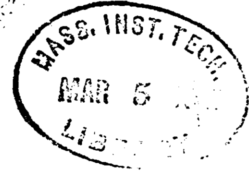
THE ZONING BOARD OF APPEALS

IN OPERATION



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Signature of Author ______________________
Architecture and Planning
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Signature of Professor
in Charge of Research ______________________

Signature of Chairman of
Department Committee of
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Cambridge, Mass.
January 17, 1946

Frederick Johnstone Adams,
Professor of City Planning
in Charge of Course,
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Dear Professor Adams:

I herewith respectfully submit this study "The Zoning Board of Appeal in Operation" as the Thesis in partial fulfillment of the requirements for the Degree of Master in City Planning.

Sincerely yours,

Alan McClennen

282833

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Primary and particular thanks are made to the Boards of Appeal of Cambridge and Concord, Mass. who so kindly permitted the author to investigate their records, without any questioning as to what might be said in the report.

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INTRODUCTION

In recent years one of the most striking aspects of government at all levels has been the growth of administrative tribunals. With the increasing complexity of social relationships in the past century, it has been found necessary for government to expand its activity into new fields. Since it early became apparent that legislation could not be framed so as to cover all contingencies in even one phase of our involved life, it was found necessary to frame laws of broad scope. The burden of filling in the details and the adaptation to changing conditions was left to the administrative group. Since many questions of fact would arise of a nature to require decisions, it was found necessary to set up semi-judicial bodies thus avoiding a crowding of the courts. These judicial functions were also left to the administrative group. There remained, however, the legislature and courts to see that these administrative groups did not get out of hand.

Among the groups so formed is the Zoning Board of Appeals which has powers over the application of the Zoning Ordinance or By-law in many communities in this country. Such boards have powers of both judicial and legislative character. They have specific

limitations in the exercise of these powers, and it is hoped that by this analysis of the work of two of them we can appraise their records and make recommendations to improve their operation.

CHAPTER I

BACKGROUND OF ZONING AND THE BOARD OF APPEALS.

1. Zoning History

Zoning is the outgrowth of the heterogeneous development of communities during the nineteenth century, and has as its purpose the avoidance of such conditions in the future. It became apparent in the early years of this century that there were measurable losses in the completely uncontrolled use of land and buildings. These losses were found to be in fields of health, safety and general welfare, which includes almost all aspects of physical, social and economic well being of the community.

One effort to overcome these deficiencies in growth was made in Boston, Mass., early in this century when a statute was passed limiting the heights of buildings in different areas of the city with different heights in different areas. About the same time the city of Los Angeles, California passed regulations concerning the use of land and buildings. In cases contesting the validity of these rules they were sustained.[1] While these were but partial zoning

1. Welch v. Swasey, 193 Mass. 364, 214 U.S. 91.
   Ex parte Quong Wo, 161 Cal. 220.
   Hadacheck v. Sebastian, 165 Cal. 416, 239 U.S. 394.

regulations, New York City followed some ten years later and passed a comprehensive ordinance which covered all the major features now found in zoning ordinances. This occured in 1916 and has been followed by several hundred comparable ordinances and by-laws in about every state of the union. In spite of these early decisions there remained a slight cloud over the constitutionality of the zoning process which was not removed until the case of Village of Euclid (Ohio) v. Ambler Realty Company, 272 U. S. 365 in 1926 which sustained the validity of the principal of zoning with sufficient clarity to prevent further litigation on that phase of the problem.

2. Zoning Procedures.

Zoning attempts to guide the various activities of community life into the most logical channels in relation to probable natural development. The theory is that each land use activity will do best for itself and for the community in an area unmarred by interference from other uses with which it does not get along. In actuality we know that residential neighborhoods, physically, socially and economically, are better off if not invaded by industry and business. Likewise there is reason to believe that industry is better off if not

interspersed with scattered residential uses. From another angle we know that certain uses will tend to follow certain natural conditions. By its very nature shipping must be associated with water frontage, and railroads. We could go on indefinitely like this but we are not expounding the practices of zoning. Suffice it to say that zoning is based on a study of these principles and the application of them to an individual community. The individual community becomes the second major factor in zoning since any zoning plan must relate to the community involved. The pure theory is of no use if due to special conditions in the locality under study growth has not even approximated the normal expectations. Thus we find that any zoning plan is intimately wrapped up with the past growth of the community.

From the studies prepared with the above ideas in view the zoner arrives at a presumed pattern of growth. This will consist of a certain proportion of residence, of business, and of industry and areas for the accomplishment of each function. These are not the areas he finds so used today, although there should be a vast preponderence of such conformance. Having thus divided the community into areas of expectable use the zoner will prepare regulations which describe in more detail many much more minor aspects of the problem such

as height, coverage, and exceptions, so as to have a complete regulation of the buildings and their use, the land and its use. When combined in a map and printed matter, it will be passed by the local legislature under some state enabling act and become the law of the community.

3. <u>Zoning Administration.</u>

While this whole paper is to deal with this subject a brief summary of the procedures involved in enforcing a Zoning Ordinance should be made. The ordinance will include one or two items that make it mechanically enforceable, namely a building permit and perhaps an occupancy permit. Under the regulations one cannot build without a building permit and one cannot occupy without an occupancy permit, and violations are subject to fine. The person responsible for its enforcement is usually the building inspector. So far as the mechanics are concerned, the prospective builder will apply to the building inspector for a permit and the inspector will review the use, location, and description of the building to find out whether they conform to the ordinance and if so will give the required permit, assuming they conform to other regulations under his control. This will occur in the vast number of cases

and in this paper we will have no further interest in them.

4. Zoning Board of Appeals and its Powers.

Like all administrative officials the building inspector can commit errors and may be unwilling to see them. To protect the individual from such mistakes it early became apparent that some opportunity for appeal must be given and for this purpose a Board of Appeal was created to review such mistakes. If the requesting party feels that the inspector is in error in his interpretation of the ordinance he may file an appeal. He is then given a hearing to state his case and the board will pass judgement on the matter. This process has served to keep the inspector on the alert with the result that but few cases of this sort arise.

There is another type of situation which may arise, namely the special exception. Very often a zoning ordinance will include a list of uses which the board of appeal may permit if they find that it will not harm the community. Common among such uses are hospitals, cemeteries and other semi-public organizations. Upon application to build a hospital for instance, the inspector will refuse the permit but proceed to fill out appeal or petition papers requesting a hearing which

will be given by the board. When all have had a chance to be heard the board will decide whether this particular hospital will be injurious to the community. As will be shown later the extent of such special exceptions will vary from community to community.

A third opportunity for appeals to the board arose from an appreciation of the fact that an ordinance no matter how well written could not meet all contingencies, and that some method of ameliorating its harshness would have to be developed. Accordingly the board of appeal was given the power to grant variances from the terms of an ordinance due to hardship. The exact wording of this power varies from community to community but not substantially.

These powers are clearly set forth in the enabling act for Massachusetts, General Laws, Chapter 40, Section 30 as follows:

> "The board of appeal shall have the following powers.
> 1. To hear and decide appeals taken as provided in this section or in an ordinance or by-law authorized under this section. [2]
> 2. To hear and decide requests for special permits upon which such board is required to pass under such ordinance or by-law.
> 3. To authorize upon appeal, or upon petition in cases where a particular use is sought for which no permit is required, with respect to a particular parcel of land a

2. This refers to administrative errors largely and the rights of interested parties.

> variance from the terms of such an ordinance or by-law where, owing to conditions especially affecting such parcel but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship to the appellant, and where desirable relief may be granted without substantial detriment to the public good and without substantially derogating from the intent or purpose of such ordinance or by-law, but not otherwise."

There follow these paragraphs several specific ways in which these powers may be exercised, but they are administrative rather than judicial in nature, and need not concern us here.

CHAPTER II

PURPOSE AND METHOD

1. Purpose

In our introduction we briefly indicated what purpose was in writing this paper, namely to appraise the work of two boards of appeal and thereby develop recommendations to improve the work. Some of the basic concepts of zoning have been mentioned, an outline of the administrative procedure has been discussed, and the powers of the board of appeal have been cited from the statute setting up the whole procedure. With these ideas in our mind we can see that while the zoner conceives a pattern for the city, the board of appeal has the power over time to substantially distort that pattern. The building inspector plays a rather subsidiary part as a purely administrative party carrying out the ideas of one or the other. Over time, therefore, we may expect that a zoning ordinance will possibly be destroyed by the activities of the board of appeal.

From this study we would like to discover where the trouble lies. Perhaps we can see flaws in the law, the ordinance or by-law, or the operation of the board of appeal. Perhaps we will find flaws in all three.

The logical result can only be to recommend new practices where necessary.

2. Method

Clearly the best way in which to judge the operation of a zoning ordinance and board of appeals is to sit in on all the hearings of a board over a period of years with the intent to appraise their work in the light of personal observation, preferably not from the point of view of a member of a board, but merely as a listener. But such a procedure is well nigh impossible since it is necessary to cover several years work in most communities in order to develop enough information to complete such a study.

Lacking this chance, this paper is based on a study solely of the records of the board as source material. The procedure was simply to go thru the records case by case and take off that data which appeared to touch on the matter at hand. The material was carried on cards and those desired for any special phase of this work could be studied together. Also statistical information could be gathered but that was not a primary purpose here. Obviously it was necessary to carefully review the General Laws, the Ordinances or By-laws, and the court decisions on the subject in order to determine the standards of performance.

For localities in which to operate, two

divergent communities were chosen, Cambridge and Concord, Massachusetts. On the one hand we find a large well settled city of about 100,000 population, a city with very mixed uses so far as Zoning is concerned. On the other we find Concord to be a small suburban community of 7,500, a town substantially residential in character. The two sets of regulations are equally divergent, one a modern three year old ordinance prepared with a great deal of care, the other 18 years old and distorted by frequent unplanned amendments. The actual cases studied in Cambridge go back to the beginning of the ordinance passed at the end of 1943 to replace an obsolete one. The cases in Concord go back to the beginning of the board of appeal in 1935.

CHAPTER III

THE RECORDS

Like all administrative boards, the board of appeal is required to make a record of its actions. In Section 30 of Chapter 40 we find these clear words.

> "The board shall cause to be made a detailed record of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and setting forth clearly the reason or reasons for its decisions, and of its other actions, ..."

In spite of these definite regulations one of the most difficult aspects of reviewing the work of a board of appeals is the fact that the records are not clear.

There are two main sources of information to which one can turn for an understanding of the cases which come before a board. First comes the actual minutes of a given hearing. These will vary in their completeness depending on whether or not the case is one of general interest. The more excitement caused by a given appeal, the more people there are to be heard and accordingly the more information is presented in the minutes. In spite of the lengths to which many objectors or proponents will talk on a given appeal, their almost uniform lack of knowledge of the legal bases of their objections makes their testimony often quite useless in

the determination of the actual facts of the case. In simple terms they dont like the idea that is urged, so they object. It often will appear that they will employ to represent them counsel, who himself knows very little about the actual reasons for allowing an appeal. By this we do not mean the parties or counsel appellant have any peculiar knowledge of the situation. On the contrary if they did we do not feel that in good conscience they could submit a great number of the appeals that are considered. The significance of this ignorance will appear further on in this paper when we are considering actual cases which appear to have no legal basis.

The second source of information is the so-called "Return" of the board, which is simply its decision on a specific case. This will include a very brief resume of the facts, the provision of the ordinance or by-law in question, the parties who favored or opposed, and the decision of the board and their reasons. It is at this last point that there is a very strong tendency for the boards to fail to conform to the statute, ordinance or by-law. One might presume that from this paper one could find sufficient information to review the case. This is definitely not so. To bear out this point there follows a copy of a return from Cambridge.

Case #1535

CITY OF CAMBRIDGE

BOARD OF APPEAL

Decision by the Board of Appeal on the written appeal and petition of Selma Silverman to vary the application of the Zoning Laws of the City of Cambridge, in so far as they pertain to the premises known as 30 Magazine Street, Cambridge, so as to permit the construction of a two car garage closer than the five feet to the rear and side lot lines. The premises are located in a Residence C.1. District.

The pap ers in this case are on file and are numbered 1535 and are made a part of this record.

A written appeal was made upon refusal of the Superintendent of Buildings to issue a permit on the ground that this would violate Article 6, Section 4, Paragraph 3, of the Zoning Ordinance.

At the hearing held on Thursday, June 14, 1945, the Board heard the Petitioner.

The Board is familiar with the location of the Appellant's property, the layout and other characteristics, as well as the surrounding neighborhood.

The Board makes the following Findings of Fact:

The Board find that the circumstances peculiar to this specific case justify a relaxation of the restrictions imposed by the said Zoning Laws and that the varying of the application of the same will not conflict with the spirit of the law or will it injure any person or property. Therefore, the Board, finds that this is a specific case wherein enforcement of the law involves practical difficulty and unnecessary hardship, and wherein desirable relief may be granted without substantially derogating from the intent and purpose of said Zoning Laws; hence, acting under its discretionary power, The Board, parries the application of the same in this specific case, annuls the refusal of the Superintendent of the Building Department to issue a permit and directs him to issue the permit.

This is typical and shows the failure of the board to conform to the above quoted portion of the statue. They also serve to show the difficulty faced by anyone trying to find out what motivates a board in a general way, more or less as is being tried here, or in a specific sense in an effort to find out what to expect in comparable situations.

Not only is the statuteclear as to what is wanted in the return, but the matter has been subject to judicial determination in Massachusetts.[1] In a case involving many procedural matters the court made itself very clear on this point also, as follows:

> ". . . . . there must be set forth in the record substantial facts which rightly can move an impartial mind, acting judicially to the definite conclusion reached."

And further:

> "They are not satisfied by a mere repitition of the statutory words. Minute recitals may not be necessary, but there must be a definite statement of rational causes and motives, founded upon adaquate findings."

These are outstandingly good statements on the part of the court, for they say nothing that one would not expect from reading the words of the statute, as quoted above; "and setting forth clearly the reasons for its decisions, ..." This is definite contrast to the quoted record from Cambridge which seems clearly to be " a mere repitition of the statutory words."

1. Prusik v. Boston Board of Appeal. 262 Mass. 451 (1928)

We here cite these aspects of the operations of boards of appeal since we feel that the failure by boards to conform to these written procedures results in the errors that are committed in actual practice. In our judgement it would appear that if the appeal boards conformed with the procedures, they would require a clearer understanding of their powers in appellant and objector, and there would follow in the course of time a clearer understanding of the whole matter on the part of the public and future appellants. This would also have its effect on the counsel who handle this type of case. It may well be noted at this time that there have been but few lawyers whose names have appeared in the records of the Cambridge board, but these few have appeared repeatedly. Lawyers are rarely called on in Concord, a logical result of its less urban character.

It is from these thoughts that our method of studying the actions of these boards has arisen. The statute prescribes very definite reasons for appeals. It seems very logical that the boards should frame their whole approach to each case within these rules. We are going to analyse a great number of cases within the statutory reasons with the judicial decisions to guide us, hoping to thus find as far as possible where the boards have succeeded or failed.

CHAPTER IV

APPEALS STATISTICALLY

1. Cambridge Cases

It is at this point that we begin to see the effect that differing ordinances have on the type of cases handled by different boards of appeal. Reference was earlier made to the three general groups of appeal of petition that might be made, namely the appeal from administrative errors, the special exception, and the appeal because of a so-called hardship.

In Cambridge during the period under review there were 114 cases that appeared in the files as having come before the board, and of these 16 were withdrawn and so no decision was rendered. The inadequacies of the records play a part in the further subdivision of the cases in that the board treats special exceptions in the same manner as appeals. From the available data it appears that there were no cases involving administrative errors, about 12 involving special exceptions, and the remaining 86 involving so-called hardship.

It appears further that 78 were granted and only 20 denied, a very liberal approach. Dividing the cases another way we find that 68 involved problems of use of which 51 were granted and 17 denied, a considerably less liberal attitude. The 30 remaining cases involved

generally the problem of coverage, including front and rear yards and related provisions, and of these 27 were granted and 3 denied. When we divided the cases between special exception and variance, we find that the board approved all 12 special exceptions and 66 out of the 86 variances.

A breakdown of the use variances by areas of the city shows that no geographical area is peculiarly subject to invasion, but that the so-called Residence C districts are constantly being attacked. They constitute the larger part of the city so the number of cases arising in them are not excessively disproportionate to their number. These invasions unfortunately are not restricted to just one lower use such as local business, but frequently extend to industry as well.

2. Concord Cases

The pattern of Concord cases is directly derived from the by-law of that town. During the period under review we find that the Concord Board has considered 94 cases but that 6 of these were withdrawn. Of the remaining 88 cases, one appears to have involved an administrative error, 69 involved special exceptions, and the remaining 18 involved hardship.

The ratio of approvals approximates that of

Cambridge, since 71 were granted and only 17 denied. When the cases are divided according to use or coverage, we find that 63 out of 77 use appeals were granted and that 8 out of 11 coverage appeals were granted. More important in a way is the matter of the division by variance as against special exception. Of the 18 variances 11 were granted and of the 69 special exceptions 59 were granted. It is interesting to note that the Concord board with what will be shown to be much more liberal powers in regard to special exceptions has found it wise to deny at least some of them.

Geographical position and use district seem also to have played little if any part in the appeals in Concord. This is of course a result of the suburban-rural aspect of the community and the fact that it is largely zoned and use for single family residence.

3. <u>The Reasons for the Differences</u>.

The drastic difference between the type of case handled by these two boards operating under the same enabling act is of course the ordinance or by-law under which they are operating. Both communities provided for the normal processes of appeal as regards hardship. There are a few phrases in the Cambridge ordinance which might be construed to limit the variance

provisions of the statute, but since they do not as a practical matter have any such affect we will not quote them here.

When we consider special exception we find that the regulations are as far apart as the poles. Cambridge provides two brief opportunities for special exceptions. The first involves problems where a zone line divides a lot so that the larger part of the lot is in the less restricted zone. Under these conditions the board may permit the less restricted use to extend up to 25 feet into the more restricted zone subject to such restrictions as it may impose after a public hearing. As a practical matter no cases seem to have been argued on this point although one much contested case seems to have involved this very question. The other exception is in behalf of non-conforming uses which may be allowed to add up to 25% of its area and 50% of its assessed valuation. This has not been cited but seems to have been used a lot as will be pointed out later. Concord's by-law is very different in that it appears to be almost a bundle of special exceptions, so liberal in fact that it takes careful study to find out what the board cannot grant if they find that it is not or would not be detrimental to the neighborhood. But more of this later. This suffices to set forth the reasons for the vast

difference in the types of cases handled by the two boards, and to show how the ordinance or by-law will affect the work of a board.

CHAPTER V

ADMINISTRATIVE ERRORS

1. The Significance of Administrative Errors.

In the previous chapter we covered the statistical importance of administrative errors, and found it to be negligible. This is a clear indication that the terms of an ordinance or by-law can be learned and understood and the map may be prepared in such a form as to be not subject to error. The lone case which arose in Concord involved the determination of what is a proper accessory use. A request for the use of quarters in a dentist's residence for the practice of his profession was refused and on appeal was allowed as a normal accessory use. While classified as an administrative error it was a reasonable one in that the by-law failed to more than state that accessory uses were allowed without giving even an outline of what should be considered as such a use.

A couple of other errors which might have come in this category were treated in special ways so that they did not fall into this statistical grouping. One of these was a simple case of misreading the map, but from an administrative point of view was dismissed without decision upon discovery of the error. Another

case of trouble with the map occurred in Cambridge where the zone division as scaled on the map was some twenty feet within the property line of the last business in a shopping district. When revisions were to be made to that business it was ruled that the property was partly in a residential zone, yet one could assume that it would not be the intent of a zoner to thus cut off his zone. Perhaps this would have been a case where the building inspector could have assumed that the intent was to follow the property line in view of the facts of the situation. The board of appeal could not see it this way either and ruled against the appellant.

2. The Building Inspector's Position

The above ideas lead us on to another proposition, namely that the building inspector is in a very strong position to assist in the operation of the board. First by a full and clear understanding of the contents and intent of the ordinance or by-law he may be of great assistance to the prospective builder. Further than that he should have a clear understanding of zoning law and the power of the board under it. Armed with such knowledge he would be in a real position to advise on the advisability of appeals. He as well as the board itself should be able to analyze a case and

find out the real basis of appeal. If he could do this the bulk of the work of a board could be half settled before the case comes up. As we develop our ideas on the actions of the board we will be able to see how the same approach would be of assistance to both of them.

CHAPTER VI

SPECIAL EXCEPTIONS

1. The Legal Status.

The statutory basis for special exceptions was set out in an earlier chapter as well as a brief note on their use. Further statutory limitations are placed on the use of such provisions are in another part of Section 30 of Chapter 40 as follows:

> "Such ordinances or by-laws may provide that the board may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinances or by-laws in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained."

The application of this power has been very easy going in most ordinances or by-laws that have found occasion to include such provisions. The Cambridge ordinance is very brief in this matter and for the so-called "appropriate conditions and safeguards" merely says that the application of district regulations may be varied "in harmony with their general intent and purpose." This appears totally inadequate and if the Cambridge board had found occasion to refer to and use this portion of their ordinance there might have been occasion for worry. The restrictions on the board in Concord are placed in several sections of the by-law depending on

when they were passed by the town with the result that they are not consistent in phraseology. We do, however, find the following:

> "substantially more detrimental to the neighborhood"
> "seriously detrimental or injurious"
> "substantially increase any detrimental or injurious effect"
> "detrimental or injurious"
> "detrimental or injurious to the neighborhood and will not substantially derogate from the purpose of this By-law"

To somewhat soften the effects of such liberal guides to the behavior of the boards in special exceptions we find some detail restrictions on the excepted uses such as the size of the signs that may show, the necessity of getting the approval of a certain proportion of the neighbors.

It is striking that with all the possible pitfalls presented by such provisions there is but little actual litigation on the subject, if we are to accept the writings of authorities in the field. The court in Massachusetts has sustained such a provision when it allowed a funeral parlor in a residence district.[1] The process may then be assumed to be valid, but at some time we may expect to find further help on the extent to which these provisions may be used.

Without the aid of cases in this jurisdiction it will be well to refer to some basic legal matters.

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1. Lambert v Lowell Board of Appeals, 295 Mass. 224 (1936)

At some time the placing of a nearly uncontrolled authority in the hands of an administrative body becomes the delegation of legislative powers. This is always subject to legal criticism. It is clear that the misuse of such powers would result in the gradual removal of the effectiveness of the zoning regulations. The formulation of a general rule to cover a whole legal jurisdiction may be almost impossible, but for local communities there may be a solution. If no measure can be set up it may well be advisable not to use the power. Perhaps in the coming review of the types of cases that have arisen in Concord we will find the broad outline of such a rule.

2. Cases Observed.

In contrast to our somewhat skeptical remarks concerning the special exception up to this point, we cannot find the erroneous cases that would truly delineate the limits of the reasonable and unreasonable in the cases in Concord. We may approach the answer but on the whole the work of the board in Concord has been so careful that the results are good in general. As noted previously 59 out of 69 cases of this type were granted in that town.

A typically harmless provision is that in the Concord by-law which permits the board to allow the

conversion of single houses to double houses in the single residence zones. This has been very extensively used in the past year during the housing emergency. Further it is an extremely logical provision in a town where there are a great number of large old houses which are gradually becoming uneconomic and will only fall to ruin if maintained in expensive single family use. But even this liberality has not been unrestricted, for the board has found occasion to limit the number of persons which can occupy some of the converted residences. Thus there may not ensue the crowded conditions which may result from a conversion. This the board feels is a way of preventing such a place being a detriment to the neighborhood. Time limitations and limitations to the present owners have been used also to assure the integrity of their permits.

Another type of problem has been met in Concord with the most liberal sort of provision in the way of special exception that one could consider. Section 6 (h) reads as follows:

> "A permit to carry on in a general or single residence district a profession or occupation not classified as an accessory use customarily incident to residential use or in a business district a business not permitted by Sec. 3 of the Zoning by-law, may be issued by the Building Inspector with the approval of the Board of Appeals, if said Board, after notice and a public hearing, shall be of the opinion and shall find and rule that such use will not

> be detrimental or injurious to the neighborhood and will not substantially derogate from the purpose of the By-law; . . . . ."

Early in the days of the board of appeal of Concord it was decided that certain uses were accessory uses. Among those were doctors and dentists. Soon the question of allied medical fields arose as well as the doctor who wanted to have his space in someone else's house so that that person could serve also as a sort of secretary. All these matters have quite reasonably, but under limited conditions been allowed in the residential areas of the town. One of the chief factors in these exceptions has been the almost total lack of initial opposition, as well as lack of opposition at later times when renewal hearings have been held.

Under a more specific exception tourist homes have been allowed with strict limitations different in each case, except that all have been for three year periods. Detail controls included parking area and size of signs. Again the opposition has not arisen even after several years of activity. This is a way to meet a need arising from the historical and educational aspects of life in the town.

Permission has frequently been granted to allow home industries under the above quoted Section 6 (h). Most of them were to be carried on in some

already existing garage, and in every case with not more than one helper. A single denial of a request of this type occurred when someone wanted to install store windows in a single residence district. Denial here was due to the noise that would accompany loading and unloading. Again these have been renewed time after time without complaint from anyone.

Provision for tea rooms, or gift shops to be included in a private dwelling was made in a special section of the by-law. A somewhat stricter attitude is to be observed here, with two out of four requests turned down. Of these one was a case where someone bought vacant land and wanted to build a house with tea room and gift shop included. Although the by-law permits such structures to be built, the board stated that it would derogate from the intent of the by-law. It may well be that it would be unwise to start building such structures so we see the board using an increasing degree of restraint.

Filling stations have been allowed along the main highway under a special permit section requiring approval of a certain proportion of the neighbors. The board has seen fit to allow only a certain number of such places on the basis that an excessive number will be detrimental.

The last substantial group of special exceptions takes care of the removal of sand, gravel and loam. The granting of these permits is made with the possible requirement of a bond which has been enforced at times. This possibly is one group of powers that has been unfortunately used. One of the pits now being used is objected to regularly at every renewal hearing by neighbors. This particular one makes one of the main entrances to the town quite unattractive, and must considerably reduce the value of land in that area.

3. The Standards to be used in Appraisal.

We have tried to skim over the types of cases which bulk large in this work of the Concord board. We have not discussed the activity of the Cambridge board in this respect because there is no indication that they have made any decisions under this provision although certain of the cases seem to fall within the limits of the special exception concerning the expansion of non-conforming uses. Can we from the cases before us see a way in which to set up usable standards of conduct in the processing of special exceptions?

It is almost absurd to say they must be reasonable, for there are almost no bounds to that. "Detrimental to the neighborhood" is nearly a measurable thing in

that the neighborhood will respond if it is detrimental, and while the judgement of neighbors should not be controlling it must be a powerful factor. "Derogation from the intent of the by-law" is a help but it is almost impossible to determine what the intent is. In a town such as Concord certainly noise is a definite factor, and we find the board has so found. Traffic disturbances should be kept at a minimum and by limiting the size of some of the projects permitted under special exceptions the board has effectively accomplished this. But certain services are a necessity and benefit to the town and by allowing doctor's offices at suitable places the board has recognized that fact. So also with the provision of filling stations they are allowing the meeting of a need which will bring an economic benefit to the town with negligible damage.

Mere words will not further describe the limits which must be placed on a board to assure its smooth handling of such cases. What has made these permits largely sound is a quite clear understanding of what the purpose of each special exception is and a use of time restrictions to allow the board to remain in control. If such a process is to be inculcated in the minds of other boards it must not be done by further

words of a descriptive nature but by directing their attention to their work. Somehow each appeal must involve a fuller statement of the case in relation to each of the limiting factors of the by-law or ordinance.

We are here beginning to invade a territory of study which can be better and more fully considered with a study of the variance, so it is to that that we will turn now.

CHAPTER VII

VARIANCES

1. Variance Powers of Boards of Appeal.

In Chapter I a general discussion of the powers of the board of appeal was presented. We have now traversed the activities of our two boards in relation to the first two powers and the time has come to discuss the third. While in the statistics presented in Chapter III it was shown that Concord used the special exception to accomplish its decisions and Cambridge used variances, we must point out here that the latter is the more usual situation. Statistical studies made in previous years in other communities have indicated this. Therefore we are now approaching the most vital part of this field.

First we will distinguish between the powers held by the two boards under review. Both communities are limited by the terms of Chapter 40, Section 30, of the General Laws, parts of which were quoted in Chapter I of this report. The only other factor involved in the work of the Concord board is a section of the by-law referring to the then existing powers as set forth in Section 27A of the General Laws effective when the by-law was passed which is as follows:

> " . . . . and subject always to the rule that due consideration shall be given to conserving the public health, safety, convenience, welfare and property values."

This phraseology does not seem to have affected the thoughts of the Concord board as being any different from the statutory provisions of Chapter 40, Section 30.

In Cambridge we find some further amplification of the variance powers after an almost word for word citation of the statute, as follows:

> "Before any variance may be granted, it shall be shown that special circumstances attach to the property covered by the application which do not generally apply to the other property in the same district; that because of said circumstances, property covered by application is deprived of privileges possessed by other properties in the same district and that the granting of the variance is essential to the enjoyment of a substantial property right possessed by other properties in the same district; and that granting the variance will not result in material damage or prejudice to other property in the same district and vicinity.
>
> If the Board of Appeal determines by a concurring vote of all of its members that the proposed variation relating to the use, construction, or alteration of a building or premises, or the use of the land can be granted without impairing the general purpose or intent of this ordinance, then the Board shall adopt a motion embodying their findings in the above mentioned specific points . . . . ."

It would appear that since the legislative body in Cambridge decided that further qualifying phraseology was needed that they meant to make certain that the

board used somewhat more rigorous standards than those set forth on the statute. Clearly all these words would be wasted to allow a less rigorous standard since that is not within the power of the legislative body under the enabling act. For the purposes of this paper we will try to use as a standard the powers as set forth in the statute and not dwell too much on the implications of these extra words.

Reference to both this expanded phraseology in the Cambridge ordinance and the specific words of the enabling act brings out four main considerations to be studied by a board in each case involving a variance, We find special conditions, hardship, the public good, and the intent of the ordinance or by-law. The power to vary is dependant in every case upon the impact of each of these factors on the facts of the case. For instance we can say without question that unless there are special conditions affecting the parcel involved there is no power to vary the application of the ordinance. So also there must be hardship, but the amount is a matter of judgement in each case as is the situation with the detriment to the public good and the derogation from the intent of the ordinance. In order to give the board some leeway in its actions, the statute and ordinance use the word substantial to

avoid a sort of veto condition which would arise in every case were the words left unqualified.

This approach leads us to a method of analyzing the cases which we have studied and the legal decisions relating to the subject. We shall take each of the above four subdivisions of the variance provision and try to determine what the boards and courts have considered as sufficient to permit a variance. In reference to the court decisions it must be pointed out that a court will try as a general rule to accept the judgement of such a group as the board of appeals. Further we must remember that the number of cases is at best small due to the cost of litigation and the unwillingness of individuals to undertake it. We are therefore restricted from these angles and also because the courts and boards have not precisely followed the method of attack which we are using here.

2. What are Special Conditions.

The first thing to consider in the subject of special conditions is to what they attach. The statute makes this precise by referring to a parcel of land, it says nothing of the owner of the land who may be appealing. The courts have found several occasions to make this point quite clear and various authorities have done the same.

A leading case in Massachusetts, Norcross v. Boston Board of Appeal, 255 Mass. 177 (1926) sustained the granting of a variance for the land at the corner of Arlington and Newbury Streets in Boston. It would not seem that this decision would be repeated today. The reasons which relate to special conditions were the high value of the land, which value was largely dependant on the type of structure that could be built on the land, the extension of business in the region, which affected all the lots near there, and the nearness to a less restricted height district which also would seem to have affected all the nearby lots. An often stated qualification on the power to grant variances is that they should not accomplish precisely what a change of zone would accomplish. It would seem that this is precisely what has occurred in this case. The court here was not thoroughly convinced by the opinion of the board, but stated that it could not be pronounced erroneous as a matter of law.

In Hammond v. Springfield Board of Appeal, 257 Mass. 446 (1926) the special conditions affecting the lot were a substantial number of non-conforming uses surrounding the land in question. Similarly a legal non-conforming use, that of a railroad yard, in a residence district attached special conditions to the

land so that it might be used for other business purposes, under a ruling in Marinelli v. Boston Board of Appeal, 275 Mass. 169 (1931).

In other cases mentioned in the authorities it is not possible to determine whether the court quashed the variance due to the lack of special conditions regardless of hardship or because of insufficient hardship. It appears that the court has not tried to make a preliminary and separate consideration of the matter of special conditions, but has in most instances considered the matter with a consideration of the matter of hardship. This cannot be construed as the result of a lack of potential cases on the matter of special conditions for our review of the subject as considered by the boards under study will show ample opportunity for litigation.

In attacking the case histories we will cite progressively cases from the correct to the doubtful and on to the incorrect. In the first group we find an appeal granted to build a garage in the front yard in violation of the ordinance. The special conditions which affected this lot were simply that there was 100 feet of front yard and almost no rear yard, the house having been built long before automobiles or zoning ordinances. This certainly was not a condition common

to lots in the district since most of them were set but 20 feet from the street. In another instance we find three connected houses, built before any zoning ordinance in the city, situated on one lot of land of about 7000 square feet, only a little more than required for a single house in that district. When the owner of all three decided to sell separately a variance was needed. This clearly was a special condition affecting this lot and not generally the district in which it was located.

A different situation arises when a party wants to divide an existing lot in a way not in conformity with the ordinance. This may arise in a city such as Cambridge where they are more or less regularly dividing up older properties, but often preserving the old houses. Conformance with the ordinance will often not be possible in respect to one of several lot requirements but will exceeded in respect to others. In other instances conformance will result in injury to a large old house, or an irregular lot. It would appear that in an instance where to produce a logical lot for a large old house, it was desired to reduce the area of a cut-off section of the land, and where this new lot had excessive frontage special conditions could properly be found to obtain. Likewise, where the maintainance of the frontage rules would have resulted in a cut off lot boundary passing almost in front of the large remaining house, but where

if a reduced frontage were allowed the new lot could be made excessive in size special conditions could be found to exist.

Topographical conditions may obviously be the cause of special conditions and we find them recognized as such in both communities. In one instance, where a lot backed up against a railroad cut and the ground in the rear was very unstable, special conditions were found. Concord has recognized the same type of situation where the land fell off rapidly toward the rear making the construction of a garage nearly impossible. There can be little doubt as to the right of such owners to claim a hearing.

Another situation which has arisen several times results from the effort of a homeowner who wishes to improve his property, but finds that the proposed work will be in violation of the ordinance. The fact that a house was so situated on a lot that even a chimney could not be added gives the basis for finding special conditions. So also the boards have found that where larger structures such as modern bathrooms or kitchens were to be added, but would produce a violation, there were special conditions.

A most difficult situation occurs when non-conforming uses become involved. We have seen that the

courts have recognized their significance. Even stronger than the case cited in the previous section of this chapter, Hammond v. Springfield Board of Appeal, is the instance where an addition is to be made onto a non-conforming use to expand or improve it. There would seem to be little doubt left after the above cited case that these were cases involving special conditions. (See also Amero v. Gloucester Board of Appeal, 283 Mass. 45 (1933).

Another instance where there are clearly special conditions affecting a lot is where a district boundary passes thru a lot. This condition will occur frequently where arbitrary dimensions are used to define the districts. Usually, however, the ordinance will make specific provision for this case either by definitely allowing the less restricted use to invade the more restricted district for a defined distance as in Concord, or providing for a special exception in Cambridge. Where these established provisions are found inadequate there would seem to be no reason for not presuming special conditions. One of the most extensively recorded cases in Cambridge involved a lot divided into single, two and multi-family districts, with a bit less than two thirds in the single family district. There would seem to be no doubt but that

there were reasons for considering the case of this lot so far as special conditions were concerned.

The next condition we may consider is that where the lot is the last one in a less restricted district. This is a necessary result of any system of drawing lines between permitted uses. There seem to be three general situations in which this may arise, one where a row of residence backs a row of business, another where in a street front at some time the business ends and the residence begins, and third when for some reason there is an angle in the district line which leaves a bit of residence jutting into business. The first involves no special conditions because it is general to the district. The second seems to involve special conditions as does the third. Whether either of these cases involves hardship is a matter which we will discuss later.

It seems that at this point that we have reached the limit of special conditions and cases cited from this point on will be to point out what should not be considered as such. Among the approved appeals we find one the Cambridge records is based on the following facts. In a business A district which does not permit an automobile parking lot there remains one vacant bit of land. A shop across the street requests

permission to use this lot for parking purposes. Further facts are that the present owner does not want to build at the present time but hopes to later. There seems to be nothing in this case to make the lot unusual for in every district we find vacant lots, and the desires of the owner are not conditions affecting the lot but conditions affecting his business operations. This is a case where if this lot and presumably any other vacant lot should be used for parking it is the responsibility of the legislature to change the zoning map.

In another case a property was zoned for residence B but at a later time was changed to Business B, a change that was probably justified since it was on a main artery and in an area not very attractive for residence. The owner got an opportunity to use the property for light industry and so appealed and the appeal was granted. There are numerous lots in the same category, which are being changed piecemeal to the lower use. By the very act of repeatedly giving variances in this area the board is giving clear proof that the condition is one affecting generally the district in which the property is situated. Comparable to this is a case where a man will buy a house in a residential district and immediately request a variance to convert to a funeral home. The lot has been in each

case observed exactly like the next one to it and yet the appeal is granted. This would appear to perhaps be a case for a special exception since in fact it is not a very injurious use.

Further citation of cases of this sort will not assist us further in determining what we should consider as special conditions. It might be well to note that in our study we have found 34 of what appear from the records to be this type of case. Of these the board has found occasion in Cambridge to approve 22. We find no such cases in the Concord records.

From all these citations from the courts and from the cases in two communities we must now draw a more precise definition of what should be considered as special conditions. To be useful it cannot be too lengthy for then it becomes unreadable. Therefore we propose the following:

> Special conditions as set forth in the statute means conditions of size, shape or physical conformation of the single parcel of land involved or the structures upon it, their present use, or the use of nearby parcels or structures.

3. What is Hardship.

Hardship is a very indefinite and personal term and it cannot be said that it is materially clarified in the statute by requiring that it be substantial. The courts in Massachusetts have considered some cases where the matter was pretty clearly before their minds but they have seen fit to settle each case on its own facts and avoided the promulgation of rule of law on the subject. Since hardship is such a personal matter and derives so certainly from the facts of the case we agree in their policy thus far. From the great number of cases we have reviewed, we intend to try and narrow the uncertainty to at least some extent.

First we must consider what the courts have said. In the Norcross case cited previously we noted that the court felt that the reasons stated by the board were not overpoweringly convincing but still were not erroneous as a matter of law. This then set up a borderline case and is very important to that extent. In the Hammond case they found that the inability to rent based on the fact that there were a very substantial number of non-conforming uses within 350 feet combined to produce a hardship warranting a variance. In the Prusik case the fact of being adjacent to a business zone and the owners understanding that the

property was in a business zone did not combine sufficiently to produce the substantial hardship called for by the statute. (This case is not too clear cut in that there were several other factors involved in the litigation, almost any of which may have been the crucial factor in the result.) In the Marinelli case,the fact that unless the coal company, which was being forced out of operation in one location due to the discontinuance of railroad service was allowed to use the land in question, which was in the same area of the city and which it had agreed to buy or lease, it might be put out of business entirely,was sufficient hardship to warrant a variance. Coleman v. Boston Board of Appeal, 281 Mass. 112 (1932) presented a set of facts not dissimilar from the Hammond Case. There were a considerable number of non-conforming uses nearby, there was a great volume of traffic on the street, and the owner had been unable to rent his property. It was expected that the completion of a subway extension nearly completed would increase the commercial aspects of the area. The court, however, felt the situation was different. This appears to be correct, for in the Coleman Case the stores were all gathered together in one block across a wide street, while in the Hammond Case they were scattered generally about. The fact that there seemed

to be a public convenience to be served seemed to add enough to the situation in the case of Amero v. Gloucester Board of Appeal, 283 Mass. 45, (1933) to support a variance. In this case a man operated one gas pump on leased land as a non-conforming use. He desired to build a new pump on his own land which was adjacent, at the time when two grades of gas became popular. Here then the financial hardship was augmented by a benefit to the community. The case of Phillips v. Springfield Board of Appeal, 286 Mass. 469 (1934) clearly set forth the principle that mere inability to rent property as a conforming use did not provide the basis for variance. The stiffest case so far as setting up the restrictions on variances is the case of Brackett v. Boston Board of Appeal, 311 Mass. 52 (1942). The facts are rather extensive and go this way. A hotel in a residence district was having trouble finding parking space for its guests. They purchased a vacant lot across the street which was also in a residence zone but restricted by private deed to single family use. It was also the last lot in the residence zone. The court over-turned the decision of the Board of Appeal, ruling that there was not sufficient hardship. They pointed out among other things that the hardship, the need for parking facilities, applied to the hotel lot, not the one in question. They put themselves

clearly on record so far as lots on borderlines between zones are concerned by the following statement.

> "In any scheme of zoning it would seem that the establishment of boundary lines may impose some hardship on premises on that side of the line where the conditions as to use are more onerous, but if this results in a general burden upon the premises so situated, the question whether there shall be a change in the boundary lines is not for the board of appeal to determine."

This case is a startling one for the strictness of the view they have taken, and hardly seems to follow from the general idea of the Norcross Case of 16 years earlier. There it may be recalled one of the major factors was the nearness of the less restricted zone, not even a problem of being adjacent. It would be interesting to contemplate what the court would have said if the applicant in the Brackett case had not been the hotel but another. It would appear that the court failed to see things about this case which it has seen in others. It would seem that a good hardship case might be made out on the following basis.

The lot involved was vacant unlike almost all the others nearby. It was subject to a deed restriction limiting construction to single houses and under changed economic conditions it was not possible to make any use of the property as zoned since no one would consider building a single residence in that area

at the time. There was a clear benefit to be obtained by the community by providing a parking space even if limited to the use of the patrons of one organization. The benefit would even extend to the other houses in the residential zone. The probable results of such an action would have been to raise values in that part of town. Further the matter was not the subject of a zone change since the result would not be accomplished by a change to business since that would only serve to aggravate the parking difficulty in the general area.

It seems then that the court has finally come to a very stiff position in regard to variances as regards hardship, but has attained that position on the basis of a set of facts that should have produced a different result. As we progress to the actual cases decided in Cambridge and Concord we will see that the actual attitude of a board is much more lenient. The cases in Cambridge were all decided after the decision in the Brackett Case. The striking thing about a great proportion of the hardship cases is that the hardship is one of business rather than land. The board will constantly grant a variance where the hardship has no relation to the lot involved.

Trying to set forth a group of cases to show what has been considered hardship is very difficult

from the cases available in the records. A few obvious ones do appear such as the cases where the sale of land is concerned. Cases have been mentioned in our discussion of special conditions which are justas relevant here. For example there was the case where the man wanted to divide his land and three existing dwellings into three land parcels. Clearly we could say that it would be a hardship to require that these three houses should always be sold together. Similarly when a lot was divided before the ordinance in an area let us say 10% less than the area required by the ordinance, we should not today say that a man cannot use his earlier investment. If we did refuse his appeal we would be putting a distress value on his land and he would stand a great loss.

The repercussions from the impact of an ordinance upon a lot and house that existed before the ordinance was passed are not dissimilar from the above cases. So in the instance where the appellant wanted to build a garage in the front yard due to the lot and layout it would be a hardship if the owner was required to walk a long distance to a public garage. The rental on the public garage would be not the only or prime motivation of hardship, but would be combined with the necessity of going for the car, which necessity would not be faced by other houses in the zoning district.

Another case involved the need of adding on to a garage to make it large enough to house a modern car. The only other alternative was to rip out the back end of the garage and add on at the expense of considerable space inside the house when the invasion of the side yard and violation of the ordinance may have totaled 4 feet.

A somewhat closer problem arises when it is desired to divide a large lot into two one of which may not conform to the ordinance for either frontage or area, but may be excessive in the other, while the main lot is excessive in both. These cases have been approved and again it seems to be a hardship that the lot always remain in one ownership when the divergence is so small. Yet the hardship is hard to define. The hardship would seem to be that the land would be frozen in a size of lot which is unwise today, and the subdivision in accord with the ordinance would produce an absurd shape of lot and thereby complicate the matter of ownership.

There are numerous other cases along the general line of the above which seem to involve the same general type of hardship, a hardship of not being able to use the land as others in the same district can use it.

Another big group of cases where the hardship

is quite substantial are those involving the expansion of non-conforming uses. Where a business is expanding through the normal efforts of management it would be a very great hardship if it were tied down to its size when the ordinance was passed. The results are of course monetary, but there are difficulties of management which are a bit different. There remain three alternatives to a business in this position, to remain in cramped quarters, to set up a subsidiary plant, or to set up a wholly new operation, all of which are difficult processes. There then seems to be little doubt that in many instances when a non-conforming use outgrows itself that we would find real instances of hardship. The situation is such that efforts have been made to cover this specially in the Cambridge ordinance by making it a special exception with very precise limits. The problem is a very real one and some way must be found to meet it for the method tried in Cambridge does not seem from the record to have been successful. For the moment we will say that this type of case should not be treated as a matter of hardship.

Certain special cases arose as a result of the war and the peace which would not have arisen in other times. During the war when building was at a standstill, many small manufacturers were badly crowded

for space. Also due to the shortage of goods for sale there were many vacant stores. It became quite common for this type of concern to try to operate part of their business in a retail store. Often this occurred without consent of the building inspector and cases arose on complaints from neighbors. There seems to be little question that under normal processes there was no right of variance. The mere inability to rent a store due to there being too many certainly does not constitute sufficient hardship to allow the introduction of industry. The war conditions being as they were the granting of a variance was probably wise for in relation to other aspects of the variance power to be mentioned later, the hardship was probably sufficient.

To continue the picture of hardship we will try to describe some cases which do not involve hardship, many of which were approved. Often a man has acquired a house in a residential district for his own use as a home and then immediately requested a variance to use it as a funeral parlor. His sole hardship is that he has bought a house too big to live in and he wants to use it in part for business. There is often nothing to prevent it being used economically within the limits of the ordinance, but there is more profit in it the other way.

There is a standing pressure on the part of apartment builders to cut down the size of the side yards provided in the ordinance. Out of four or five such cases, in only one was it possible for the appellantto show even half way decently that it was physically impossible for him to build a reasonable apartment on his lot within the limits prescribed. In the other cases the sole desire was to get more dwelling units on the land purchased and so to increase the profit. The board of appeals should not allow itself to become the means whereby a buyer can pay too much for land expecting to get a variance. So also there is no reason why the board should become an insurance agancy to cover the poor estimates of real estate operators. A comparable type of request is that urging that a builder be able to go above the available height limit. The reasons for such a request are no better as a general rule.

Parking spaces are always causing some trouble in a city as crowded as Cambridge. As the ordinance stands now they are allowed only in Business B districts. Requests have come from random types of property owners all wanting to use some vacant land for this purpose. In every case the complaint was based largely on the hardship of a nature related to an adjoining business

rather than the land itself. In one instance the owner admitted he wanted to keep the land open pending the building of a permanent structure. Another found that he could not satisfactorily make use of his house as a rooming house as he had planned so desired to sell it to a nearby store. In another case an elderly lady thought it would assist her income and payment of taxes. There is a marked tendency to approve parking space cases regardless of reason. Only one seems to have been refused.

The further repetition of so-called hardship cases will not clear the matter up particularly. It is all too clear that the Cambridge board is considering some sort of convenience, not substantial hardship. The Concord board seems in its few cases to have followed a bit clearer line. In one instance the latter group did find hardship in the fact that a lot was adjacent to a business zone and permitted the construction of a doctors office which in appearance looks like a house. There seems to be some good reason to allow some such latitude in the board in spite of the wording of the Brackett Case.

At the end of Section 2 of this chapter we stated what seemed to be a more specific definition of the term Special Conditions as given in the statute.

To follow it with an adaquate definition of hardship, more than that, substantial hardship, does not come easily. We note from our previous paragraphs that the courts and actual boards have not found the answer. We find results that indicate that the thought involved means inability to use the land in the most profitable manner. Another case tends toward the idea that it would be inconvenient. The Cambridge ordinance has said that the granting of the variance must be essential to the enjoyment of a substantial property right, and yet the Cambridge board seems to have taken an entirely too liberal meaning of this phrase. Do we then find that the hardship need only be that it is impractical or difficult to use the property in the manner for which it is zoned, noting especially that this difficulty must come as a result of special conditions as defined above? It seems that it is this relationship which would serve best to circumscribe the actions of the board. We therefore propose the following more complete wording of the phrase:

> Hardship is difficulty or inconvenience, resulting from special conditions. To be substantial the special conditions must result in the inability to make use of the land as zoned, but it cannot be the result solely of a past, present or future value.

4. What is Detriment to the Public Good?

This phrase offers us little more assistance than the term hardship. The courts have found little occasion to discourse on the subject. They have, however, mentioned it as well as its oonverse, the conferring of a benefit to the community. The matter is so broad in its aspects that we can go but briefly into it here.

In the Hammond case the court recognized the fact that the neighborhood was in need of new stores and one may conclude that they there had the idea that the store would confer a benefit to the public good. The other side of the matter came under review in the Marinelli Case where the court stated that there would be no detriment to the public good in that the coal pocket there involved would not be any more detrimental than the railroad yard already in existance. Like the Hammond Case the decision in the Amero Case recognized that there would be a benefit conferred upon the community if the filling station involved were able to sell two kinds of gasoline. Unfortunately the court did not feel greatly persuaded in their review of the Brackett Case by the clear benefit to the public good in the provision of off street parking under the facts of that case. It would seem that the benefit here conferred should have weighed more heavily.

Both the Cambridge and Concord Boards have found occasion to notice the matter of detriment to the public good, or its opposite benefit to the public good. Concord has seen fit to decide that a garage can be built within the side yard limits where in fact it cannot be seen by the adjoining landowner due to the position of the latters garage and the location of the petitioner's garage many feet from the street. It was also obvious that the addition of a new chimney to an old house which would encroach 8 inches into the side yard would be no detriment to the public good. It was decided that where a man wanted to move a non-conforming barn to another non-conforming position on his lot, but where the latter one was much better, would be no harm to the public good. Where a man wanted to build a porch which would have cut off the light and air of his neighbors the board had no hesitation in refusing the appeal. A final case in Concord involved a lot in a residence zone adjacent to a business zone. The board there allowed the construction of a building for doctor's offices. Here was a clear instance of conferring a benefit since it provided a center for medical activities in the town which would provide better service.

There are 98 cases in Cambridge which involve the matter of detriment to the public good to a certain extent but in nowhere near all of them is the matter discussed in the records of the hearings. Certain appeals were granted because there was clearly no detriment to the public good.

The cases which have been mentioned before involving the subdivision of lots and existing houses, the invasion of side and rear yards with garages were allowed easily because garages so located were common to the city before the passage of this ordinance. The board has felt, it would appear from the record, that the addition to an already non-conforming use would be no detriment to the public good. One may assume that the extension of such a use will not be particularly worse than the existing condition which trend of thought is sustained by the Marinelli Case. In a couple of instances there has been a revolt from this policy the most vigorous being a case that involved the expansion of a beer trucking station.

This last mentioned case brings up what is apparently the most relied on determination of detriment to the public good, namely, how much of a fuss is made and by how powerful a group. Where the objectors can go so far as to get the City Council to pass a motion in

opposition to the variance the ultimate in influence has been reached. Most cases do not go that far depending more on the individual Councillor from the district, the local church or even in special cases such groups as the local historical society. Each has had its say in special instances.

While the importance of such groups is great, especially when the City Council feels moved to act, boards should not be fooled by them. Where, for example, the owner of a lot divided by a zone line wants a variance to permit the construction of a new part of a store in the residence part of the lot, the objections of the local historical society to the change on the ground that it would injure the historical importance of the older building on the lot, the board should be very skeptical. So also the objections of the adjoining owner to the prospective use, when he had just obtained a considerable variance from the regulations on his lot should not be worried about too much.

A major factor in this problem should be the relationship of the proposed project to projects that are already in existance nearby. As a general rule it would be hard to say that the extension of a business zone and business uses for thirty feet or so beyond the present zoned business would be any serious detriment

to the public good. So also the extension of a two family house over the border into a single residence zone has no great effect on the public good in and of itself. These above comments are of course based on the assumption that special conditions causing substantial hardship have been shown. From the above it can be seen that detriment to the public good cannot be expected to be a strong control where the property involved lies adjacent to a district line. Above we have pointed out its weakness when non-conforming uses are involved. We can, however, assume a detriment when any lower use tries to invade the center of a district from which it is excluded, and in that instance there would seem to be the need of conferring a benefit upon the community if a variance is to be issued.

We seem then to have come again to a point where the subject is almost too broad for simple definition by words. It is of necessity an absolutely individual matter dependant entirely upon the facts. If detriment is not definable in words we need not necessarily assume that it cannot be the basis for judicious judgement. To this end we propose a definition or description of the term that will at least bring to a focus the matters that should be considered at a hearing.

> Detriment to the public good is that aspect of the granting of a variance which tends to rouse the general disapproval of the public or neighborhood in a manner that cannot be specifically classified and the importance of the aroused opinion should be considered with great care never allowing such opinion to outweigh substantial hardship.

5. <u>What is Derogation from the Intent of the Ordinance?</u>

The last limitation on the granting of variances is that a variance shall not derogate from the intent of the ordinance or by-law. Fortunately there is more specific guidance on this matter than there is on any other of the limitations placed on variances, for there is a long list of purposes and intents at the beginning of the statute and most ordinances or by-laws. Section 25 of Chapter 40 goes in part as follows:

> "Such regulations and restrictions shall be designed among other purposes to lessen congestion in the streets; to secure safety from fire panic and other dangers; to provide adequate light and air; to prevent the over-crowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; and to increase the amenities of the municipality."

The City of Cambridge has rephrased these intents by including at the beginning of their ordinance the following purposes and intents:

"The purposes of this ordinance are to promote

> the general welfare of the City of Cambridge to protect the health of its inhabitants, to encourage the most appropriate use of land within the city, to insure the value of property, to lessen the congestion in the streets and ways, to avoid undue concentration of population, to provide an adequate supply of light and air by regulation the location, use, and height of buildings and the area of open spaces about them, and to reduce the hazard from fire."

And further:

> "In interpreting and applying the provisions of this ordinance, the requirements contained herein are declared to be the minimum requirements for the purposes set forth."

The town of Concord in its by-law makes no statement of intent so we may presume that it accepts the principles set forth in the statute as quoted above.

In the cases which the matter of variance has been under review the court in Massachusetts does not seem to have gone into much detail on this matter of intent as it affects variances, yet there would seem to be a great deal of possible material here. Clearly they did not feel that where a benefit in accord with the intents of the ordinance was to be conferred by the variance it was a matter of importance. We refer here to the Brackett case where there would have been a marked lessening of congestion in the streets had the variance been allowed. This appears to be

somewhat in conflict with the willingness to use the benefit to be conferred in the Amero Case as a means of partially justifying the variance. While the statute states that no variance shall be granted where it would derogate from the intent, the courts have a slight idea that if it encourages the intent, or furthers the intent, that a variance should be granted.

While the court has not found it necessary to make a clear statement of this general idea, it is clear from the rulings of the boards under review that the conferring of benefit in accord with the intent of the law should be an important reason for granting a variance. We have mentioned before a few cases in Cambridge were regardless of special conditions causing hardship it has been found possible to allow parking spaces in restricted districts apparently on the basis that they would improve conditions in the community. To the mind of the board it has seemed to be more beneficial to allow parking in a restricted area if it is possible than to adhere to the precise terms of the ordinance. The board has allowed very weak special conditions, actually nothing more than the fact the lot was vacant to provide the basis for conferring the benefit. Using the same approach with different facts the Concord board allowed a variance

to allow the construction of a medical office in a residence district considerably on the basis of the benefit to be conferred.

These instances where the boards have allowed variances to confer a benefit are far outnumbered by cases where they have not considered the matter of derogation from the intent of the law at all. While the intent is to a limited extent set out in the above quoted sections of the statute and ordinance the actual body of an ordinance will include many matters which are an expression of intent, for that matter the whole ordinance is the mere putting into measurable quantities of the intents, as specifically set forth in the second part of the above quotation from the Cambridge Ordinance. Therefore if the ordinance makes it necessary to have a side yard of 15 feet in a certain district the allowing of a reduction to 10 feet is a substantial derogation from the intent. The same conditions would apply to the reductions of ~~side~~ front and rear yards. There would remain a real distinction between the case of a whole apartment structure being allowed a variance such as this and a single garage covering perhaps not more than 20 feet of yard being allowed such a variance. Instances of both have been mentioned before in this paper and are merely cited again at this time in a general way. So also if

the ordinance states that funeral parlors shall be allowed in business districts there is a considerable derogation from the intent when they are allowed in a residence district. Yet the board in Cambridge has seen fit to allow a couple of such cases to pass, perhaps we may assume on the idea of conferring a benefit. There can be no clear justification for allowing a variance as to use only a matter of months after the legislative body had made a specific use classification of a specific parcel of land and yet the board in Cambridge has done it.

The most serious violation of the intent of the ordinance as it is written in Cambridge has been in the matter of non-conforming uses and their expansion of repair. The ordinance has a clearly stated provision for the consideration of such case which reads as follows:

> "(the board may) . . . Permit the alteration or extension of a non-conforming building or use, provided such building or use is neither increased in volume nor in area during its life by more than twenty-five (25) per cent or is altered during its life to an extent not exceeding fifty (50) per cent of its assessed valuation at the time this ordinance takes effect, and provided such use is not altered to a less restricted use."

This would seem to be a clear expression of the intent to hinder the prolongation of the life of non-conforming uses and yet the board in Cambridge has made almost no

use of this clause. Reference is not made to it either by the board or parties since the board simply handles all cases as variances which is clearly in error. It seems to us that any granting of a variance for a non-conforming use is a substantial derogation from the intent of the law in Cambridge and would require extreme qualities of hardship to support it. We note here again that it is a failure to really know the ordinance that causes the difficulty. If the Cambridge City Council had meant to allow all non-conforming uses to continue without limit there would have been no need for such a clause.

There is another body of the government that becomes vitally interested in the zoning ordinance when intent is concerned, and should have some opportunity to regularly make itself heard, namely the planning board. In most communities this group will either have written the ordinance or assisted some special commission which actually wrote it. In any case it is considered the custodian of the law and is responsible for preparing and reviewing changes. If this is the case their opinion becomes very important in the matter of variances so far as intent is concerned and their opinion should have considerable weight. In Concord the Planning Board almost always either sits in as a

group on appeals hearings or has a spokesman there. In Cambridge this is not the case, and it is only with difficulty that the Planning Board can make itself heard. There are numerous letters from the latter expressing their attitude on various matters but the board of appeal does not seem to take too much interest in them. Such was the case when a district line passed thru a lot and resulted in part being in business and part in residence. Even the statement that it could not have been the intent of the zoning board to thus divide an existing business lot did not convince the board of appeal. Likewise the objections of the Planning Board to various variances for reduced side yards have had little or no effect. In the future provision should be made to inform the Planning Board of all hearings and decisions along with other interested parties.

There would seem to be no particular benefit in repeating the facts of cases since there is such a broad field to cover in the matter of intent. The cases cited in the previous sections of this chapter show how every set of facts will have some relationship to the matter of intent. So also it can be said that the extent of the derogation often is not given much consideration. There is a repeatedly marked tendency to

consider a multitude of generalities without referring them to the wording of the ordinance.

From the above brief discussion of intent we must try to draw up a guide in order to better direct the attention of boards to the consideration of this matter. We propose the following wording:

> In the consideration of a variance, the board should give due consideration to the intent of the ordinance by a statement relating to at least some of the matters of intent as stated in the law, such as to promote the general welfare, to protect the health of the inhabitants, to encourage the most appropriate use of land, to insure the value of property, to lessen the congestion in the streets, to avoid undue concentration of population, to provide an adaquate supply of light and air, and to reduce the hazard from fire, and further should report the opinion of the Planning Board on the matter where given.

6. The Variance Power as a Whole.

The time has now come to summarize the various statements that have been offered as guides to the improved operation of boards of appeal. It is our opinion that the plain repetition of the words of the statute in an ordinance is not sufficient and that it is better to substitute some other phraseology amplifying and detailing the statute which is too broad in scope to be effective, a phraseology that will include the ideas that have been developed thru many years of experience and litigation. We therefore would include in that

section giving the board its powers the following:

> The board shall have the power to grant a variance when in their opinion there are with respect to the single parcel of land with respect to which appeal is taken special conditions of size, shape, physical conformation, or the use of it, or the structures upon it or their use, or the condition and use of nearby parcels or structures which produce hardship in the use of the land as zoned, but not without giving stated consideration to the amount of detriment to the public good, as expressed by the community or parts thereof, and not without giving stated consideration to the amount of derogation from the intent of the ordinance which includes the following, to promote the general welfare, to protect the health, to encourage the most appropriate use of land, to insure the value of property, to lessen the congestion in the streets, to avoid undue concentration of population, to provide an adequate supply of light and air, and to reduce the hazard from fire, and not without giving consideration to the opinion of the planning board on said appeal.

It must be pointed out that this is but one of a series of steps that aim at requiring a closer attention on the part of boards of appeal to the substance of the law and the facts of the case which relate to it.

CHAPTER VIII

CONCLUSION

While we have traversed the field of activity of boards of appeal and have made several comments concerning what have been more or less details, the time has come to prepare a corrective program for the main fault in their operations, namely their failure to know their job as defined by statute and judicial interpretation. The first thing to do is to place an expanded definition of the powers of boards of appeal in an ordinance or by-law which will better focus attention on the matter of major importance, the necessity for special condition where a variance is under consideration. This may be done in the manner suggested at the end of Chapter VII above.

If we thus accomplish a better statement of the law as it applies in each case we must now provide a means whereby people will become aware of it. We have noted that the Cambridge board does not seem to have used parts of the law provided and in the light of this fact we want everyone involved to become aware of as much of the law as possible. As things are now, appeal is made on a simple form and it is probable that in most cases the appellant only knows that he can appeal

in the case of hardship. This is inadequate since the hardship as we have pointed out above is the secondary aspect of the matter. Existing records indicate that appeals are purely as a matter of convenience or desire. If a form of appeal can be developed which will direct the appellant's attention immediately to the law, many cases might be dropped before the start and accordingly more time would be left for the important ones. Obviously one of the first things to be required of the appellant should be that he state the type of appeal that he is making and where he wanted a variance he should be obliged to state his special conditions. To this end we propose that the following information should be required on the Appeal Blank.

1) A statement by the Building Inspector as to the section of the ordinance to be violated by the proposed construction.

2) A statement by the appellant that he appeals under a special section of the zoning ordinance namely; administrative error, special exception, or variance.

3) A statement of the reasons for appeal from an administrative error.

4) A statement of the section number under which a special exception is requested.

5) Where a variance is requested the appellant should answer the following questions.

   a) What special conditions of size, shape physical conformation, or use of the land or the structures upon it, or the condition and use of nearby parcels or

structures produce a hardship in
conforming to the Zoning Ordinance.

b) What is the hardship.

And further should state that he is aware that the board of appeal cannot grant a variance which would be detrimental to the public good or derogate from the intent of the ordinance, which intents should be restated in full on the appeal form.

While this amount of information may seem a bit on the heavy side, it is no more than would be required of the appellant at the hearing later on. By this means he would be required to think out his case at the time he appealed and less time would be spent at the hearing talking over irrelevant matters.

To properly prepare a case for appeal a party should have some idea of what has happened before. In spite of the statements that each case is a different case and should be decided by itself, as the number of cases increase over the years, facts will begin to repeat themselves. In certain instances they have already done so. In order that a sort of case system may be built up there should be a regular catalogue kept of all decisions so that reference to them would be easy. The exact form of such a catalogue would be dependant on the substance of the local ordinance, but certain things would naturally be included. Among them would be the zone, the use,

matters of coverage, accessory use, the section of the ordinance involved and of course which power was involved. Such a catalogue need only have a reference as to the decision and a reference to the actual case number. If available to the public through the building inspector everyone would have a chance to find out what has happened in similar cases and needless appeals would be avoided. Naturally the board itself would use it to assure at least a reasonable consistency in its decisions.

The final recommendation stems again from the same matter of lack of knowledge of the powers involved in appeals. The return must be improved so that it is not a mere repetition of the statutory words but is a judicial document. The courts have had their say as noted before, but the current results do not indicate that their opinion has gotten to actual boards. In the ordinance there must be a clear statement that the return must give the reasons whereby the board fround special conditions, hardship, lack of detriment to the public good and derogation from the intent. This will avoid the policy of giving decisions which are unsupported by facts. So also such a policy would considerably assist in the developing of good records and a better understanding of the

actual processes involved in a zoning appeal.

Throughout this paper there has been but one main purpose which was to discover the flaws in the operations of boards of appeal and from that to develop ways of improving their work where needed. The time has come to again quote from the decision of the court in the Prusik case:

> "there must be set forth in the record substantial facts which rightly can move an impartial mind, acting judicially to the definite conclusion reached."

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