residences of all kinds and depend on requirements of the area in respect of density and height maps for the prevention of close building and the production of one-family detached houses.[1]

In municipalities which have adopted one-family detached house districts on the use maps, criticism has frequently arisen to the effect that zoning is a rich man's proposition and that the police power is being employed not for the community welfare but for the preservation of exclusive localities. This criticism is not justifiable. It is generally recognized that a community of small detached-home owners has many reasons for existence apart from attempted exclusiveness. Nevertheless it is likely that the best way to answer this criticism is to show the critics that it is not the number of families in a single building but the amount of open space around the building that is controlled by the zoning regulations. Let it be apparent that a two-family house or a multi-family house can be built in any district if the required amount of open space or street frontage is dedicated to the building. There would seem to be no objection to fixing the amount of this open space or street frontage in relation to the number of families. This method relates directly to density of population and to the health, safety and general welfare of the community.

It is becoming increasingly apparent that the courts are more likely to uphold area and height regulations than use regulations. It cannot be doubted that for many years to come courts will be more likely to uphold area regulations producing one-family houses in the main rather than use regulations requiring one-family detached houses. These area regulations can be based on

(1) Required courts and yards (including front yards),
(2) Percentage of lot covered,
(3) Required square feet of lot per family,
(4) Required street frontage per family.

[1] Since the preparation of this report the Supreme Judicial Court of Massachusetts have handed down their decision upholding one-family house districts on the use map (Brett v. Town of Brookline, October 18, 1924, 145 N. E. 269).

Regulation by number of families has become well established in the Region. It was recognized in the tenement house law of New York, and has been employed in many building codes and zoning ordinances. Fanciful objections are sometimes made on the grounds that some families are large and some small or that a family cannot be defined. From a practical point of view, however, this method is probably the most effective. A family is any number of individuals living together as a single housekeeping unit, and doing their cooking upon the premises.

New York.—In cities detached homes must be obtained, if at all, by court and yard provisions and the limitation of the percentage of lot covered. Later if the New York charter and the general city law are amended to provide for regulation of density of population, limitations of square feet per family and street frontage per family can be introduced. Inasmuch as the village law provides for regulation of density of population, the four methods enumerated above should be used instead of creating one-family detached house use districts. Towns cannot safely be zoned at all until an enabling act is passed for them.

New Jersey.—Now that this state has its new zoning enabling act passed in 1924, which includes a provision for regulation of density of population, it is prudent to eliminate one-family detached house districts on the use map and establish area districts by means of the four regulative methods stated above.

Connecticut.—One-family detached house districts on the use map should be avoided. Regulations to produce detached units must consist of front, side and rear yard requirements and limitation of percentage of lot covered.

V. DENSITY OF POPULATION

Although regulation of density of population was one of the main objects sought in the zoning of Greater New York, the framers of the state and local legislation depended too much on regulation of height and bulk in seeking to accomplish this result. The C district on the area map of New York makes possible a far greater density than should have been allowed. The same may be said of the D district although in the latter district the results have not been so marked. In 1915 only a few people were convinced that sunlight apartments would be successful. It has been suggested that a new district intermediate between D and E should be created and large parts of present C and D districts

should be placed in this new district. Even the E district did not bring about the distribution of population that was hoped for, which fact had much to do with the creation of the new F district. The experience of the last eight years has shown that court and yard requirements, coupled with regulations of percentage of lot covered, are not sufficiently adequate to prevent too great congestion of population. Zoning consultants have during that time developed as part of the area regulations graded requirements of families per acre, square feet of lot per family and families per foot of street frontage. These requirements, coupled with court and yard provisions and limitation of percentage of lot covered, are undoubtedly much more adequate in bringing about a reasonable distribution of population. Ingenious builders gradually find methods of crowding too many families into a given space. There is little doubt that the best way to prevent this is to regulate according to the number of families.

Regulation of the number of families by different districts on the area map is an entirely different thing from placing one-family detached house districts on the use map. In the latter case there is no relation to light and air requirements. A house in such a district surrounded by a ten-acre lot must still be a one-family detached house. Not so, however, where the number of families has some relation to the amount of space as in the area map requirements.

New York.—It will be difficult to alter the requirements of the present area districts of Greater New York. The building departments and builders have become accustomed to them and the landowners of every locality will be likely to oppose any rearrangement. The best way to approach the problem is to amend the charter by including the power to regulate the density of population, and then amend the zoning resolution by adding to the requirements of each area district respectively appropriate provisions for square feet of lot per family and street frontage per family. The same course should be pursued in connection with cities in the Region outside of Greater New York. A provision for families per acre is already in the ordinances of White Plains, Yonkers and New Rochelle, and if the general city law is amended by providing for regulation of the density of population there should not be any court criticism such as occurred in the recent New Rochelle case.[1] These gradations can now be inserted for

[1] Matter of Barker v. New Rochelle, 209 App. Div. 151 (N. Y., 1924).

area districts in villages inasmuch as the village law provides for regulation of density of population. An enabling act for zoning in towns and towns outside of villages and cities will undoubtedly be introduced in the next session of the New York legislature and the words "density of population" will be inserted.

New Jersey.—A large number of zoning ordinances in this state have provided for limiting families per acre. The old zoning enabling acts did not include the words "density of population," but the new enabling act passed in 1924 contains this necessary provision. Inasmuch as existing ordinances are expressly validated under the new enabling act it is considered that the existing families per acre provisions have been rendered valid. Municipalities in this state, which may be zoned hereafter, should contain provisions for limitation per family as above stated.

Connecticut.—The incomplete enabling act of this state does not provide for regulation of density of population. West Hartford is the only municipality that has thus far adopted an ordinance under this act, and this ordinance provides for area limitations according to square feet of lot per family. It is fairly likely that the liberal attitude of the courts of this state regarding the police power will cause these provisions to be upheld. There should be no delay, however, in the adoption of a complete zoning enabling act in this state and provision should be inserted for regulating the density of population.

VI. DUMPING

This term is applied to the practice of prohibiting within the limits of a municipality those uses which a community needs, but would prefer to have inflicted on some other community. Dumping is not fair to the municipality which is made the dumping ground for neighboring communities that first adopt zoning ordinances. There can be no sound regional planning where unzoned localities can be filled with outcast uses. Examples are garbage incinerators, livery stables, garages, automobile repair shops, laundries and carpet cleaning works. Reasonable comprehensive zoning requires that a municipality should find within its own limits suitable localities for the conduct of its own business and such industries as usually go with civilized communities. The courts will not hesitate to declare that it is unreasonable to exclude an undesired use simply because it may seem more appropriate in the next town. Cities differ in their natural and ac-

quired characteristics. It cannot be doubted that some are especially suitable for high-class residences and others for smaller homes and industries. Nevertheless it is a mistake to practice dumping. Appropriate places can be found in every municipality for its own accessory uses. If some surrounding community wants these industries and is better adapted for them, then the first city can set aside smaller areas, but it ought not to practice exclusion.

When we come to industries not needed by the community, such as fertilizer works, chemical plants and refineries, there is much to be said concerning the propriety of excluding these uses from residential communities.

Residential cities in New Jersey and in the counties north of New York City have sometimes desired to employ zoning to keep out hospitals and other charitable institutions. They assert that such institutions are often undesirable neighbors. Undesirability as neighbors will not warrant exclusion by the exercise of the police power, nor is it lawful to exclude some of these institutions and allow others of the same sort. No way has been discovered by which the police power can be employed to exclude an undesired surplus of any kind of building or use. Some communities also complain that an increased and improper burden for the support of the city is forced upon the non-exempt taxpayers by reason of the large land areas that are held by these tax-exempt institutions. Exemption from taxation, however, is not a basis for exclusion by zoning. The remedy must be found, if found at all, in some other reason for exclusion.

Every municipality should have a suitable place, even if it is sometimes a very small place, for every use that is not an actual danger or nuisance. Especially must it provide some space for its own accessory industries. If it does not do so, there is danger that it will be invaded by the very use which it tries to exclude. Some property owner may show the court that the ordinance unreasonably excludes from the entire municipality a certain necessary use, and thereupon the court may not only declare that the exclusion is unreasonable and void, but may allow the hurtful structure or use in a place where it causes great injury.

VII. FRONT YARDS

A zoning consultant can hardly begin his work in any city before he is asked how to create setback lines that will keep builders

from projecting their buildings in front of other structures or to the street line. Within the Region are many villages and cities where the structures are so largely built flush with the street line that it is almost hopeless to improve the older portions. It is difficult to blame individual owners for this result. Where there are no binding regulations on this subject a builder is often penalized if he sets his building back from the street, because there is nothing to prevent his neighbors from building to the street line and thus pocketing and injuring the structure of the first and more generous builder.

Efforts were early made in various parts of what is now Greater New York to afford some remedy. The device hit upon was to create courtyards which were strips of street land not available for roadway or sidewalk and on which the main building could not be constructed. Sometimes fences and stoops were allowed within this courtyard strip.[1] These strips were always considered parts of the street, but in some cases they were not specifically included within the street area and were merely designated as open strips of private property that could not be built upon. The courts, however, quite invariably said that they were parts of streets, and insisted that the city must employ eminent domain to establish them.[2] Court decisions to this effect have been so emphatic and unvarying that in New York and New Jersey at least the courts will undoubtedly be prone to consider that any creation of a courtyard under the police power is an indirect way of widening a street. The compulsory establishment of streets has been so long within the exclusive field of eminent domain that the courts can hardly be blamed for their inclination to adhere to past customs.

On the other hand, the courts have freely recognized that the police power can be resorted to for required courts, side yards and back yards.[3] Such requirement of open spaces prevents congestion, allows the entrance of light and air and affords greater safety against conflagration by giving access to fire-fighting apparatus.

These two tendencies of the courts (the one to insist that any indirect street widening should be by condemnation and the other to recognize the legality of requirements for courts and yards) were well established before the days of modern zoning.

[1] Matter of Lafayette Avenue, 118 Misc. 161 (N. Y., 1922).
[2] Matter of Clinton Avenue, 57 App. Div. 166 (N. Y., 1901).
[3] People ex rel. Kemp v. D'Oench, 111 N. Y. 359 (1888).

Now that setbacks are authorized in some enabling acts and many cities are introducing compulsory street setbacks into their zoning ordinances, some officials consider that a way has been discovered to accomplish something under the police power without payment to take the place of what formerly could be accomplished only by condemnation and payment.

The first police power front-yard requirement in the zoning of Greater New York was introduced in F districts on the area map. New buildings were compelled to set back fifteen feet from the street line. Somewhat later the E district requirements were amended so that a new building in that district was compelled to set back ten feet from the street line. These new front-yard requirements have not been tested in court, but they are so reasonable in extent and so plainly linked up with requirements of open construction that the courts will be likely to uphold them. Then, too, they are not placed on districts like B, C and D, where closer construction is allowed.

This brings us to the question of where the danger line can be drawn. Some cities, largely outside of the Region, are inserting front-yard requirements of forty, fifty and sixty feet in their zoning ordinances. No heed is paid to the limitations of the police power. No subject in zoning is more difficult, and probably more mistakes are being made in this particular zoning field than in any other.

In the first place it is probably better to call this form of regulation front-yard requirements instead of setbacks. Building laws before the days of zoning, and more recently nearly all zoning ordinances, have freely provided for necessary courts, side yards and rear yards. Why not follow the same wording and use the term "front yards"? The word "setback" seems to contain an indirect intention to widen a street or prepare for a future widening. If the front-yard requirement is to be based on the police power, this intention should be absent. The reason for the front-yard requirement should be the health, safety, morals and general welfare of the community.[1]

The main consideration, however, is to frame the front-yard requirement so that it will have a relation to health and safety. It should take into account the proposed use of the lots whether

[1] Zahn v. Board of Public Works, Los Angeles, District Court of Appeal, Second Appellate District, Division One, Calif., Mar. 20, 1924.
Town of Windsor v. Whitney, 95 Conn. 357 (1920).

business or residence, the width of the street, the amount and kind of traffic and probably the location of existing buildings. A 50-foot residential street used only for local traffic might well warrant a front-yard requirement of 25 feet. This would separate the opposite house fronts by 100 feet. If, however, the street were 100 feet wide and used only for local traffic, the court might well consider that it was not equally justifiable to make the front-yard requirement 25 feet, as this would cause the opposite house fronts to be 150 feet apart. Such a wide street, however, would usually be a through traffic street and in this case the dust, noise and fumes might justify a front-yard requirement of even more than 25 feet. Then, too, where a block front is almost entirely built up with structures flush with the street line, it would be unreasonable to impose any front-yard requirement.

The ideal arrangement for front-yard requirements would be the preparation of a separate map showing front-yard requirements on all the frontages in the city. Such maps have actually been prepared for a few cities, but usually the front-yard requirements are provided for each kind of area district. It is evidently difficult to make the same requirement reasonable regardless of the width of streets or the kind of traffic. Two dangers confront the engineer—one, that any front-yard requirements will be unreasonable because of existing buildings already built on or near the street line, and next that in open building districts too great a requirement will be unreasonable because some certain street may be broad but not a main traffic artery.

To prevent the unreasonable application of the requirement where existing buildings are flush with the street line or nearly so, many cities have provided that the requirement shall not operate to keep the new structures further back than the average of the old.[1] It cannot be denied that this plan has thus far worked out quite well, although it is open to the objection that the destruction of part of the existing houses or the erection of a number of new houses will alter the average and therefore alter the requirement. Such changeable or travelling regulations should not be used if they can well be avoided.

The temptation to make the requirement too great, especially on high-class residential streets, constantly results in latent

[1] In re Permit to American Reduction Co., Municipal Law Rep. (Pennsylvania), Vol. 15, No. 8, April, 1924 (Court of Common Pleas, Allegheny County, Pittsburgh).

dangers. Any thirty, forty or fifty foot front-yard requirement on a wide residence street used only for local traffic is vulnerable because the courts may be unable to see how so drastic a requirement is related to the health, safety, morals or general welfare. It would therefore seem to be the part of wisdom to make these requirements moderate in extent. They should be capable of justification under considerations of health, safety and morals. If local residents demand front-yard requirements that cannot be justified along these lines, they should be instructed to employ contractual restrictions.

VIII. BOARD OF APPEALS

There is no need of mentioning the board of appeals in the ordinance. Its membership, appointment, powers, procedure and the court review of its decisions all depend upon the state enabling act for zoning. Consequently there is no need of repeating these matters in whole or in part in the ordinance.

This statement is made in order to emphasize the fact that all the main provisions and functions of the board of appeals are independent of the ordinance itself. The safety valve function of the board of appeals, i. e., the granting of variances in cases of practical difficulty and unnecessary hardship, must be completely provided for in the enabling act. No ordinance could enumerate all the particular instances that can arise under this definition. The unexpected arises more often than the expected. It would be a mistake to try to print every possible situation which might constitute a practical difficulty or unnecessary hardship. Even if the ordinance prescribes a thousand situations, some case would arise within a month that could not be classified under any of them, and if the case went to court the court would be likely to decide that the emergency situation was unreasonable and arbitrary as to the property owner and that therefore the application of the zoning ordinance in that instance was void. What is desired is to prevent all instances of unreasonableness by giving the board of appeals an opportunity to vary under a rule, to give every property owner his day before a tribunal if he conceives that he is treated arbitrarily, and then to give the courts an opportunity to review the decision of the board of appeals. All the machinery to accomplish this is embodied in the enabling act, and every property owner can have recourse to it whether the board of appeals is mentioned in the ordinance or not.

It frequently happens, however, that a city desires to permit certain non-conforming buildings or uses under circumstances that will be non-injurious to neighbors and greatly advantageous to the property owner. This is quite a different class of applications from those arising in situations which involve practical difficulty or unnecessary hardship. They are capable of precise definitions in the ordinance itself. No two cities have the same requirements in this respect. The situation of any two municipalities regarding large public garages, for instance, is quite apt to be different although certain important principles apply to this class of erection in all cases. Accordingly nearly every city enumerates in its zoning ordinance those particular instances where certain non-conforming buildings can be permitted in the discretion of the board of appeals. It is a comparatively unimportant function of the board. It is, however, the only function that must be defined in the ordinance itself. Because it has been found desirable to insert these instances in ordinances, the enabling act provides that the council can enumerate the instances and that the board of appeals has the power to decide such matters as are referred to it in the ordinance. Strictly speaking, therefore, these referred matters come to the board of appeals not on appeal from the building commissioner, but as matters invoking the original jurisdiction of the board of appeals. In common practice, however, all applications are usually first made to the building commissioner and the subject matter comes as if on appeal to the board of appeals. It should be kept in mind, however, that the matters instanced and enumerated in the ordinance are matters of original jurisdiction, and that variances from the strict letter of the ordinance and maps come to the board of appeals only on appeals.

This particular subject constantly causes so much confusion in the drafting of ordinances, to say nothing of being the cause of incomplete and unworkable zoning enabling acts, that this detailed analysis is perhaps warranted.

The analysis, moreover, helps us to perceive what kind of instances should be specified in the ordinance itself. Examples of proper instances to be specified in ordinances are extensions of buildings on original lots, public utility buildings in residence districts, garages for more than three cars in business districts, 80% consent garages and temporary uses in undeveloped sections.

The confusion caused by inserting improper items in the ordinance itself is shown in paragraph b of §7 of the Greater New York zoning resolution. This was as follows:

"(b) Where a use district boundary line divides a lot in a single ownership at the time of the passage of this resolution (the board of appeals may) permit a use authorized on either portion of such lot to extend to the entire lot, but not more than 25 feet beyond the boundary line of the district in which such use is authorized."

It soon appeared, however, that in some exceptional cases more than 25 feet should be allowed, and consequently paragraph c was added as an amendment. Here is paragraph c:

"(c) (The board of appeals may) Permit the extension of an existing or proposed building into a more restricted district under such conditions as will safeguard the character of the more restricted district."

Both provisions now remain in the resolution and cause confusion where their history is not known. As a matter of fact, neither b nor c is necessary or proper in the enumerated items. They assume to cover an exceptional situation which is only one of thousands which are sure to arise and which under the power to vary in cases of practical difficulty and unnecessary hardship the board of appeals has the power to adjust in a way that is reasonable for the property owner and upon conditions that will safeguard the character of the more restricted district. The administration of the New York resolution would have been more clear-cut since the beginning if these two paragraphs had been omitted.

PART II

APPLICATION OF ZONING IN NEW YORK CITY

I. PROCEDURE IN PREPARING ORDINANCE

THE first comprehensive zoning ordinance prepared in the United States under the police power was established in Greater New York on July 25, 1916. The state legislature granted to the Board of Estimate of Greater New York the power to regulate the height, area and use of buildings. Pursuant to this grant, the Board of Estimate enacted the Zoning Resolution of 1916. During the intervening eight years experience has proved the wisdom of the City of New York in initiating the legislation and applying the zoning regulations that were designed to lessen the excessive height and undue density of buildings and prevent them being put to uses that would be injurious to health, safety or public welfare.

The zoning ordinance in New York City was prepared by a Commission on Building Districts and Regulations, appointed by the Board of Estimate. Under its original title it made a thorough study of the future needs of the city, and as a result decided that under the police power use districts should be as few as possible and should come under the three heads of residence, business and unrestricted. Localities near waterways, railroads, switch connections and present industries were placed in industrial districts, and sufficient areas were thus designated to provide for the future industry of the city for two or three generations to come. In addition to these large unrestricted districts, small sections of area were left unrestricted where stables, garages, breweries or certain trades had been built in juxtaposition to residence districts.

Other areas were marked as business districts fronting on streets throughout the city which were already somewhat or largely dedicated to business. To these were added, as a rule, the frontage land on trolley car streets and traffic thoroughfares,

and other streets that seemed to be rightly located for business purposes. The intent was to provide business streets within a reasonable walk of every residential plot or area, so as to avoid any objection to the regulation on the ground that business premises were at an unreasonable distance from the residences.

Having proceeded by this process of elimination, all the remaining areas were left as residential. The result of this procedure of course meant that there were areas designated for residential purposes which might later be required to be allocated for business purposes. In the main, however, it has been found that business has gone to the streets which were designated for business. It was recognized that doubtful territory should be left in residence, because residences mainly needed protection. Certain localities that had not shown distinct tendencies in any direction were marked undetermined. These localities were mainly in the southern part of Staten Island, all of Jamaica Bay, and a few other places. One of the urgent needs in connection with zoning in the City of New York today is to extend the use map so as to provide appropriate and adequate regulations over these areas that were left undetermined. It is admitted that the procedure and method of approach were not what might be called scientific. No doubt this was partly due to the novelty of zoning in this country at the time it was introduced, but it was also due to the fact that in dealing with the dynamic conditions of the city shrewd common sense may be more likely to produce satisfactory results than attempts to achieve theoretical perfection on the basis of accurate or presumably accurate data.

II. ELEMENTS OF SUCCESS

The success of zoning in New York has been due very largely to four things. The first of these is that no attempt was made to impose anything in the nature of an unreasonable restriction. It has come to be seen that this is a proper attitude, for the result has been that zoning has become firmly entrenched in the law and practice of the city and that strengthening will be a matter of evolution toward a higher quality of zoning. The second merit of the New York ordinance was the provision it made for an appeal by the applicant for a permit to a board of appeals for a variance from the strict letter of the law, thereby providing a safety valve for the prevention of arbitrariness. In the third place, success has been made possible because of the facility with

which needed changes in the zoning maps can be made by the Board of Estimate. A fourth reason for successful administration has been the educational work carried on by the Zoning Committee of New York. This committee consists of public-spirited citizens who are interested in maintaining the integrity of the New York zoning and in giving information to people outside as well as inside of New York on the subject. These elements of success, comprising reasonableness, liberty of appeal, flexibility, and education, are essential to the permanence of all zoning.

III. ZONING CLASSIFICATIONS

The Zoning Resolution in New York defines the regulations and three maps, one showing allowable heights in different parts of the city, one showing allowable cover of lots, and one showing allowable uses. The use districts are residence, business and unrestricted. The area districts are classified as A, B, C, D, E and F. A districts are primarily for warehouses and industrial buildings; B districts for office, business and apartment buildings; C districts for non-elevator apartment houses; D districts for one- and two-family private residences in blocks; E districts for private residences where new buildings may not cover over 30% of the lot; and F districts for private detached residences covering not over 25% of the lot. Most of the restricted areas in E zones and all in the F zones have been placed there on the petition of property owners.

The restrictions on density vary from 100% in the A zones to 25% in the F zones. In regard to heights, the maximum height varies from once the width of the street in the outlying parts of the city to the maximum of 2½ times the street width in the lower part of Manhattan.

The resolution is not retroactive; consequently buildings and uses in existence prior to July 25, 1916, are not affected. Every borough is zoned on the three maps. The Board of Estimate can amend the resolution and maps, and does so on petition at almost every meeting. The building commissioners will not issue permits unless the plans of proposed buildings or alterations conform to the zoning resolution. As many exceptional situations exist in the diverse field of buildings, and as no words or maps could provide for all these exceptions, the city charter provides that a board of appeals can, after a hearing and in accordance with prescribed rules, vary the strict letter of the law regarding par-

ticular permits. Its decisions are subject to court review. No decision of any court has criticized the New York zoning resolution or declared it invalid in any particular.

IV. CHANGES IN ZONING MAPS

For the first four years the changes authorized by the Board of Estimate and Apportionment were mostly in the form of relaxing amendments to the maps. Because these greatly exceeded the strengthening amendments, there was a fear that the regulations would be levelled down until the protective qualities of the zoning plan were largely lost. A study of the figures, however, shows that, although the relaxing changes were greater than the strengthening changes for the first four years of the law, there was a yearly increase of the strengthening changes during that time. This upward curve continued until in 1920 the strengthening changes outnumbered the relaxing. This increase of the strengthening changes has continued until in 1923 the figures seem to be rather well stabilized at three strengthening changes for one relaxing change. Here are the figures for all the years that zoning has been in force in this city. In 1916 there were no strengthening changes; in 1917 the strengthening changes were 16% of the total; in 1918, 23%; in 1919, 35%; in 1920, 56%; in 1921, 61%; in 1922, 77%; and in 1923, 77%.

These proportions show that the zoning plan had a vitality which was little suspected at the beginning. They show that, as property owners become more familiar with the protection afforded by zoning, their tendency is to petition the Board of Estimate for an increase of that protection. In the main these changes are brought about by property owners themselves, for the Board of Estimate seldom refuses to make a change where the property owners set forth a good case. The Board of Estimate, however, through its Chief Engineer and the local boards of the various boroughs, makes careful investigation in order to be sure that the proposed change will not injure the city as a whole.

The experience of eight years has proved that the protective features of the zoning law largely outweigh its drawbacks. It does not prevent proper changes of use, height and bulk, but allows these changes to come along when the locality is ripe for a change instead of having the change brought prematurely by two or three exploiters who, for the sake of their own profits, bring disaster upon a multitude of honest investors.

V. TABULATION OF ZONING MAP CHANGES IN NEW YORK IN 1923

(1)	Amendments adopted	81
(2)	Height amendments adopted	3
(3)	Percentage (2) of (1)	4%
(4)	Area amendments adopted	10
(5)	Percentage (4) of (1)	12%
(6)	Use amendments adopted	68
(7)	Percentage (6) of (1)	84%
(8)	Height strengthening amendments adopted	1
(9)	Percentage (8) of (2)	33%
(10)	Area strengthening amendments adopted	9
(11)	Percentage (10) of (4)	90%
(12)	Use strengthening amendments adopted	52
(13)	Percentage (12) of (6)	76%
(14)	Total strengthening amendments adopted	62
(15)	Percentage (14) of (1)	77%
(16)	Total relaxing amendments adopted	19
(17)	Percentage (16) of (1)	23%
(18)	Percentage (14) of (16)	326%

PART III

A FORM OF STATE ENABLING ACT FOR ZONING

ZONING under the police power has become the recognized method of applying community planning to privately owned land. As the state legislature is the repository of the police power it must grant powers with suitable checks to municipal corporations before they can adopt and administer zoning ordinances.[1] The following form of a state enabling act is primarily designed for use in the three states, New York, New Jersey and Connecticut, parts of which are within the region. Suitable changes must be made to adapt it to particular classes of municipalities, although it is desirable to have a single enabling act apply to all municipalities so far as possible. The check of the twenty per cent protest and the safeguard of the board of appeals provisions are as necessary for the small village as for the great city. The application of any zoning plan, however perfect, will be arbitrary in certain exceptional instances, and if the plan cannot be adjusted by a board of appeals to prevent arbitrariness, the courts are likely to declare it void in that particular respect.

Inadequate state enabling acts are largely responsible for court decisions adverse to zoning. No one of the three states named has adequate enabling acts. The village law of New York and the New Jersey zoning act of 1924 probably contain the best provisions. Other states will find this form useful.

The form follows established lines. It is not claimed to be original except to a slight extent, but it takes advantage of all that has gone before, including efforts in all of the states and the most recent court decisions.

[1] Opinion of Justices, 127 N. E. 525 (Mass., 1920).
Cliffside Park Realty Co. v. Borough of Cliffside Park, 114 Atl. 797 (N. J., 1921).
Fitzhugh v. City of Jackson, 97 So. 190 (Miss., 1923).
City of St. Louis v. Evraiff, 256 S. W. 489 (Mo., 1923); see also pp. 474 and 495.

FORM OF STATE ENABLING ACT

SECTION 1. *Grant of Power.*—For the purpose of promoting the health, safety, morals or the general welfare of the community,[1] the legislative body of cities and incorporated villages is hereby

[1] "Promoting the health, safety, morals or the general welfare of the community": This statement of purpose brings the subject under the police power of the state.

Hadacheck v. Sebastian, 239 U. S. 394 (1915).

Anderson v. Steinway & Sons, 178 App. Div. 507 (N. Y., 1917).

Biggs v. Steinway & Sons, 229 N. Y. 320 (1920).

Lincoln Trust Co. v. Williams Building Corp., 229 N. Y. 313 (1920).

Where states have tried to empower municipalities to zone under eminent domain, confusion has ensued and usually the state has been compelled to change the law.

State of Minnesota ex rel. Twin City Bldg. & Inv. Co. v. City of Minneapolis, 176 N. W. 159 (1919).

Efforts to provide for compensation spring from a misconception of the purpose of zoning. The zoning enabling act merely grants to each municipality the police power to regulate the height, bulk and use of buildings. The enabling act itself cannot possibly be unlawful because it merely grants what the legislature possesses, and no more. If, however, a municipality employs this grant of police power so that the zoning is unreasonable or discriminatory toward any property owner, then the ordinance in that particular may be void. The reason it is void is because the state and federal constitutions provide that no person shall be deprived of life, liberty or property without due process of law. If the municipality should employ the police power granted it by the state legislature in an unreasonable or discriminatory manner, the courts would consider that the citizen was deprived of his property without due process of law, and consequently such provision in that instance would be void.

The above considerations show the impropriety of provisions for compensation. They are tantamount to saying that, where a zoning provision is void, damages must be paid to the property owner. The courts will protect property owners against unreasonable or discriminatory regulation. Zoning is not taking private property for a public use. Zoning cannot be accomplished under eminent domain. Accordingly it is absurd and unworkable to make a provision for money payment in exactly those cases where the courts will protect the private citizen by declaring the ordinance void.

But someone may say that the zoning will entail injury in some cases even if the regulations are reasonable and non-discriminatory. In rare instances this may be true. Sometimes a piece of property might be better off if it were outside of the fire limits instead of inside. Or a man could make more money if he could disregard strength of beams, sanitary requirements in plumbing, or fireproof construction. But he is not paid money damages by the city for these minor injuries because they are a part and parcel of the community health and safety requirements. For the prevention of the spread of epidemics, people are compelled to submit to some impairment of their property rights, or some disturbance of their personal comfort, but this is in the interest of the safety of the entire community, and the individual cannot collect damages against the city or state. Each citizen is obliged to give up somewhat of the absolute control of his own property in order that the property of all may be safeguarded. His recompense for this is that he, along with all other citizens, is protected by reasonable police power regulations.

If an unreasonable zoning regulation, coupled with a provision for compensation, appeared to injure a citizen and he appealed to the courts, the courts would be perplexed as to whether the zoning regulations were enforced under eminent domain, or whether under the police power. The court would refer to the enabling act and discover at once that the legislature stated that the

empowered to regulate and restrict the height,[1] number of stories and size of buildings and other structures, the percentage of lot

zoning is enforced under the police power. The court would then declare the particular provision void if it were unreasonable. The litigant, perhaps having partly erected his building, would want damages and would carry on appeals on the theory that he could choose between the police power provisions of the law and the eminent domain provision. This mixture of the police power and eminent domain would bring about an endless chance for litigation. It would be hard to prophesy how the courts would solve it. The courts endeavor to give effect to every legislative provision. The fault would not be the fault of the courts if litigation became complex, or the zoning ordinance became unworkable. The legislature would be to blame for creating a situation which was self-contradictory.

If a city should make payment to some property owner who claimed to be injured, the city at large would not assume this expense but would assess it upon the property benefited. This would entail two separate proceedings—one proceeding under eminent domain to ascertain the amount of the damage and another proceeding to assess it on the property benefited. The first proceeding would be expensive. The second would not only be expensive but extremely irritating to the other property owners. But the litigation, expense and delay might not be the worst result of this mistaken method. After a property owner had received from the public purse an amount of money to represent his damages, the public would have obtained by eminent domain an easement over the property. The property owner would have suffered a diminution of his complete title. This diminution or easement would follow his property for generations or centuries. It could only be taken off by another court proceeding.

A succession of such permanent alterations of property rights scattered throughout the city would bring about an impossible and unbearable situation. The growth and necessary change of the city would be impaired and embarrassed. Certain pieces of property could not be used for the natural purposes for which the growth or change of the locality made them desirable. The city would gradually become ossified. The result of condemnation is permanent. The exercise of the police power, however, without any admixture of eminent domain is easily altered as circumstances require. This alteration is accomplished by a mere amendment to the zoning ordinance passed by the city council.

Wherever a state legislature has mixed police power and eminent domain in a zoning enabling act, there has been a complete stoppage of zoning. The state of Minnesota a few years ago passed such an act. Nothing in the way of zoning was done until it was repealed and a police power enactment substituted in its place. The state of Wisconsin attached a provision for compensation to its first zoning enabling act. Nothing was done under it. After a while it was amended to strike out the provision for payment of damages, and since that time zoning has gone on rapidly in the state of Wisconsin. No case can be found in the United States where there has been a successful union of the police power and eminent domain in the field of zoning. Moreover, every attempt in this country to accomplish zoning by eminent domain has been a failure.

Laws of Minnesota, Chapter 128 of 1915.
Laws of Wisconsin, Chapter 404 of 1917.
Laws of Wisconsin, Chapter 691 of 1919.

[1] Welch v. Swasey, 214 U. S. 91 (1909).
Romar Realty Co. v. Board of Commissioners of Haddonfield, 114 Atl. 248 (N. J., 1921).
Dorison v. Saul, 118 Atl. 691 (N. J., 1922).
State ex rel. Klefisch v. Wisconsin Telephone Co., 195 N. W. 544 (Wis., 1923).
Piper v. Ekern, 194 N. W. 159 (Wis., 1923).

that may be occupied, the size of yards,[1] courts and other open spaces, the density of population,[2] and the location and use of buildings, structures and land for trade, industry, residence or other purposes.[3] Such regulations may provide that a board of

[1] "The size of yards": It will be noticed that provision for street setbacks is omitted. The reason for this is that street setback regulations have usually been associated with the creation of streets or courtyard easements. Numerous court cases require the latter to be acquired by eminent domain. Street setbacks. under the police power have not yet received widespread court approval.

Halsell v. Ferguson, 202 S. W. 317 (Texas, 1918).

Town of Windsor v. Whitney, 95 Conn. 357 (1920).

In re Appeal of White from Decision of Board of Appeals, Pittsburgh, Pa., Court of Common Pleas, Allegheny County, No. 2714, April Term, 1924.

On the other hand, side, rear and front-yard requirements, when directly related to light, air, health, and safety against fire, are upheld by the courts. While some may say it is a mere difference of words and not of realities to provide for front-yard requirements instead of street setbacks, nevertheless the treatment of front yards under the same authorization as side and rear yards is more consistent. It calls the attention of the framers of ordinances to the necessity of relating such requirements to the health and safety of the community, and it impresses the court that front-yard requirements are not an evasion under which a street widening is initiated.

[2] "The density of population": The general city law of New York state authorizes the regulation of height, bulk and use. New Rochelle, N. Y., proceeding under this law, adopted a zoning ordinance limiting the house arrangement to a certain number of families per acre. An applicant for a permit claimed before the court that the city had received no authority from the legislature to limit the number of families per acre. The court held that this provision in the ordinance was void.

Matter of Barker v. New Rochelle, 209 App. Div. 151 (N. Y., 1924).

It is considered that this provision for the regulation of density of population will make it possible for ordinances to impose a limitation of families per acre, or of square feet per family, or of feet frontage per family.

[3] State ex rel. Morris v. East Cleveland, 22 Ohio N. P. (N.S.) 549 (1920).

City of Des Moines v. Manhattan Oil Co., 184 N. W. 823 (Iowa, 1921); 193 Iowa 1096 (1922).

Schait v. Senior, 117 Atl. 517 (N. J., 1922).

Handy v. South Orange, 118 Atl. 838 (N. J., 1922).

Ware v. City of Wichita, 214 Pac. 99 (Kan., 1923).

State of Ohio ex rel. Danzig v. Lakewood, 21 Ohio Law Bull. and Rep. (No. 43) 395 (Court of Appeals, 1923).

State ex rel. Civello v. City of New Orleans, 97 So. 440 (La., 1923).

State ex rel. Carter v. City of Milwaukee, 196 N. W. 451 (Wis., 1923).

Motor Home, Inc. v. Hedden, Superior Court, Los Angeles, Calif., November 14, 1923.

Miller v. Board of Public Works of Los Angeles, District Court of Appeal, Second Appellate District, Calif., Division Two, Dec. 21, 1923.

State ex rel. Vernon v. Mayor & Council of Town of Westfield, 124 Atl. 248 (N. J., 1923).

City of Memphis v. Gianotti, Supreme Court, Tennessee, Western Division, Mar. 29, 1924.

Ambler Realty Co. v. Village of Euclid, Ohio, 297 Federal Rep. 307 (1924).

Ignaciunas v. Town of Nutley, 125 Atl. 121 (N. J., 1924).

Santangelo v. City of Cincinnati, Superior Court of Cincinnati, Ohio, No. 50087, June 18, 1924.

appeals may determine and vary[1] their application in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained.

SECTION 2. *Districts.*—For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this Act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.[2]

[1] "A board of appeals may determine and vary": This is part of the grant of power to municipalities and should not be omitted here. This provision is quite distinct from others relating to appeals from the building superintendent. Such appeals can be taken to the board whether provided for in the ordinance or not. This sentence has nothing to do with appeals. Strictly speaking it empowers the municipality to prescribe items for the board to pass on as matters of original jurisdiction.

People ex rel. Beinert v. Miller, 188 App. Div. 113 (N. Y., 1919).

People ex rel. Sondern v. Walsh, 108 Misc. 193 (N. Y., 1919); see also p. 196. If a municipality desires to leave the items out of the ordinance entirely, the appellate jurisdiction of the board will remain unimpaired. Similarly if the board of appeals is not mentioned in the ordinance at all, its appellate jurisdiction would remain intact. The reason why it has always been considered best to empower the municipality to prescribe certain items with appropriate rules is because appeals must be based on practical difficulties or unnecessary hardship, and sometimes it is desirable to provide for special cases not within these confines. For instance, it might not be a practical difficulty or unnecessary hardship if an owner of a vacant sand lot in a residence district could not use it temporarily for making concrete blocks. On the other hand, a temporary permit can reasonably be granted where no one is injured. This might well be done "in harmony with the general purpose and intent" of the regulations, but if done the provision must be inserted in the ordinance. Then the board can pass on it, not as an appeal but as a matter of original jurisdiction. Most ordinances contain a list of these special items. They vary in different municipalities. In actual practice the building plans are usually first submitted to the building superintendent by the builder whether on an item of original jurisdiction or on appeal, and then the form of an appeal is used in all cases. The fundamental difference of the two kinds of cases must, however, be observed in drawing the enabling act and the ordinance. No satisfactory substitute for this dual functioning of the board of appeals has been found. The enabling act or the ordinance will be found incomplete if both methods are not provided.

[2] "The regulations in one district may differ from those in other districts": This provision was inserted in the original zoning amendment to the Greater New York charter.

Chapter 470 of Laws of 1914 and amended by Chapter 497 of Laws of 1916. It was intended to be the foundation of police power zoning and it has undoubtedly been more important than any other clause in bringing court support to the subject. Charters of many cities had heretofore authorized ordinances regulating height, bulk and use of buildings. These were known as building laws or building codes. But apart from fire limits they applied alike to all parts of the city. There was no *zoning*,—that is, no recognition of the

SECTION 3. *Purposes in View.*—Such regulations shall be made in accordance with a comprehensive plan[1] and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district[2] and its peculiar suitability for partic-

need of different regulations for different districts. The fundamental idea of zoning is that the health and safety of the community justify a gradually increasing allowance of light, air, and access for structures in the outlying parts of a city. The belts or zones thus pass from intensive to dispersive. Zoning in this sense is the reasonable distribution of the dwellings, business and industry of a community for its safety, health and general welfare. Therefore the new departure in building regulations called zoning provides different requirements for different districts. A building code gives the uniform requirements for buildings wherever situated. The two cannot be merged in a single ordinance, because the nature of zoning requires a different approach from building laws or a building code. Zoning pertains to specific localities that may gradually change. Therefore there is need of checks, hearings and procedure entirely different from what is needed in framing or amending a building code. These differences necessarily appear in the enabling acts.

The requirement that the regulations shall be uniform in each district is complementary to the provision for different regulations in different districts. This prevents special exceptions from time to time by the council. It shows the court that all property situated alike is presumably treated alike.

Willerup v. Village of Hempstead, 120 Misc. 485 (N. Y., 1923).

It serves to take the entire subject out of the realm of legislative favors as well as out of the domain of common law nuisance.

[1] "A comprehensive plan": Sound zoning implies a comprehensive plan. The zoning ordinance should be applied to the whole municipality at once. Piecemeal zoning is dangerous, because it treats the same kind of property differently in the same community.

City of Utica v. Hanna, 206 App. Div. 732 (N. Y., 1923).

Cities are sometimes tempted to pass piecemeal ordinances to protect small residence districts pending the preparation of the comprehensive plan. This usually happens where private restrictions are expiring and residents urge that the locality will be ruined unless it is immediately zoned. It is better for the entire city to hasten the passage of the complete ordinance than to favor a single locality by passing a preferential and piecemeal ordinance perhaps followed by an adverse court decision which may postpone all zoning for years.

Clements v. McCabe, 177 N. W. 722 (Mich., 1920).

The same argument applies to preliminary or interim zoning. An ordinance without maps creating districts according to the preponderance of dwellings is commonly called interim zoning. The courts are more and more setting such regulations aside as unreasonable and not based on the health and safety of the community.

Spann v. City of Dallas, 235 S. W. 513 (Texas, 1921).

Hayden v. Clary, Supreme Court, Onondaga County, Syracuse, N. Y. January 6, 1922.

People ex rel. Roos v. Kaul, 302 Ill. 317 (1922).

Harris v. Village of Dobbs Ferry, 208 App. Div. 853 (N. Y., 1924).

[2] "The character of the district": After the zoning of New York was upheld by the courts, some cities and more villages jumped to the conclusion that a

ular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

SECTION 4. *Method of Procedure.*—The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed. However, no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days' notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such municipality.

SECTION 5. *Changes.*—Such regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed. In case, however, a protest against such

substitute for private restrictions had been discovered, and thereupon proceeded to pass zoning ordinances that were little more than a copy of private restrictions. They seemed to think that, if the word zoning was used and the regulations were passed by the council, the courts would approve all kinds of regulations whether based on the health, safety and general welfare or not. This has been the cause of many adverse court decisions. Police power zoning differs fundamentally from private restrictions. It must be based on community health, safety and welfare. It must be reasonable and impartial. It cannot be used to carry out all kinds of personal preferences. Thus far the courts have not been willing to uphold zoning merely for æsthetics. Private restrictions on the other hand are contracts and can properly cover all kinds of objects. These may include such requirements as peaked roofs, low hedges, fences of open construction, cost of buildings, architectural design, etc., none of which can properly be introduced into a zoning ordinance.

Zoning regulations are better than private restrictions inasmuch as they can be changed by the council when changes are necessary. They do not have a date of expiration and they do not become unenforceable by reason of the laches of neighbors. Private restrictions have the advantage of covering a much wider field. Zoning regulations and private restrictions are enforced in different ways. Zoning regulations are enforced by the non-issue of permits or the ousting of non-conforming uses. Ordinarily the city only can take the initiative. A property owner, however, who pleads and proves special damages can maintain an injunction.

Whitridge v. Calestock, 179 App. Div. 884 (N. Y., 1917).

Cohen v. Rosevale Realty Co., 120 Misc., 416; affd. 206 App. Div. 681 (N. Y., 1923).

Cohen v. Rosevale Realty Co., 121 Misc. 618 (N. Y., 1923).

Private restrictions are enforced mainly by injunction brought by the injured party who must establish a privity of contract with the owner sought to be enjoined. Zoning regulations and private restrictions can exist or be imposed simultaneously. They operate hand in hand. One can supplement the other. They never interfere with each other. The courts in Greater New York disregard the zoning when passing on a case of private restrictions and similarly disregard private restrictions when passing on a case of zoning.

change be presented, duly signed and acknowledged by the owners of twenty per cent or more of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending 100 feet therefrom, or of those directly opposite thereto, extending 100 feet from the street frontage of such opposite lots,[1] such amendment shall not become effective except by the favorable vote of three-fourths[2] of all the members of the legislative body of such municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments.

SECTION 6. *Zoning Commission.*—In order to avail itself of the powers conferred by this Act, such legislative body shall appoint a commission to be known as the Zoning Commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings[3] thereon be-

[1] "The street frontage of such opposite lots": The owners of three different groups of lots can sign the protest. The owners of 20% of the area of any one of the groups can make necessary the three-fourths vote. The third group of lots includes the lots opposite both street sides of a corner lot.

[2] "Shall not become effective except by the favorable vote of three-fourths": The purpose of the 20% protest is to make changes of the ordinance and maps difficult unless there is a high degree of acquiescence. A zoning ordinance ought to be stiff. If a change of one vote of the council or a bare majority of a new council can disorganize a carefully studied zoning plan, then the municipality is likely to be worse off than if it had no zoning plan at all. For instance, if a man erects a six-story building in compliance with the limitations of the zoning ordinance and then his neighbors induce the council to change his district to a twelve-story district, he is penalized because he obeyed the zoning. A zoning plan should be susceptible of change when needed, but the property owners actually affected should be given a means of compelling a nearly unanimous vote of the council if a change not desired by the property owners is to be made. In Greater New York the unanimous vote of the board of estimate is requisite to make a change after a 20% protest is filed.

Matter of Palmer v. Mann, 237 N. Y. 616 (1924).

The present general city law (Chapter 743, Laws of 1920) and the village law (Chapter 564, Laws of 1923) of New York state require a unanimous vote. The new enabling act (Chapter 146, Laws of 1924) of New Jersey requires a three-fourths vote. The enabling act (Chapter 279, Laws of 1923) of Connecticut applicable to Greenwich and other towns and cities requires a four-fifths vote. A zoning enabling act intended for all the municipalities of a state will almost always affect some cities which have a large council and therefore such general act usually requires a three-fourths vote of all the members. It is needless to say that this is a greater safeguard than a provision requiring the vote of three-fourths of the members present.

[3] "Hold public hearings": Not only should public hearings be held but so far as possible the commission should obtain the views of property owners at the very beginning. Many proposed zoning ordinances are today resting in pigeon-holes because a plan was prepared without the knowledge of the property owners and their instinct was to rebel against it as an unfair limitation of their constitutional rights. The best way is to begin the preparation for

fore submitting its final report; and such legislative body shall not hold its public hearings or take action until it has received the final report of such commission. Where a city plan commission already exists, it may be appointed as the Zoning Commission.

SECTION 7. *Board of Appeals.*—Such local legislative body may provide for the appointment of a board of appeals[1] consisting of five members, each to be appointed for three years. The appointing authority shall have the power to remove any member of the board for cause and after public hearing. Vacancies shall be filled for the unexpired term of the member whose place has become vacant. All meetings of the board of appeals shall be held at the call of the chairman and at such other times as such board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of such board shall be open to the public. Such board shall keep minutes of its proceedings, showing

zoning by interesting the property owners, particularly the owners of small homes and stores, in the protective possibilities of a zoning ordinance. After the property owners of any locality have become informed on the limitations of the police power and the proper objects of zoning, great weight should be given to their opinion in the preparation of the maps. This statement refers to the owners of property in the locality to be zoned, not so much to people in other localities who want it zoned a certain way. More than half of the court decisions against municipalities for arbitrary and unreasonable zoning arise because the officials zone a locality to suit some neighboring group of property owners who may be more vociferous or who may have more votes. The question is not at all what will please the neighbors who do not own the land, but what is a fair and reasonable regulation for the land itself, taking into account the health, safety and welfare of the entire community.

[1] "Appointment of a board of appeals": This is a discretionary administrative body, always acting under rules prescribed by the state or municipality. It should be an expert board whose decisions after hearings and investigations will be such that courts will uphold them if arrived at in good faith and in accordance with the law.

People ex rel. Healy v. Leo, 194 App. Div. 973 (N. Y., 1920).

People ex rel. Helvetia Realty Co. v. Leo, 231 N. Y. 619 (1921).

Suitable appointees are the head of the uniformed force of the fire department, a health officer, an architect, a structural engineer, a practical builder or a real estate broker. It is better that the members should not be drawn from the council because of the danger of confusing their functions. The council is a lawmaking body and its discretion cannot be reviewed by the courts. The board of appeals, however, is not a legislative body. It exercises discretion within prescribed limits, and its discretion is reviewable by the courts. If the legislative body is made up of the same people as the board, its members are constantly tempted to accomplish by legislation what they cannot accomplish by variances within the rules. Similarly it is not best that the members of the board of appeals should be drawn from the zoning commission. The zoning commission advises the council on legislative matters. It is the helper to the council. If it is at the same time a board of appeals, it will be constantly tempted to accomplish under the guise of variances the very things which the council is unwilling to enact as laws.

the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and shall also keep records of its examinations and other official actions. Every rule, regulation, every amendment or repeal thereof, and every order, requirement, decision or determination of the board shall immediately be filed in the office of the board and shall be a public record.

Such board of appeals shall hear and decide appeals from and review any order, requirement, decision or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this Act. It shall also hear and decide all matters referred to it or upon which it is required to pass under any such ordinance. The concurring vote of four members of the board[1] shall be necessary to reverse any order, requirement, decision or determination of any such administrative official, or to decide in favor of the applicant any matter upon which it is required to pass under any such ordinance or to effect any variation in such ordinance. Such appeal may be taken by any person aggrieved or by an officer, department, board or bureau of the municipality.

Such appeal shall be taken within such time as shall be prescribed by the board of appeals by general rule, 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. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of appeals after the notice of appeal shall have been filed with him that by reason of facts stated in the

[1] "The concurring vote of four members of the board": The requirement is of more than a majority vote. An applicant for a variance desires to have a structure or use approved which differs from the general rule imposed on all his neighbors. Under such circumstances it is right that the merits of the applicant's case should appeal to more than a bare majority. The first Greater New York charter provisions and some of other enabling acts based thereon required this preponderating vote for all decisions. It was found in actual practice that the board would sometimes divide in a way that neither granted the variance nor refused it. As the applicant could not ask for a court review until the board of appeals had filed a decision, the applicant was embarrassed in obtaining a speedy court review. The above provisions obviate this danger.
People ex rel. N. Y. Central R. R. v. Leo, 105 Misc. 372 (N. Y., 1918).
Matter of West Side Mort. Co. v. Leo, 174 N. Y. Supp. 451 (1919).

certificate a stay would, in his 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 officer from whom the appeal is taken and on due cause shown.

The board of appeals shall fix a reasonable time for the hearing of the appeal or other matter referred to it and give due notice thereof to the parties, and decide the same within a reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and shall make such order, requirement, decision or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer from whom the appeal is taken. Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the board of appeals shall have the power in passing upon appeals, to vary or modify[1] the application of any of the

[1] "Power in passing upon appeals, to vary or modify": The need of giving an administrative board the power to vary the strict letter of the ordinance and maps has become generally recognized.

In re Permit to American Reduction Company, Municipal Law Rep. (Pennsylvania) Vol. 15, No. 8, April, 1924 (Court of Common Pleas, Allegheny County, Pittsburgh).

This power granted directly by the state legislature to the board of appeals is not only a protection to the applicant but a safeguard of the entire ordinance against court decisions of unconstitutionality. The ordinance itself can enumerate a dozen or more special situations wherein a particular environment will justify a non-conforming structure. The enabling act makes provision for the enumeration of such matters by the council. No enumeration, however, could be long enough to cover all the exceptional cases in the great field of buildings and their uses. It is the unexpected that happens. Consequently the most that the ordinance itself can do is to provide the maps and general requirements covering perhaps 98% of the applications for permits, then the enumerated items in the ordinance for the board of appeals to decide may cover 1% more of the applications, but the remaining 1% no prophet can foresee and no ordinance can define. These cases of practical difficulty and unnecessary hardship sometimes arise where a single lot is in two districts, or where the building plot is irregular or on different grades, or where a certain kind of construction is unduly expensive, or where non-conforming buildings or uses render a conforming building impossible, unprofitable or abnormal. In all cases such as these the board of appeals, in passing on appeals, can vary the strict letter of the ordinance, but it cannot do it whenever and in any way that it chooses. It must follow the rules prescribed for it, or else its acts will be unlawful.

People ex rel. McAvoy v. Leo, 109 Misc. 255 (N. Y., 1919).

People ex rel. Facey v. Leo, 230 N. Y. 602 (1921).

People ex rel. Forty-First & Park Ave. Corp. v. Walsh, 199 App. Div. 925 (N. Y., 1921).

regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.

Any person or persons, jointly or severally aggrieved by any decision of the board of appeals,[1] or any officer, department, board or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition must be presented to the court within thirty days after the filing of the decision in the office of the board.

People ex rel. Wohl v. Leo, 192 N. Y. Supp. 945 (1922).
People ex rel. Brennan v. Walsh, 195 N. Y. Supp. 264 (1922).
People ex rel. Kannensohn Holding Corp. v. Walsh, 120 Misc. 467 (N. Y., 1923).
People ex rel. Ventres v. Walsh, 121 Misc. 494 (N. Y., 1923).
Allen v. City of Paterson, 123 Atl. 884 (N. J., 1294).
People ex rel. Parry v. Walsh, 121 Misc. 631; 209 App. Div. 889 (N. Y., 1924).

It can only make a variance where it can prescribe an alternative that will observe the spirit of the ordinance and comport with public safety and welfare.

The power of the board is not limited to minor adjustments. It can vary the strict letter of the law in the matter of any particular permit so that the alternative authorized is reasonable. It can adjust situations that would otherwise involve unconstitutionality, so that they come within the pale of constitutionality.

People ex rel. Sheldon v. Board of Appeals, 234 N. Y. 484 (1923).

It can impose requirements as a condition to granting the permit that will safeguard the surrounding property. The functions of the council and the board do not clash. The council controls the ordinance and maps. The board grants variances in permits for particular buildings under prescribed rules.

[1] "Aggrieved by any decision of the board of appeals": Although in every state the decisions of a discretionary board like the board of appeals are subject to court review, it has been found prudent to provide a specific provision for court review in the enabling act, for one thing so that courts may plainly see that the doings of the board of appeals are subject to the courts so far as due discretion and legality of conduct are concerned, and for another reason so that an aggrieved person, even if he is not a party to the case before the board of appeals, can still obtain a court review. Sometimes it happens that the only person aggrieved is an opposite neighbor whose property is injured by the granting of the variance. If he does not have a standing to obtain a court review, then no one will obtain it. The applicant for the permit is presumably satisfied because he has obtained what he applied for. The municipality will presumably uphold the decision of its own board of appeals and will not ask for a court review. Some enabling acts provide that any citizen can ask for and obtain a court review, but there is much to be said in favor of limiting this privilege to property owners who are aggrieved, otherwise a citizen of no responsibility, perhaps prompted by malice, might harass a legitimate builder. It would seem that any citizen, if he thought that a bad precedent was being established, could find some property owner near the objectionable building who would be willing to ask for a court review and who could establish the fact that he was an aggrieved person. In some states any taxpayer has a standing to ask for a court review even if he does not plead and prove that he is an aggrieved person.

Upon the presentation of such petition, the court may allow a writ of certiorari[1] directed to the board of appeals to review such

[1] "Court may allow a writ of certiorari": Six years ago it was commonly supposed that the provision of a board of appeals with power to vary, followed by the right of court review, was merely a method of rounding off the sharp corners of the ordinance and maps. It is now generally considered that this remedy is a vital necessity to a zoning plan. The occasional exceptional situation of arbitrariness is sure to arise. If a variance cannot in some way be made, the courts will decide that, in respect to that particular situation, the ordinance is unconstitutional and void.

State ex rel. Westminster Presbyterian Church v. Edgcomb, 189 N. W. 617 (Neb. 1922).

Zahn v. Board of Public Works, Los Angeles, District Court of Appeal, Second Appellate District, Calif., Division One, Mar. 20, 1924.

Sometimes the occasion arises where a lot is partly in one district and partly in another. Sometimes the lot itself is of a peculiar form. Sometimes grades of two streets on which the lot faces are abnormal. Sometimes a vacant lot is between two non-conforming buildings, and to force the owner to erect a conforming building would be unreasonable and confiscatory. Sometimes part of a building unit is already constructed and the strict letter of the ordinance would compel a misshapen addition that would destroy the harmony of the whole. In some cities the framers of zoning plans have endeavored to meet these emergencies by creating an advisory board which can hear the merits of such exceptional cases and advise the legislative body to make special exceptions. The trouble with this method is that special exceptions by councils are destructive of comprehensive zoning. But worse still this method fails to accomplish the main object, which is to substitute court review for attacks on constitutionality. No applicant for a permit need postpone his court action until the ordinance is amended. He can proceed by application for a writ of mandamus to ask the court to pronounce the ordinance void. No one can be compelled to wait until a void law is amended before he has a standing to bring the defect to the attention of the court. Courts will not review and adjust legislative acts. The board of appeals on the other hand is not a legislative body. It is an administrative body acting according to its discretion under rules prescribed by law. It furnishes a forum provided by law to which the applicant must resort for an adjustment. It is axiomatic in the laws of all the states that a litigant cannot bring up questions of constitutionality until he has exhausted the remedies given him by law. The board of appeals is such a remedy. After a functioning board of appeals is established every city attorney should request the courts to refer to the board of appeals all applicants for mandamus or injunction based on claims of unconstitutionality.

People ex rel. Cantoni v. Moore, 179 App. Div. 121 (N. Y., 1917).

Flegenheimer v. Walsh, Supreme Court, New York County, opinion by Mr. Justice Hotchkiss, New York Law Journal, April 27, 1918, p. 328.

People ex rel. Stockton Tea Room, Inc. v. Copeland, Supreme Court, New York County, opinion by Mr. Justice Cohalan, New York Law Journal, April 19, 1922, p. 228.

Matter of Heepe, Supreme Court, Special Term, Part I, Kings County, opinion by Mr. Justice Callaghan, New York Law Journal, March 14, 1924, p. 2138.

If the applicant is dissatisfied after the decision of the board of appeals is rendered, he still cannot resort immediately to a court action to annul the law. He must continue to employ the alternative remedy given him by law.

People ex rel. Cockcroft v. Miller, 187 App. Div. 704 (N. Y., 1919).

People ex rel. Broadway and Ninety-Sixth Street Realty Co. v. Walsh, 203 App. Div. 468 (N. Y., 1922).

Matter of Kelmenson v. Mann, 237 N. Y. 615 (1924).

This additional remedy is a review of the discretion of the board of appeals by the court. He must also continue to exhaust his remedy by appeal to higher courts if he is still dissatisfied.

decision of the board of appeals and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

The board of appeals shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return must concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and must be verified.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

Costs shall not be allowed against the board, unless it shall appear to the court that it acted with gross negligence or in bad faith or with malice[1] in making the decision appealed from.

In the city of New York for eight years no applicant for a permit has been able to attack the constitutionality of the ordinance because he is compelled to go to the board of appeals and then review the decision of that board by certiorari. This is no evasion of the intention of the constitution. It proceeds on the principle that, if there is a method of preventing arbitrariness, unreasonableness and confiscation, then the litigant must use that method instead of attacking constitutionality.

This is what all the states do regarding assessments for taxes, and the courts become helpers in adjusting fair assessments. They do it by the use of writs of certiorari. If the assessments for taxes were fixed by the municipal legislature as a legislative act, a grossly unfair assessment could be attacked by injunction and the court would declare it unconstitutional and void. Then the taxpayer would pay no tax that year. This would upset the whole system of taxation. Instead of this the statute provides that an administrative board, usually called the board of assessment, can fix assessments for taxation subject to the rule of fair value between a willing buyer and a willing seller, an aggrieved person can obtain a court review if he desires, and thereupon the court instead of nullifying the assessment can adjust it so that the taxpayer will be treated reasonably and will still pay his tax of that year.

The courts presume that boards of appeals are composed of experts and the court will refuse to substitute its own opinion for the opinion of the board if the board has acted in accordance with the law.

People ex rel. Ruth v. Leo, 188 N. Y. Supp. 945 (1921).

[1]"Gross negligence or in bad faith or with malice": One occasionally hears objection that it is dangerous to give such wide discretionary power to an

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

SECTION 8. *Remedies.*—In case any building or structure is erected, constructed, reconstructed, altered, converted or maintained; or any building, structure or land is used in violation of this Act or of any ordinance or other regulation made under authority conferred thereby, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land or to prevent any illegal act, conduct, business or use in or about such premises.

Said regulations shall be enforced by the superintendent of buildings who is empowered to cause any building, structure, place or premises to be inspected and examined and to order in writing the remedying of any condition found to exist therein or thereat in violation of any provision of the regulations made under authority of this Act. The owner or general agent of a building or premises where a violation of any provision of said regulations has been committed or shall exist, or the lessee or tenant of an entire building or entire premises where such violation has been committed or shall exist, or the owner, general agent, lessee or tenant of any part of the building or premises in which such violation has been committed or shall exist, or the general agent, architect, builder, contractor or any other person who commits, takes part or assists in any such violation or who maintains any building or premises in which any such violation shall exist shall be guilty of a misdemeanor[1] punishable by a fine of not less than

appointive board. Experience shows, however, not only that these boards are usually of a high character but that the required publicity of their doings prevents favoritism. If the board exercises due discretion, the city treasury should pay costs in cases where the applicant succeeds in the court review. It is a precaution against favoritism, however, to allow the court to inflict the costs personally on the members of the board in cases of abuse of discretion.

People ex rel. Cotton v. Leo, 110 Misc. 519; aff'd 194 App. Div. 921 (N. Y., 1920).

[1] "Misdemeanor": The violation of an ordinance is a misdemeanor only when the state law makes it such.

People v. Sagat, 204 App. Div. 485 (N. Y., 1923).

Some state legislatures have passed general provisions making such violations misdemeanors. It is a safeguard in every state to provide in the enabling act itself for the enforcement of the ordinance by civil and criminal procedure.

Walsh v. Cusack Co., 196 N. Y. Supp. 435 (1921).

ten dollars and not more than one hundred dollars for each and every day that such violation continues, but if the offense be wilful, on conviction thereof the punishment shall be a fine of not less than one hundred dollars or more than two hundred and fifty dollars for each and every day that such violation shall continue or by imprisonment for ten days for each and every day such violation shall continue or by both such fine and imprisonment in the discretion of the court.

Any such person who having been served with an order to remove any such violation shall fail to comply with said order within ten days after such service or shall continue to violate any provision of the regulations made under authority of this Act in the respect named in such order shall also be subject to a civil penalty of two hundred and fifty dollars.

SECTION 9. *Conflict With Other Laws.*—Wherever the regulations made under authority of this Act require a greater width or size of yards, courts or other open spaces, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute, local ordinance or regulation, the provisions of the regulations made under authority of this Act shall govern. Wherever the provisions of any other statute, local ordinance or regulation require a greater width or size of yards, courts or other open spaces, or require a lower height of building or a less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under authority of this Act, the provisions of such statute, local ordinance or regulation shall govern.

ADDENDA

Important court decisions have been made since the collection of cases set forth in the notes on previous pages was prepared. These include:—

A comprehensive zoning plan can properly exclude new stores from a residence district.

Spector v. Town of Milton, 145 N. E. 265 (Mass., Oct. 1924).

A landowner must plead and prove special damages to obtain injunctive relief.

Holzbauer v. Ritter, 198 N. W. 852 (Wis., 1924).

Courts will uphold decisions of boards of appeals if arrived at with the exercise of due discretion.

Armstrong v. City of Pittsburgh, Court of Common Pleas of Allegheny Co., Pa. (Oct. 1924).

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