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THE PLACE OF THE PLANNING COMMISSION AND THE BOARD OF ZONING APPEALS IN COMMUNITY LIFE

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Progressive and fortunate is the city or town served by a planning commission whose membership is comprised of upstanding and public spirited citizens of known integrity, who give freely of their time and talents in such activity. When the same city or town can point with pride to a board of zoning appeals possessing the same high qualities of dedicated public service, it is doubly blessed.

The members of such commissions and boards become the city's most effective police officers when they properly perform their duties. This is literally true, because they derive all of their authority from such part of the police power of the state as is lawfully delegated to them. Some members of such commissions and boards, if they should ever read this article, will be surprised to find themselves designated policemen, but just as the police officer in the prowl car performs an essential community function when he breaks up a riot or fight and restores order in a disorderly neighborhood, so do the members of planning bodies and appeal boards contribute to the good order and welfare of the community when they bring order out of chaos in the proper regulation of the use of property by citizens who might otherwise run roughshod over the rights of their neighbors.

Just what is the proper place of the planning commission and the board of zoning appeals in the life of a community? The answer must be found in an examination of the respective powers and duties of such boards and commissions and the manner in which these powers and duties are performed through the medium of properly conducted hearings.

In such a discussion here some generalizations are necessarily in order in the interest of complying with limitations of space. To properly explore all the facets of the subject chosen for discussion would consume a volume of considerable size.

THE PLANNING COMMISSION

Unprecedented increases in population in urban areas throughout the nation have created problems that serve to emphasize the importance of careful municipal planning, not only to provide for anticipated growth and expansion but also in order that unsatisfactory existing conditions might be remedied. It has been said that municipal

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planning "is the accommodation, through unity of construction, of the variant interests seeking expression in the local physical life to the interests of the community as a social unit;" that planning "is a science and an art concerned with land economics and land policies in terms of social and economic betterment;" that the "control essential to planning is exercised through government ownership or regulation of the use of the *locus*."[1]

Under the provisions of most enabling statutes, the planning commission is, as far as zoning is concerned, merely a recommendatory body, with the final decision resting with the local legislative body. It is usually provided that the planning commission consider legislation before final approval by the legislative body, and when the planning commission disapproves the legislation, most laws require that a proposed ordinance or resolution shall, in order to be effective, receive a favorable vote of three fourths or some other high percentage of the entire legislative body.

Hearings on such legislation constitute an important part of the work of the planning commission. Proper notices must be given in connection with all hearings held by a planning commission, and in the giving of such notices the statute must be carefully followed. Frequently, requests for zone changes originate before a planning commission by those who petition for favorable action looking to the enactment of legislation.

These hearings are very important. There can be no doubt about one thing: far too little importance is attached to the manner of presenting a case before a planning commission. Those who advocate beneficial zone changes frequently miss a golden opportunity when they neglect to prepare properly for hearings before the planning commission. Its recommendations carry great weight in most communities, and a good start before such a commission will frequently insure the ultimate success of proposed legislation before the municipal legislative body. No less important is the proper appearance before the planning commission in opposition to objectionable legislation. A proper protest will frequently result in enlisting the aid of the planning commission in opposing such unwise legislation when the same reaches the legislative body.

Another important function of the planning commission consists of its approval and preparation of a master plan for community development. Here again, the statute governs the scope of the authority of the commission. In formulating a master plan, the rights of property holders must not be ignored. In the adoption of a master plan for a community a planning commission may not, in the process

1. Birkfield Realty Co. v. Board of Commissioners, 79 A.2d 326 (N.J. Super. 1951), citing Grosso v. Board of Adjustment of Millburn, 137 N.J.L. 630, 61 A.2d 167 (Sup. Ct. 1948).

of adoption, transfer rights in private property to a city or a county. Hence, in a Kentucky decision, we find that the Louisville and Jefferson County Planning and Zoning Commission was held to be without authority to adopt a resolution amending the master plan for Jefferson County by designating certain unincorporated territory as "ponding areas" in connection with flood protection projects in Louisville and Jefferson County. The Court of Appeals of Kentucky held that the commission could not, under the guise of amending its master plan, transfer rights in private property to the city and county which they could only acquire by purchase or by the exercise of the power of eminent domain.[2]

A very important feature of the work of the planning commission is its supervision and control over subdivision activities within its jurisdiction. The right of the commission to exercise jurisdiction over the development of subdivisions and to regulate this development in the interest of the public health, safety and general welfare is well settled.[3]

We must bear in mind, however, that a planning commission may neither approve nor disapprove subdivision plans until after it has adopted regulations to guide it in its approval or disapproval. The necessary implication of statutes providing for approval of subdivision plans by planning commissions is that in passing upon such plans the commission is to be controlled by the regulations which it has adopted. Any subdivision plan which complies with those regulations must be approved by the commission. In the exercise of its function of approving or disapproving any particular subdivision plan, as distinguished from its function of adopting regulations, a municipal planning commission acts in an administrative rather than a legislative capacity.[4]

The courts have had occasion in recent years to pass on a number

2. Hager v. Louisville & Jefferson County P. & Z. Comm'n, 261 S.W.2d 619, (Ky. 1953). citing Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (Sup. Ct. 1945).

3. State *ex rel.* Prats v. City Planning & Zoning Comm'n of New Orleans, 59 So. 2d 832 (La. App. 1952); Gore v. Hicks, 115 N.Y.S.2d 187 (Sup. Ct. 1952); Feldman v. Star Homes, 199 Md. 1, 84 A.2d 903 (1951); Brous v. Smith, 304 N.Y. 164, 106 N.E. 2d 503 (1952), holding that the challenged regulation was an enactment in the important field of regulation concerned with the problem of community planning and designed to secure the "uniform and harmonious growth and development" of villages, towns and cities, citing Village of Lynbrook v. Cadoo, 252 N.Y. 308, 169 N.E. 394 (1929).

4. Beach v. Planning & Zoning Comm'n, 149 Conn. 79, 103 A.2d 814 (1954). In this case the court held that the planning commission could not disapprove a subdivision plan because in its opinion the subdivision of the land would place too heavy a financial burden on the town. Particularly was this held to be true, where, as in this case, there had been no standards adopted prescribing the rules and regulations whereby subdivisions might be prohibited. The court held that to single out a single subdivision applicant and refuse his plan for admission on grounds which would not, by regulations, apply to all, would deprive the applicant of the use of his property without due process of law.

of interesting questions involving subdivision regulation. It is felt that reference to some illustrative examples might be in order at this point.

In the case of *Feldman v. Star Homes*,[5] a decision of the Court of Appeals of Maryland, affecting property in the City of Baltimore, there was presented the question of whether or not notice and hearing were necessary before subdivision plans could be legally approved. Apparently the city charter, although providing for public hearings after notice in connection with the adoption of the city's master plan, made no such requirement in connection with the approval of subdivisions which was provided for in a separate section of the charter. The court, citing the case of *Windsor Hills Improvement Ass'n v. Baltimore*,[6] held that whether the lack of a requirement of notice and hearing was "in contravention of sound planning," as was contended, was not the concern of the courts.

In this case the court held that it could not supply words in the enactment of the charter that were apparently deliberately omitted, and that the court could not find that the commission acted illegally where it decided not to exercise its veto power in connection with the approval of the subdivision plan.

In the case of *City of Rahway v. Raritan Homes*,[7] the Superior Court of New Jersey held that the City of Rahway, having failed to take advantage of a statute authorizing a planning board, by establishing such a board, could not enjoin sales of duplex dwellings by the defendant. The court held that there was no master plan for the development of Rahway, and no regulations governing the subdivision of land within the city.

In the case of *Borough of Oakland v. Roth*,[8] there was involved the right of the Borough of Oakland under a statute to restrain the sale or transfer of land in a subdivision thereof before approval of the subdivision by the municipal planning board or governing body, unless the requirement was waived. The court held the statute unconstitutional because of its failure to provide adequate standards to guide the board and governing body in the exercise of the power to waive such requirement.

In a California case,[9] a local ordinance in Burlingame required the approval of the city council for the subdivision of any tract of land and, additionally, made compliance with that ordinance a condition precedent for a building permit. It seems that the ordinance did not prescribe standards on which permission to subdivide should be granted. The court held that the ordinance was subject to the same

5. 199 Md. 1, 84 A.2d 903 (1951).
6. 195 Md. 383, 73 A.2d 531 (1950).
7. 21 N.J. Super. 541, 91 A.2d 409 (1952).
8. 25 N.J. Super. 32, 95 A.2d 422 (1953).
9. Roussey v. City of Burlingame, 100 Cal. App. 2d 321, 223 P. 2d 517 (1950).

limitations as the police power on which it was based and that certain standards—in particular, reasonableness—had to be read into the ordinance if it were to be held valid.

The Supreme Court of Alabama in the case of *Tuxedo Homes v. Green*,[10] held that the mere approval of a subdivision plat or map by the city governing body did not constitute an acceptance of dedication of proposed streets, alleys and other public places shown thereon.

There is a presumption that public officers have performed their duties as required by law and it must therefore, be presumed that a planning commission, on a question of written notice, as required by law, has performed its full duty to those entitled to notice of its decisions.[11]

Planning commissions are authorized to make and establish their own rules of procedure, which are usually recorded by a reporting service. Delegations may be heard, with or without counsel. The position of those who appear before the commission should be clearly stated, preferably by a selected spokesman. Those who appear in their capacity as citizens should always remember that they appear before their fellow citizens, whose only interest is to perform creditably, and without compensation, a community service. Every citizen has a right to expect a full, fair and courteous hearing before a planning commission, and in like manner he is obligated to present his case or statement fairly, concisely and as briefly as possible. Those who appear before planning commissions are, of course, entitled to the benefit of the advice and services of their private counsel, and within reasonable limits, the commission chairman should permit cross-examination of witnesses or spokesmen before the commission by counsel for opposing parties. An observance of these fundamental principles, inherent in the democratic processes, will assure for all a fair and orderly hearing.

THE BOARD OF ZONING APPEALS

Procedure

A board of zoning appeals or adjustment, referred to hereinafter as the board, usually acquires jurisdiction of a case when it has been properly appealed to the board from the action of the chief building official or enforcement officer, by whatever name he is called. The appeal may result from the refusal of such official to issue a building permit or a certificate of occupancy. An appeal may result when such official has issued a permit and some affected property owner opposing the issuance of it perfects an appeal. On the other hand, an appeal may reach the board on a request for an interpretation of certain actions or

10. 258 Ala. 494, 63 So.2d 812 (1953).
11. Fisher v. Eby, 272 Ky. 545, 114 S.W.2d 763 (1938); Hennessy v. Bischoff, 240 S.W.2d 71 (Ky. 1951).

decisions by the enforcement or issuing official. Regardless of the manner in which the appeal originates, the board has a serious duty to perform and in the performance of its duties it is bound to respect its own authority as conferred by ordinance as well as the general duties imposed by the natural rules of justice in the conduct of hearings discussed above in the case of procedures before planning commissions.

As the writer has stated on a former occasion,[12] the board of appeals is to a zoning system what a balance staff is to a good watch. As the Court of Appeals of New York has well put it, the board regulates and keeps on an even keel the machinery of the law and when a city adopts zoning it must furnish the machinery to carry out the spirit and the intent of the law under which it creates such zoning ordinance.[13]

Every municipality, of course, has its own ordinance providing for appeals and procedure before the board, and these provisions must be followed. Most ordinances provide that the appeal shall be made to the board on a regular form to be secured at the office of the secretary or clerk of the board. The ordinance should provide a time limit within which appeals may be taken to the board and the ordinance should require that the appeal specify the grounds for the appeal. A small deposit is usually required in connection with the appeal to cover the cost of the required notices of appeal to be published in a daily or weekly newspaper of general circulation. Any person injured or aggrieved by the action or decision of the enforcement official of the city is entitled to perfect an appeal to the board.

A newspaper publication of notice of the appeal giving the time, place and date of the hearing is always required by the ordinance and this publication of notice must not be omitted.[14] A failure to do so may invalidate the hearing.[15] It has been held that, where no notice is given, the board is powerless to act on the appeal.[16]

However, there are indications that notice of a hearing may be waived by appearance before the board and submitting thereby to its jurisdiction. In the case of *Wilson v. Township Committee of Union Tp.*,[17] the court held that the board was not deprived of jurisdiction because of improper notice where property owners appeared before the board and waived the informality of the notice which was given

12. 1 YOKLEY, ZONING LAW & PRACTICE § 120, p. 295 (2d ed. 1953).
13. Leone v. Brewer, 259 N.Y. 386, 182 N.E. 57 (1932); Ballard v. Roth, 141 Misc. 319, 253 N.Y. Supp. 6 (Sup. Ct. 1931).
14. Co-Ray Realty Co. v. Board of Zoning Adjustment, 328 Mass. 103, 101 N.E.2d 888 (1951); Prusik v. Board of Appeal of Boston, 262 Mass. 451, 160 N.E. 312 (1928); Selleck v. Waterbury, 257 App. Div. 1049, 13 N.Y.S.2d 591 (2d Dep't. 1939).
15. Co-Ray Realty Co. v. Board of Zoning Adjustment, 328 Mass. 103, 101 N.E.2d 888 (1951); Kane v. Board of Appeals of Medford, 273 Mass. 97, 173 N.E. 1 (1930).
16. Retoske v. Boettger, 290 N.Y. Supp. 957 (2d Dep't. 1936).
17. 123 N.J.L. 474, 9 A.2d 771 (1939).

by registered mail and did not claim that a notice was not received.

In the well-known case of *Hopkins v. MacCulloch*,[18] the California court held that property owners who had actual notice of a hearing on an application for a permit to remodel a non-conforming building could not complain that they did not receive notice of the hearing by publication, as required by the zoning ordinance, the court saying:

> "We see little merit to this claim of the respondents. Respondents had actual notice of the hearing. They, together with many other property owners, appeared at the hearing in opposition to the application. Respondents are not now in a position to claim that they did not receive notice of the hearing by publication."[19]

Most ordinances provide that public hearings shall be held and where this provision is made it must be complied with. For instance, it has been held that a variance cannot validly be granted if the required public hearings are not held.[20] However, it has been held that while the hearing before the board must be public, the board's deliberations after the hearing may be private.[21] The courts have frowned on private meetings held in advance of the regular meeting.[22]

Zoning ordinances should provide for a legal quorum for the transaction of the business before the board. In fixing quorums, provision should be made that the concurring vote of a certain number of the members of the board will be necessary to affirm, reverse or modify all orders, requirements or decisions of the city building inspector or issuing authority or to decide any other matters within the jurisdiction of the board.

Where a statute provides that a certain number of the members of a board shall, by concurring votes, authorize a variance, a simple majority of the members of the board cannot legally act. The requirements of the statute regarding lawful quorums must be observed. Hence, we find, in an Alabama decision, that a majority of the full membership of a board in the City of Montgomery was without authority to grant a variance to an applicant, since there were not four concurring votes, as required by law. The court made it clear that it construed the statute to require that the vote of the four concurring members should be recorded on the minutes of the meeting at which those members were present.[23]

It must be remembered that proceedings before a zoning board are

18. 35 Cal. App. 2d 442, 95 P.2d 950 (1939).

19. *Id.* at 954.

20. Hendey v. Ackerman, 103 N.J.L. 305, 136 Atl. 733 (1927).

21. St. John's Roman Catholic Church v. Board of Stamford, 125 Conn. 714, 8 A.2d 1 (1939).

22. Hardy v. Horst, 101 N.E.2d 398 (Ohio Com. Pl. 1951).

23. Moore v. Pettus, 260 Ala. 616, 71 So.2d 814 (1954), citing Sesnovich v. Board of Appeals of Boston, 313 Mass. 393, 47 N.E.2d 943 (1943).

informal.[24] Nor are they to be carried out under the strict rules of evidence. As was clearly stated in *Parsons v. Board of Zoning Appeals:*[25]

> "The only requirement is that the conduct of the hearing shall not violate the fundamentals of natural justice. That is, there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary or to be fairly apprised of the facts upon which the board is asked to act."[26]

Powers and duties of the zoning board

We now pass to a consideration of the very important subject of the general powers and functions of the zoning board. The responsibility of the members of a zoning board to the people of the community they serve is not one that can be lightly regarded. Unfortunately, many board members do not properly consider the impact of many of their decisions on community life and thought.

In the performance of its functions the board acts as a quasi-judicial body.[27] One of the primary functions of a board is to weigh questions of fact relating to the use of property within its jurisdiction. The powers of a board, however, are delimited by statute. In an Indiana decision, the court held that the Board of Zoning Appeals of the City of Indianapolis had no authority, on a petition for a variance, to make a declaratory finding that it was without jurisdiction to consider an application.[28]

Many ordinances make provision for special exceptions that may be granted by the board in those cases that are expressly provided for and when they may be in harmony with the general purposes of the zoning ordinance. To illustrate: in Pennsylvania a special exception was upheld granting the right to erect apartment houses in a Residence B district.[29] In a Rhode Island decision, the zoning board of the City of Cranston was upheld in its action granting permission to construct a dental office building in a dwelling area.[30]

In the matter of granting exceptions it must be remembered that there must be a statutory authorization and that the same care

24. Mitchell Land Co. v. Planning and Zoning Board of Appeals, 140 Conn. 527, 102 A.2d 316 (1953); Saporiti v. Zoning Board of Appeals, 137 Conn. 478, 78 A.2d 741 (1951).
25. 140 Conn. 290, 99 A.2d 149 (1953).
26. *Id.* at 150.
27. City of Dallas v. Halbert, 246 S.W.2d 686 (Tex. Civ. App. 1952); Gay v. City of Lyons, 209 Ga. 599, 74 S.E.2d 839 (1953); Tzeses v. Board of Trustees, 22 N.J. Super. 45, 91 A.2d 588 (1952).
28. Anderson Lumber & Supply Co. v. Fletcher, 228 Ind. 383, 89 N.E.449 (1950). See YOKLEY, ZONING LAW & PRACTICE § 136 (2d ed. 1953).
29. Appeal of Borden, 369 Pa. 517, 87 A.2d 465 (1952).
30. Nutini v. Zoning Board of Review of City of Cranston, 82 A.2d 883 (R.I. 1951).

should be exercised by the board as when granting a variance. The board must find as a fact that the exception will serve the public welfare and not the needs of some private individual.

Sometimes what may appear to be a request for special exceptions is, in reality, a request for a variance and, when this is true, the exception must be disallowed, particularly where not properly authorized in the first instance.[31] From the foregoing it must be apparent that an exception differs from a variance.

In the administration of zoning laws no board can properly perform its functions without a clear understanding of the distinction between an exception and a variance. This statement applies with equal force to the practitioner and the municipal legal advisor.

An exception is not to be confused with a variance. While the two words have often been treated as synonymous, they are readily distinguishable. Generally speaking, a variance is the authority extended to an owner to use his property in a manner forbidden by the zoning enactment, while an exception, on the other hand, allows him to put his property to a use which the enactment expressly permits, under qualifying conditions which must be met.[32] Putting the matter differently, where an ordinance specifically provides for special exceptions in addition to variation and modification, a showing or claim of "undue hardship or practical difficulty" need not be first made as a prerequisite to review by the board of zoning appeals.[33]

The Court of Appeals of Maryland has spelled out the distinction in the following language which we consider quite adequate:

> "It is the common practice to join an application for an exception with an application for a variance, leaving it to the board to decide on which ground it will grant the application. As a result, many cases discuss exceptions and variances without differentiation, yet the two do differ, and one important distinction is that where a specific use is permitted by the legislative body in a given area if the general zoning plan is conformed to and there is no adverse affect on the neighborhood, the application can be granted without a showing of hardship or other conditions which are necessary for the allowance of a variance."[34]

It has been stated that finality of decision is just as desirable in the case of an exception as in one involving a variance. Because of the nature of an exception, however, the power of a zoning board to review a prior decision denying the exception is not limited, as it

31. Dooling's Windy Hill v. Springfield, 371 Pa. 290, 89 A.2d 505 (1952).
32. Mitchell Land Co. v. Planning and Zoning Board of Appeals, 140 Conn. 527, 102 A.2d 316 (1953). See YOKLEY, ZONING LAW & PRACTICE § 133 (2d ed. 1953). See also, Dooling's Windy Hill, Inc. v. Springfield, 371 Pa. 290, 89 A.2d 505 (1952); Lukens v. Ridley Zoning Board, 367 Pa. 608, 80 A.2d 765 (1951); Application of Devereux Foundation Inc., 351 Pa. 478, 41 A.2d 744 (1945).
33. Mitchell v. Grewal, 338 Mich. 81, 61 N.W.2d 3 (1953).
34. Montgomery County v. Merlands Club, 202 Md. 279, 96 A.2d 261 (1953).

is when a variance is sought. Situations have arisen where an owner requesting an exception files a subsequent application altering the plan under which he had previously sought the exception, in order to meet the reasons for which the board denied the prior one. As we have already stated, to justify a variance, it must appear that adherence to the strict letter of the zoning regulations will cause practical difficulties or unnecessary hardships upon the owner. To justify a special exception, on the other hand, it must appear that the manner in which the owner proposes to use his property will satisfy the conditions imposed by the regulations. If, therefore, upon a second request for a special exception, there is a substantial change in the manner of use planned by the owner, the board is faced with an application materially different from the one previously denied. It may well be that the new plan, by reason of the changes made therein, will succeed, where the former failed, in satisfying the conditions enumerated in the regulations. Under such circumstances the board is not precluded from granting the second application merely because it had denied the first. In following this rule the Supreme Court of Errors of Connecticut upheld the action of a town planning and zoning board in granting an exception so as to permit the construction and operation of an asphalt mixing plant in a general business zone, after the board, in a second hearing, found that objections offered at the first hearing had been met.[35]

The phase of the board's activity that requires by far the greater portion of its time is the granting of variances, or to put the matter in another way, varying the strict or literal provisions of the ordinance. It is beyond debate that the proper approach to the problem of how to handle the many requests for variances constitutes the most troublesome feature of zoning law administration. This is due to the fact that so many requests for variances reach the various boards not based on any real need. As a result many variances are improperly granted. In an address to a Regional meeting of the American Bar Association (Municipal Section) in Atlanta, Georgia one year ago, the writer stated that, in his opinion, fully seventy-five per cent of all variances which do not reach the courts for review are improvidently granted when tested by a strict application of the "unnecessary hardship" rule. A number of eminent authorities on zoning matters were present and all expressed the view that we were too conservative in our estimate of the number, or rather percentage, of cases falling within this category. Perhaps they were right.

Far too many applicants for variances entertain the view that all they have to do is show to a board of adjustment that they are in financial straits or in need of help to improve their financial plans for

35. Mitchell Land Co. v. Planning and Zoning Board of Appeals, 140 Conn. 527, 102 A.2d 316 (1953).

their property, and that these facts, standing alone, will entitle them to a variance from the use provisions of a zoning ordinance. This is a complete misconception of the authority conferred on boards to vary the literal provisions of zoning ordinances.

On the question of what constitutes unnecessary hardship, the Supreme Court of Pennsylvania, in affirming its previous holdings, has correctly stated the rule that a board cannot set at naught the zoning statute and ordinance under the guise of a variance. In this case, *Pincus v. Power*,[36] the court held that merely proving hardship was not sufficient; that there would have to be present evidence of "unnecessary hardship" which the court held did not exist in this case. The only substantial hardship proved was the fact that the plaintiff's property would be 400% more valuable if the variance were granted than if it were refused. This the court held not to be an unnecessary hardship. Here the court held that landowners should not be permitted to construct, by variance, combination commercial and residential structures in a residential zone.

Neighboring violations of a zoning ordinance do not constitute "practical difficulties or unnecessary hardships" justifying a zoning board in granting a variance to enable property owners to change their one-family house to a two-family dwelling in a residence district in which such use is prohibited.[37] How such a strained construction can be indulged by some boards defies comprehension. The burden of proof is always on the applicant to establish that his land is uniquely affected resulting in unnecessary hardship.[38]

It is fundamental in construing the powers and duties of a board of appeals that it is limited by its properly delegated powers and that it cannot exercise legislative functions under the guise of granting a variance so as to really change the law regulating the character and use of property in certain zones. Decisions on this point are countless.[39]

It is well settled that the power of a board to authorize a variance from the terms of the ordinance must be exercised sparingly and only under exceptional circumstances. Here too, the cases are legion.[40]

In determining whether it should authorize a variance from the terms of the zoning ordinance because of special conditions or circumstances, the board is vested with a wide discretion, however, and

36. 376 Pa. 175, 101 A.2d 914 (1954).

37. Von Elm v. Zoning Board of Hempstead, 258 App. Div. 989, 17 N.Y.S.2d 548 (2d Dep't 1940).

38. Lumund v. Board of Adjustment of Rutherford, 4 N.J. 577, 73 A.2d 545 (1950).

39. *E.g.*, Antrim v. Hohlt, 122 Ind. App. 681, 108 N.E.2d 197 (1952); Clark v. Board of Zoning Appeals, 301 N.Y. 86, 92 N.E.2d 903 (1950); Abbott v. Zoning Board of Review of City of Warwick, 79 A.2d 620 (R.I. 1951).

40. *E.g.*, Shipman v. Town of Montclair, 16 N.J. Super. 365, 84 A.2d 652 (1951); Board of Adjustment v. Levinson, 244 S.W.2d 281 (Tex. Civ. App. 1951); Hammond v. Kephart, 331 Mich. 551, 50 N.W.2d 155 (1951).

the courts will not interfere with that discretion unless it is abused.[41]

It has been held that a petitioner seeking a variance may not attack the constitutionality of the ordinance, since, by filing the application for a variance, he admits the validity of the ordinance.[42]

It is hoped that the foregoing will serve to briefiy delineate the power and authority of the zoning board. Detailed analyses of the decisions, as stated earlier, is impossible in an article such as this. It is felt that it would be more helpful to give a general resume of the principal functions and duties of the board rather than to dwell at length on some particular phase of the subject. It is hoped that the result has been to point up the importance of the planning commission and the board of zoning appeals in the proper regulation of property uses in the life of a community.

41. Katzin v. McShain, 371 Pa. 251, 89 A.2d 519 (1952); Smith v. Selligman, 270 Ky. 69, 109 S.W.2d 14 (1937).

42. Sweck v. Zoning Board of Review of North Kingstown, 77 R.I. 8. 72 A.2d 679 (1950).