ZONING VARIANCES
CITY OF TUCSON, ARIZONA
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by
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STATEMENT BY AUTHOR

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Date: May 1, 1972
A review of zoning variance actions in the City of Tucson shows that the quasi-judicial powers of the Board of Adjustment have been used to circumvent or alter the letter and intent of the zoning process. It appears that the Tucson situation is an example of a very common problem. Detailed investigation of ninety cases shows where and how abuse of discretion and due process occur. Recommendations to solve these problems are presented in the form of proposed zoning ordinance changes.
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CHAPTER I

INTRODUCTION

This internship report is an attempt to analyze zoning variances as heard by Tucson's City Board of Adjustment during a given period, and to examine the appeals and decisions made during that time. Such analysis will contain specific direction in displaying problem areas of those variances allowed, the procedural "breakdown" of the Board of Adjustment decision-making process and what "immediate" workable solutions, under present statutory framework can best be applied effectively to change those weaker aspects of the present zoning variance procedure.

The Zoning Variance

Zoning variances can best be described by first examining the process from which they evolve; this being a local zoning code or ordinance. The variance process must operate within certain limits, these limits usually take on the form of local zoning or land use controls which are prescribed and allowed by law, usually, and in the case of Tucson, these laws are set forth by the State. In Arizona the designation becomes the Arizona
Revised Statutes. Zoning is a designated power delegated to incorporated Arizona cities and towns in the form of State Enabling Legislation set forth for the expressed purpose of promoting the health, safety and general welfare of the community for which it is established.

Zoning is probably the single most commonly used legal device available for implementing the land use plan of a community. Zoning is essentially a means of insuring that the land uses of a community are properly situated in relation to one another, providing adequate space for each type of development. It allows the control of development density in each area so that property can be adequately serviced by such governmental facilities as the street, school, recreation, and utilities systems. This directs new growth into appropriate areas and protects existing property by requiring that development afford adequate light, air and privacy for persons living and working within the municipality.

Zoning variances then are the measures or vehicle by which a body is authorized to hear and decide unique

or hardship appeals from those restrictions or designations prescribed in the local zoning ordinance. In the case of Tucson this body is the City Board of Adjustment, in other cities or towns it may be referred to as a Zoning Board of Appeals. The legality and limits of such jurisdiction are discussed in detail in later chapters.

Overview of the Report

Throughout this report analysis, certain problems associated with granting specific zoning variances are often obvious and sometimes stretch the imagination of even the most liberal legal minds. Even those variances allowed which do not have obvious signs of incredibility often induce problems of a related nature adversely effecting the planned development of an area in some future aspect. These then are situations which prompt evaluation of decisions on zoning variances and are included within the report focus.

The over-all disregard for planning principles, theory and legality often leave much in the way of promoting any sense of health, safety and general welfare, as originally intended under the State Enabling Legislation.

In this report on the variance process, I focused in on a period dating from June 1, 1970 to January 1, 1971.
During this period, the administrative body which has the jurisdiction to decide variance cases, the Board of Adjustment, had before it 90 cases of which approximately 52 involved the application for a variance. The remaining 42 per cent or 38 cases concerned primarily the special problem of non-conforming uses, categorized generally as a special exception. Several areas were concentrated on by myself as staff advisor to the Board of Adjustment, when studying the applications for this seven month period. First of all, the statutory framework was examined to ascertain if the ordinance provisions relating to variances were adequate in terms of clarity and constitutionality, specifically to determine if there were any internal inconsistencies in the ordinance. Secondly, I examined the composition of the Board of Adjustment and its decisions to determine if that body had misinterpreted its function with respect to the variance process. Specifically in this regard, the kinds of zones, (e.g., R-1, R-2, B-1, etc.), involved in the cases were looked at along with the type of variance the applicant sought. The Board's susceptibility to the presence of an attorney, architect or engineer or to a showing of protest against the proposed variance was also inquired into. The cases were also examined to determine what influence the planning staff
has on the decision-making process of the Board of Adjustment. Third, the applications were examined to determine if the requisite "special condition" or "unnecessary hardship" was present which justifies the Board in granting the variance. Primarily, I was concerned with whether the Board presumed hardship in most cases or whether they even knew what a hardship was. Additionally, the findings of fact were examined to see if there was substantive evidence present to warrant a grant or denial of the variance. Finally, I also examined the cases with respect to how many of the variances were granted on conditions imposed by the Board. After correlating all the material gathered in the process of delving into these areas as well as the area of variance administration generally, I made the findings and drew the conclusions that follow.

The final chapter includes those amendments, best suited for Tucson's legal and administrative structure, the Tucson Code, specifically relating to the Board of Adjustment's jurisdiction. The amendments to this section of the zoning ordinance demonstrate the best alternative in strengthening the decision-making process to the extent that the City Board of Adjustment may better serve in the public interest.
This final chapter reflects what I believe to be the practical function of the internship report. As a staff member directly responsible to and for the City Board of Adjustment, I gained first hand insight into the immediate problems faced in its operation. This study, along with many hours of day to day work covering planning and zoning principles, theory, and practical operations, have allowed me the opportunity of applying the educational techniques with the operating experience to produce a practical and highly applicable solution. The amendments suggested are based on case law, constitutionality and common sense expressed accordingly in the best interest of the public health, safety and general welfare.

As a concluding remark in this introduction, I am compelled to state that unfortunately the variance process as administered by the City of Tucson's Board of Adjustment is typical of that which is found throughout the Country.

CHAPTER II

THE ZONING VARIANCE TUCSON, ARIZONA

The Statutory Matrix

The ultimate goal of modern day city planning is the achievement of coordinated and harmonious growth of the city which is beneficial, as well as utilitarian, in character to all the inhabitants of the community. To achieve the harmonious development of its communities, Arizona has adopted legislation which vests the local legislative bodies with the power to adopt ordinances for the regulation of land use within their respective communities. This enabling legislation gives the local legislatures varying degrees of administrative discretion in setting up the regulatory process which hopefully will control and direct growth. The local legislature, assisted by a group of professional planners and by the general public attitude as reflected in an appointed planning and zoning commission, then applies that power vested in them by the enabling legislation to arrive at a general scheme of zoning for the


entire community which is in accord with the needs and which promotes the health, safety and general welfare of the community. However, once the complete zoning plan is formulated and implemented by the local legislative body the process is not complete. Two important aspects of the power granted by the enabling legislation come into play. The first aspect is the power to make amendments to the zoning ordinance and the second is the power to grant relief from the terms of the ordinance when the strict or literal enforcement of it would deprive an individual of the use of his land.

This second aspect of the power given to the legislature on the local level is called the variance process. This process is of singular importance because it is inconsistent with the goal of harmonious growth through effective zoning regimentation. The variance permits allow individuals to use their land in fashions not otherwise sanctioned by the zoning ordinance. It is, therefore, the very antithesis of


6. Ibid., Section 23-472 (E) (1971) (See Appendix p. 72).

the concept involved in the zoning process. Because of this element of inconsistency, the administration of this process is significant. The manner in which it is conducted can ultimately play a great role in a community's attempt to effectively regulate its growth.

Furthermore, judicial review of administrative decisions in the zoning process is restricted by statutory and case law. A trial de novo is available to an aggrieved party in limited circumstances only and most of the time the only permitted course of action is the filing of a writ of certiorari in the appropriate court for review of the decision. Once an aggrieved party has succeeded in getting review of the decision, the chances that he will prevail over the administrative body and get the decision reversed are small. The current approach of the courts is not to disturb the decisions of an administrative body unless such decisions are clearly arbitrary and unreasonable and without any substantial relation to the public health, safety, morals or general welfare. Therefore, in the final analysis, the zoning process is relatively immune from any "judicial" legislation in the form of reversal.


or modification of the decisions of the committees which administer it. Because of this immunity and because of the inconsistency between the variance concept and the zoning process generally, the administration of the procedure involved in the granting or denying of variances becomes by necessity a subject of investigation.

Section 9-464 of the Arizona Revised Statutes provides that the local legislature may, in its discretion, appoint a board of adjustment with the power in appropriate cases to make special exceptions to the terms of the ordinance in accordance with the provisions therein. It further states that this administrative body shall consist of not more than seven nor less than five members, each to be appointed for a term of three years, and that the board of adjustment shall adopt rules in accordance with the ordinance creating it. Therefore, in its inception the Board of Adjustment was to be subservient to, and expressive of, the whole concept which lays behind the zoning process. Each decision contemplating departure from the general zoning scheme as formulated by the local legislature was to be made with an eye toward conformity with the zoning ordinance. However, initially this goal of decisional

10. Arizona Revised Statutes, Section 9-464 (A) and (B).
uniformity with the intent of the ordinance breaks down in the variance process because of a lack of adequate guidelines. Section 9-465(C)(3) states that the Board of Adjustment has the power to, among other things, "authorize in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest where, due to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship." Putting this in generic terms, the Board of Adjustment cannot grant a variance unless it finds that (1) there are special conditions affecting the parcel of land and (2) that when combined with the normal administration of the zoning process, these conditions create an unnecessary hardship on the individual seeking to use the parcel. Therefore, the essential matters for concern are what is the special condition involved and does it create an unnecessary hardship on the applicant. One should suppose then that given the character of the variance there should be adequate guidelines set forth in the enabling legislation to direct the local administrative body in its decision-making process. However, the Arizona legislation contains no such guidelines but instead refers only to the highly ambiguous terms, special conditions and unnecessary hardship -- terms capable of an infinite number of definitions. Thus, the local
legislature or administrative body is left with the
difficult task of determining for itself when cases
involve special conditions which create unnecessary
hardships. In such circumstances, the ultimate effective-
ness of any zoning process becomes dependent upon the
ability of the local legislature and, in lieu of that,
upon the ability of the local Board of Adjustment to
formulate adequate guidelines for the disposition of
variance cases.

In Tucson, by ordinance, the Board of Adjustment
is to be comprised of seven members, each to be appointed
by the Mayor and Council for a term of three years. How-
ever, one of the members must be a member of the City
Planning and Zoning Commission; one must be a person
engaged in the real estate business; and one must be a
person who is an architect or engineer. The members
of the Board are to serve without compensation and are to
adopt rules of procedure which are consistent with the
provisions of the ordinance. The Board is to be as-
isted in fulfilling its duties by all the departments
of the city administration which means essentially by all
the professionals engaged in the city planning process.

11. Tucson Zoning Ordinance, Chapter 23 of the
Tucson Code, Section 23-461 (1971) (See Appendix p. 70).


The Board of Adjustment is given the power to decide cases involving special exceptions which deal with permitted uses found within the ordinance that require the approval of the Board and variances from the terms of the ordinance which require a showing of unnecessary hardship on the part of the applicant. The relevant language of the ordinance with respect to the latter states that the Board has the power "To authorize upon appeal in specific cases such variance from the terms of this article as will not be contrary to the public interest, where, owing to special conditions, the literal enforcement of the provisions of this article will result in unnecessary hardship, and so that the spirit of this article shall be observed and substantial justice done." The provision further states that in accordance with the above, the Board of Adjustment may permit in any zone a modification of the requirements of the ordinance to secure an appropriate development of a lot, where adjacent to the lot there are uses which do not conform to the regulations prescribed for that district. The ordinance also allows

15. Ibid., Section 23-472(B)(2)(1971).
16. Ibid., Section 23-472(B)(2) a (1971).
the Board to permit the projection of a building into a required front or rear yard when there is a topographically unique piece of property involved. Finally, the Board is given the power to authorize a variance in specific cases where by reason of exceptional narrowness, shallowness, or shape of a specified piece of property at the time of the enactment of the ordinance or by reason of exceptional topographic condition, or other extraordinary situation, the strict application of any provision would result in peculiar and exceptional practical difficulties or exceptional or undue hardship upon the individual. With respect to this provision of the ordinance, it should be noted that the power of the Board in making its determination is almost plenary. The decision of the Board is reviewable only by a writ of certiorari filed by an aggrieved party in Superior Court. This element of finality of the Board of Adjustment decisions becomes important not only because of the possible repercussions to the zoning process of bad decision-making but also because it points up an inconsistency between the variance provisions.

Section 23-426 of the Tucson Zoning Ordinance authorizes the Board of Adjustment to grant variances

17. Ibid., Section 23-472(B)(2) c. (1971).
from established street setback lines on streets designated as major thoroughfares by the Mayor and Council in cases where there are special circumstances attached to the property which do not apply generally to other lands and where the variance is necessary for the preservation and enjoyment of substantial property rights of the applicant. However, the Board assumes a different role in this process. After the initial decision is made, a report of that finding is submitted to the Planning and Zoning Commission and the Mayor and Council. No variance in this particular process is deemed to be granted until it has the approval of the Mayor and Council. Furthermore, in this process and aggrieved party may avail himself of a trial de novo in order to seek reversal of the decision. Thus, it appears that there is much more scrutiny of the variance decision in this process as compared to those under the "regular" variance procedure. One plausible reason for this dichotomy between the variance provision is that the local legislature wanted to keep tight reins on the variance allowed along the major thoroughfares in order to more effectively control growth and thus avoid congestion. A second would be that because there are procedures established by "official map"

19. Ibid., Section 23-428.
20. Ibid., Section 23-429(B).
designation they do not consider a semi-judicial body as jurisdictionally legal in making amendments. This procedure then would be handled somewhat the same as a zoning land use matter. However, there seems to be little rationality in controlling growth along major arterials and then not maintaining the same standard for the rest of the community. Perhaps, the Mayor and Council felt that they could not handle the number of variance cases which might presumably come before them if such a procedure were adopted for the entire variance process. Considering that only one of the approximately 52 variance cases studied involved a major thoroughfare setback variance, this explanation seems the more acceptable. However, the fact remains that the process itself is inconsistent with the total variance procedure and this inconsistency should be remedied by applying the same standard to both provisions.

One possible way to remedy the above inconsistency would have been to set forth guidelines for the administration of the general variance process which are clear and concise. This would have partially eliminated the need for review by giving the Board specific criteria by which to make their decisions which the local legislature feels are necessary to be met in order to control growth. However, the Tucson pro-
visions lack any real clarity. Some clarity is afforded when the Board encounters narrow, shallow or topographically unique pieces of property. However, experience proves that seldom is the case heard that involves hardship from these types of conditions alone. The Board, therefore, is left in the majority of the cases with the problem of determining when the grant of a variance is justified by the conditions alleged by the applicant. Such a practice in itself leads to confusion in the decision-making process. Perhaps it is this lack of adequate and definite rules to follow which leads to a tendency of leniency by the Board of Adjustment in its administration of the variance process.

For the zoning process to operate effectively, all of the provisions of the zoning ordinance must be constitutionally sound. Section 23-472(C)(2)(a) states that the Board may grant a variance when it deems it is necessary for the appropriate development of a lot, where adjacent to a lot there are uses which do not conform to the requirements of the ordinance. On its face, this provision constitutes the power to
rezone land. One of the chief characteristics of the variance is that it is available only when there is some special circumstance affecting the land which is not general to the area. If the conditions are general to the area, then they justify rezoning. Therefore, in this section the local legislature has given the Board power not enabled to it in the state enabling legislation. This it cannot do. Nicolai v. Board of Adjustment of the City of Tucson 55 Ariz. at 289 (1940) states the rule as follows:

We are of the opinion that the later and better rule is that when an ordinance passed under a statute like ours expressly prohibits the use of property within certain districts for certain purposes, a board of adjustment created by authority of the statute may not change the use established by the legislative body of the city through its ordinance, and that any such change must be made by the legislative body itself through a new ordinance rezoning the property involved.21

Section 23-472 also states that not only unnecessary or undue hardship but also exceptional and peculiar practical difficulties justify the grant of a variance. As was previously pointed out, the enabling legislation refers only to unnecessary hardship. The

phrase "peculiar and exceptional practical difficulties" seems to have been an attempt by the local legislature to achieve clarity in defining what an unnecessary hardship is. However, on its face the phrase is ambiguous and connotes something less than unnecessary hardship. If practical difficulty as contained in the provision is something different than unnecessary hardship as contained in the enabling legislation, then the local legislature has vested the Board of Adjustment with powers in excess of that provided for it. This problem involves the intricacies of the concept of "home rule" which are beyond the scope of this report. However, it is relevant to the inquiry in that under the circumstances the decisions of the Board of Adjustment can be subjected to the charge that they are ultra vires, when it appears from the record that the decision was made on less than special conditions creating unnecessary hardships. Whatever the ultimate determination would be, this infirmity emphasizes the weakness of the Tucson provisions. This weakness is ultimately carried over into the decision-making process.
CHAPTER III

THE ZONING VARIANCE TUCSON, ARIZONA

Unnecessary Hardships and the Board of Adjustment

The Tucson Board of Adjustment, as presently constituted, consists of individuals who are not engaged professionally in the process of city planning. Five of the seven appointed, non-salaried members of the Board are engaged in the development of land in one form or another. One member is an engineer, one is a lumber salesman, another is a salesman for a business which contracts air-conditioning and two others are real estate agents. Also, as required by the ordinance, one member is a member of the City Planning and Zoning Commission. It is significant to note that four concurring votes are all that is necessary to get an application for a variance granted. With five of the seven members of the Board thus involved in the development end of land use, it becomes important to determine whether the Board, as evidenced by its decisions, understands what its role in the planning and zoning process is.

As stated previously the Board, by Tucson ordinance, is comprised of seven members of which one must be a member of the City Planning and Zoning Commission, one must be engaged in the real estate business and one other must be either an engineer or architect. This then constitutes special dictum for only three of seven members. All other members can be selected on an arbitrary basis. There-

fore, because at the present time five of the seven appointed are engaged in land development in one form or another does not necessarily mean this is a situation which will ultimately continue. In this instance the Tucson ordinance seems to be fair in form, yet in fact has been subject to indiscriminate appointment by Mayor and Council.

During the period in which the Board of Adjustment was examined the total case-load was 90 cases, averaging approximately 12 to 15 cases per hearing. Of the cases examined, approximately 72 per cent of the cases were granted, 12 per cent were denied, and 16 per cent of the cases were either continued, withdrawn or referred to the Planning and Zoning Commission. Fifty-eight per cent or 52 of the 90 cases for the seven month period from June 1, 1970 until January 1, 1971 involved the application for a variance. Of these variance cases 84 per cent were granted, ten per cent were denied and six per cent were either withdrawn or referred to the Planning and Zoning Commission.

The first impression one gets from these figures is that there are too many cases being brought before the Board of Adjustment. The case-load for a year averages approximately 150 to 160 cases. One

23. Case History Files of Executive Secretary of the Board of Adjustment, City of Tucson, Arizona, (See Appendix p. 106).
reason for this is that there is no administrative
deterrent to anyone asking for a variance or special
exception. This situation is under-going some change
at the present time, however, and under revised admin-
istrative procedure the case load should decrease
somewhat within the next few years. The Planning
Director and his staff are presently handling all
applications for appeals to the zoning ordinance,
thereby offering a direct link between the applicant
and the individuals who advise the Board. Jurisdictional
advice at this level often saves the city and the
petitioner time and money by receiving frank advice
on what constitutes jurisdiction for a variance.

The system is still under experiment but has
proven to be valuable in eliminating cases which are
completely without jurisdiction of the Board and
has often been used to convince a prospective applicant
that he has no "grounds" for a legitimate variance.

A Zoning Administrator or a Planning Director
with the power to decide minor variances becomes the
most desirable alternative in decreasing the yearly
case load.
The approval ratio does cause problems and this is compounded by the fact that once an individual has sought a variance without actually meeting the hardship requirements and gained it, other individuals who likewise have no genuine hardship are encouraged to go before the Board hoping they also will get their variance approved. The same problem arises as to special exceptions. The result is that the Board is virtually swamped by the number of applications before it. Each case is therefore given less consideration -- a practice which inevitably leads to leniency in decision-making.

The second impression one gets from the figures is that the rate of approval overall and for variances in particular is likewise much too high. One would expect that as the number of applications for variances increased the percentage of denials would also increase as a matter of course. However, this last statement might be vitiated by the fact that of the 52 variance cases reviewed approximately 80 to 90 per cent involved bulk variances. But when one considers that 75 per cent of the time the applicant sought relief from the requirements of residential zoning, it seems reasonable to say that the amount of consideration needed when
considering whether or not to grant a variance in a residential area should be reflected in a lower rate of approval. Furthermore, the fact that a minor setback variance is sought should not mean that perforce it should be granted. For example, an applicant seeks a variance in a R-1 zone from the seven feet side yard and 40 feet rear yard requirements so that he can convert an existing garage into a rear yard apartment. The existing side yard is five feet and the rear yard is 24 feet from the centerline of the alley. The applicant alleges that the variance is necessary due to the size of his family and the dwelling. The Board grants his request without finding of fact. In this case, the applicant sought what appeared to be a minor setback variance but in reality he was seeking a use variance that was totally adverse to the surroundings. The Planning staff had recognized this fact and made adverse recommendation to the Board on both written and oral report. When the Board gave its approval to his request, it was sanctioning a use or possible use prohibited by the R-1 zone. This case


is illustrative of the kind of adverse effect the Board of Adjustment decisions can have on the community and the planning process generally. The Board must be aware at all times of the type of case which it has before it. Unfortunately, the Tucson Board of Adjustment does not exhibit this type of awareness. In the 52 variance cases before it, the Board chose to deny only one out of every ten during the entire seven month period.

It is very difficult to determine what influences the Board of Adjustment in the making of its decisions. Because of the high rate of approval, the determination of deciding factors becomes almost fruitless. However, investigation did reveal that the Board was favorably influenced by certain factors.

The Board of Adjustment did seem to be affected by large shows of protest against the proposed variance. In 11 cases there were such showings with the result being that five were denied while six were granted. For example, in one case involving the proposed construction of a drive-in theatre in a B-2A zone the variance was denied principally because 594 people had signed a petition of protest and because there
was very much protest from the audience at the hearing. Thus, it appears that the chances that a variance will be granted diminish as the amount of protest grows. Of course, there are cases where the variance was denied because of the protest of one or two individuals but it is submitted that the general trend follows the above.

Lawyers and other professional people such as engineers and architects also seemed to have an influence on the Board. However, two factors enter the picture which make the determination difficult. Only in cases involving large developments or large companies were attorneys or other professional men present before the Board. The individual seeking a variance regarding his own piece of land rarely was represented by an attorney. Secondly, since over 80 per cent of the cases were approved, it is difficult to say that approval was due to the attorney's presence or to the Board's protracted tendency to be lenient. However, the facts seem to indicate at least that the representation by an attorney or other professional men did not guarantee approval by

the Board. In the 20 cases in which an attorney, architect or engineer appeared for the applicant, 20 per cent of time the application was denied. Approximately one-half of those cases involved an attorney appearing before the Board. In these cases the attorney was successful most of the time. After observing the Board in action on numerous occasions in which the applicant was represented by an attorney, as a staff member I came to the conclusion that the attorney's presence led to several specific cases being granted. Upon a show of protest, the attorney's are able and allowed to compromise with the protestants and thus have the matter resolved to the Board's satisfaction.

Another element which appears to influence the Board of Adjustment is the recommendation of the planning department. Statistically, the Board follows the recommendation 62 per cent of the time. Thus, one might assume that the planning department has a definite influence on the Board. However, this is misleading in that when a case involving development priorities is before the Board, it seems less likely to follow the recommendation. More simply speaking, when the planning staff recommends approval, the Board

will follow that recommendation. However, when the staff recommends denial of the request, only rarely does the Board follow that recommendation. In the 21 cases in which staff advised the Board to deny the application, only seven times did the Board actually follow the staff advice. This tendency to follow the staff recommendation only 33 per cent of the time has led the planning department to label the whole variance process as a "give-away."

Finally, the Board seems to be influenced by the capacity of the party seeking the variance. Approximately one in every ten applications made by an individual is denied; while one in every eight or nine applications made by a business or business related enterprise is denied. However, as can be readily seen, the figures are definitive of nothing more than affect of increased individual applications over those of business.

In the final analysis, it is almost impossible to determine what influences the Board of Adjustment in its decision-making process. The only consistency in the decisions of the seven month period was the record or consistent approvals of requests. It

28. Statements made at August 1971 hearing of the Board of Adjustment.
is submitted that this record is evidence of an abuse of discretion by the Board of Adjustment.

One of the reasons for the tendency of the Board of Adjustment to be lenient in the variance process stems from the lack of adequate guidelines to govern the procedure. As was previously stated, the enabling legislation and the local ordinance place responsibility for determination of when a variance is justified on the Board. Considering that the Board consists of laymen, it is no wonder that they are lenient in administering the process since they probably have no concept of what the special conditions are which create the unnecessary hardship with respect to the variance process. What they are apt to characterize as a hardship in some instances might turn out to be self-imposed in others. For instance, a corporation asks for a variance because of the hardship created by an odd-shaped lot. The Board grants the request notwithstanding a staff recommendation of denial because the corporation builds a standard type of facility and should have known that the structure would need a variance.

Variances were also granted by the Board because the applicant alleged unnecessary hardship on

29. Board of Adjustment Application C10-70-72.
the ground of "sun and weather consideration," \(^\text{30}\) "We need more sleeping room," \(^\text{31}\) or "extra kitchen necessary for entertaining." \(^\text{32}\) There were, of course, a number of cases in which there were sufficient unnecessary hardships involved to justify the grant of a variance. However, there were also some cases which were denied that also had sufficient hardships involved to justify a grant under the above formulation. For what justifies the grant of a variance on the basis of sun and weather considerations over the denial of a request on the basis that an extra room is needed for the care of an invalid son? \(^\text{33}\) Both hardships are, in a sense, self-imposed. The answer seems to lie in the randomness of the decision-making process of the Board of Adjustment. It is submitted that this randomness is also an abuse of the administrative discretion. The abuse is generated by the vagueness of the statutory framework and is compounded by the unwillingness or inability of the Board of Adjustment to grasp the fundamental concept behind the zoning process. The end result is a misconception by the Board of its role in the entire zoning scheme.

\(^{30}\) Ibid., C10-70-64.

\(^{31}\) Ibid., C10-70-68.

\(^{32}\) Ibid., C10-70-82.

\(^{33}\) Ibid., C10-70-62.
Requiring the Board to make findings by written resolution and to be supported by substantial evidence may eliminate indiscriminate decision-making by forcing the Board to examine the jurisdictional aspects of all decisions made. The following chapter emphasizes the finding of fact situation in Tucson providing further evidence to its need for revision.
CHAPTER IV
THE ZONING VARIANCE TUCSON, ARIZONA

Findings of Fact - Justification for Granting a Variance

Section 23-470 of the Tucson Zoning Ordinance provides that within a reasonable time after the application for a variance the Board of Adjustment shall hold a public hearing. Section 23-465 further provides that such hearing shall be open to the public and that minutes will be kept of the hearing showing the action of the Board and the vote of its members. There are no provisions relating to the variance process which specifically require a finding of fact by the Board of Adjustment. However, when one reads the minutes of the hearing, a finding of fact is included in the disposition of the case. It, the finding, is in somewhat of a standardized form which resembles the following:

1. That there are special circumstances or conditions attached to the property upon which the proposed structure is sought to be constructed, erected, placed or extended which circumstances or conditions do not apply generally to other land or buildings in the neighborhood, and have not resulted from any act of the applicant.

2. That these are:
   a. The use is not detrimental to others.
   b. The manner of conducting the use is not detrimental to others.
   c. The structures to be used will not be detrimental to others.
It was found that in a significant number of cases the findings of fact were in reality no more than conclusions drawn from the presentation of the case. Considering that it was essential for the purpose of any later incidental judicial review that there be a finding of fact by the Board of Adjustment, it was surprising to find in fact that the Board, itself, did not find the facts or conclusions as portrayed in the record but that the assistant city attorney found them. After all the cases had been presented, the Board of Adjustment made its decision. The attorney then read what the facts found were and the chairman simply approved that finding as the Board's finding. It is submitted that this practice is undesirable and detrimental to the whole variance process. Since it is assumed that once a decision is made, the probative facts to justify it exist as a presumption, the Tucson process perpetrates a sham. Decisions made without a recitation of fact from the Board itself imply decisions made without regard to fact or to put it more simply, decisions made by "gut reaction." For the planning process to succeed in its goal of controlling and directing growth, the decision-making process must

34. Variance Administration in Alameda County; supra.
be grounded in fact. This eliminates retrogression in planning or at least helps to minimize it by a practical consideration of all the competing values with an eye toward achieving stability.

There is one last comment that should be made in connection with the finding of fact. A number of variances were granted for the reason that there were a number of similar variances on the adjacent land in the area. As was previously pointed out this is not grounds for the grant of a variance; but instead is grounds for rezoning an area. Section 23-472 states that no grant or variance shall be authorized unless the Board specifically finds that the condition of the specific piece of property for which the variance is sought is not of so typical or recurrent a nature as to make it reasonably practicable for the formulation of a general regulation for the conditions. Therefore, when the Board grants a variance for the above reasons it is administering in deference to the ordinance creating it. Thus, all these decisions are *ultra vires*. This is further evidence that the Board has misunderstood what its role should be and marks a definite abuse of administrative discretion by the Board in its decision-making process.
CHAPTER V

THE ZONING VARIANCE TUCSON, ARIZONA

The Special Problem of the Contract Variance

Section 23-472 of the Tucson Zoning Ordinance provides that in granting a variance the Board of Adjustment may attach thereto such conditions regarding the location, character and other features of the proposed building, structure or use as it may deem advisable in the interest of the intent of the ordinance. There is no such provision enabling the city to do this in the relevant provisions of the Arizona Revised Statutes. However, assuming that Tucson as a "home-rule" city can adopt such legislation, there is no constitutional objection to the attaching of conditions to the grant of a variance. Contract variances present a special problem since they are subject to the argument that they represent a contracting away of the police power. If they are administered properly, contract variances can withstand this argument since they represent an invocation of the police power to assure development beneficial to the general welfare. However, if contract variances are handled poorly, they become destructive of any attempt to zone effectively.

In Tucson, the Board of Adjustment uses its power to put conditions on the grant of a variance liberally. In most instances of the 20 per cent of the cases granted upon conditions, the conditions were imposed for the purpose of protecting the general welfare. For example, in one case the variance was granted with the conditions that the applicant obtain building permits for improvements and that they meet the code and that the quarters not be use for rental. However, in some cases the applicant used language in his presentation which tended to indicate that there had indeed been a bargaining away of the police power involved. For instance, the applicant stated that if the Board would grant the variance requested the company would dedicate a right-of-way of 65 feet "in consideration thereof." Thus when the variance was granted, the city received the dedication at no charge. It is not submitted that this is necessarily a bad practice. What this writer does suggest is that when it becomes a consistent practice, the chances that it will be abused increase. Especially, when the administrative body that employs this technique is as volatile as the Tucson Board of Adjustment.

36. Board of Adjustment Application Cl0-70-117.
37. Ibid., Cl0-70-72.
CHAPTER VI

SUMMARY

The variance process as administered by the Board of Adjustment of Tucson, Arizona is typical of most administrative bodies made up of laymen. The Board, through its decisions, has shown that it has misinterpreted its function with respect to the variance process and has abused the discretion given to it by legislation. In its unique situation, the Board of Adjustment is subject only to limited review from higher legislative or judicial bodies. In the seven month period examined, the Mayor and Council denied the one major thoroughfare setback case which the Board had recommended approval of and only one case during the entire period was appealed to the Superior Court of Pima County. It is therefore crucial that such a body have proper direction and control in the form of legislative guidelines. However, in Tucson and in Arizona generally there is a noticeable lack of any such guidelines. Therefore, as long as there is no guidance from the legislatures, the Board of Adjustment will continue in its administrative morass.
There are several feasible alternatives to this problem. The first is to do away with the variance process to all but a limited extent and combine it with a program of eminent domain proceedings to compensate those individuals whose land cannot be used under the zoning scheme of regimentation. This concept is limited by the adverse public reaction it creates and the money it takes to run it. The second alternative is to replace the lay Board of Adjustment with a trained professional staff of city planners who grasp the concept behind the provisions of the zoning ordinance. A slight deviation from this concept, but one which provides similar input is practiced in Oakland, California. Local ordinance "minor variances" are considered by the Director of City Planning, appeals from his decisions are then made to the Board of Adjustments. In San Jose, California a similar ordinance provides that the Planning Director shall hear all appeals for variances, and appeals from his decision shall then be made directly to the San Jose Planning Commission. Selected variances

must also receive concurring approval by the City Council. However, the concept is open to the argument that private individuals, instead of the public, will be controlling the growth of the city in an undemocratic, semi-totalitarian manner.

The third alternative available to the city is the redrafting of the provisions relating to the variance process. Such a redrafting would have to eliminate those sections mentioned before which amount to a grant of power in excess of that permissible under the enabling legislation and existing case law. Such a redrafting would also have to include guidelines for the making of administrative decisions.

The following proposed provision which is based on Section 40: 55-61 (b) of the Revised Statutes of New Jersey might aid the Board of Adjustment in the administration of the variance process.

The grant or denial of a variance, special exception or any other permit by the Board of Adjustment by written resolution shall include not only conclusions but also findings of fact made by the Board related to the specific proposal and shall set forth the reasons for the grant, with or without conditions, or for the denial, and said re-

39. Zoning Regulations of the City of San Jose, California, March 1970, Department of City Planning, pp. 63-71 (See Appendix p. 119).
solution shall set forth with particularity in what respects the plan would or would not be in the public interest but not limited to findings of fact or conclusions related to:

1. in what respect the plan conforms to the overall objectives as embodied in the master plan or neighborhood plans and

2. in what respects the plan departs from the overall objectives of city planning in regard to use and bulk requirements taking into consideration all requirements that are specified in the ordinance for conservation of harmonious growth.

a. Specifically, physical design and the manner in which the design does or does not make adequate provision for public services, traffic control and further amenities of light and air, recreational and visual enjoyment.

b. The relationship, beneficial and adverse, of the proposed development to the neighborhood in which it is proposed to be established.

On the local level similar revisions to the Tucson ordinance can incorporate provisions of various city policy regarding the Board of Adjustment's jurisdiction and findings of fact.

In New York City, New York, the following provision is one which can be incorporated to substantiate findings required for variances.
"It shall be a further requirement that the decision or determination of the Board shall set forth each required finding in each specific grant of a variance, and in each denial thereof which of the required findings have not been satisfied. In any such case, each finding shall be supported by substantial evidence or other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board. Reports of other city agencies made as a result of inquiry by the Board shall not be considered hearsay, but may be considered by the Board as if the data therein contained were secured by personal inspection."  

In Albuquerque, New Mexico, findings of fact must be recorded by written resolution of the Board. Each resolution must contain a complete statement of findings of fact.

I propose that two elements be added to the present statutory framework that are based on provisions of the Vermont Planning and Development Act. They are (1) that the unnecessary hardship has not been created by the applicant and (2) that the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification of the terms of the ordinance.

40. New York City Zoning Ordinance, pp. 233-234, (See Appendix p. 129).

CHAPTER VII

PROPOSED AMENDMENTS TO THE CITY OF TUCSON CODE

Throughout the report analysis many discrepancies, decision-making breakdowns, and administrative ineffectiveness have been noted.

It is possible that Tucson's ordinance can incorporate some proposals which will increase the possibility of a more rational, less arbitrary form of decision-making with regard to zoning variances.

Many possible reforms workable under alternate legislation can be attempted and some of these were brought forth throughout the report.

Allowing for establishment of a zoning administrator to rule on variance cases is practiced effectively in Fremont, California and Baltimore, Maryland. Minor variance powers are also placed at the Planning Directors discretion such as in San Jose, California. Extended appeal procedures to the Mayor and Council for all variance cases is provided under ordinances in Chicago, Illinois and Oakland.

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42. Zoning Regulations of the City of San Jose, California, March 1970, Department of City Planning, pp. 63-71 (See Appendix p. 119).

Varieties of controls and procedures are incorporated throughout the country. Naturally many ordinances are subject to state enabling legislation which often limits the legal authority and flexibility of power. Those controls successful in some communities may become legal impossibilities in others; therefore, certain constraints are present and the amendments suggested herein are designed for Tucson's ordinance and existing legislative capabilities. Such amendments could legally and practically be incorporated as soon as possible, thereby effective immediately.

Many forms of revision could be offered, some of which would be extremely effective; however, the goal of this report is to offer immediate steps at producing the best amendments which could immediately be incorporated under the present system of operation in the City of Tucson and the State of Arizona.

The following section of this report concentrates specifically on proposed amendments to the Tucson City

44. Zoning Regulations, Oakland Planning Code, Oakland, California Ordinance, No. 7248, July 1967, pp. 131-133 (See Appendix p. 115).
Code relating directly to the City Board of Adjustment (Chapter 23 - Section 461-465).

These amendments are felt to be the primary elements to this internship report. Applying the educational benefits of the Urban Planning Program with the practical operational City planning experience produces, what I believe to be, the ultimate advantage of these combined educational functions. The Amendments offered herein will be introduced and examined by city staff to be brought before the City Board of Adjustment, Planning and Zoning Commission and, if recommended, as official ordinance amendments to the local legislative body, the Mayor and Council.

The entire Board of Adjustment section of the code has been examined in relationship to the seven month report analysis. Suggested amendments are underlined and those sections of the ordinance which are lined out represent suggested deletions of existing wording within the ordinance.
Sec. 23-461 MEMBERSHIP. The Board of Adjustment as constituted at the time of enactment of this article shall continue in power. The membership of the Board shall consist of seven members each to be appointed for three years. Future appointments shall be made in the manner prescribed by A. R. S. § 9-461 et. seq.; provided, however, that one of the members shall be a member of the city planning and zoning commission, one shall be engaged in the real estate business and one shall be a builder or architect. The term of the member of the city planning and zoning commission shall expire at the same time as his term on such commission, if this occurs prior to the expiration of his term as a member of the Board of Adjustment. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant. (1965 Code, Sec. 23-485)
Sec. 23-462 REMOVAL OF MEMBERS; COMPENSATION; EMPLOYEES; EXPENDITURES.

A member of the Board may be removed for cause, by the appointing authority, upon the filing of written charges and after a public hearing, and vacancies shall be filled as herein specified. The members of the Board shall serve without compensation, but the Board shall have the power and authority to employ a secretary and other necessary clerical assistance and to incur such other expenses as may be necessary in the performance of its duties; provided, however, that the total amount of obligations incurred against the city in any one year shall not exceed the appropriation of the city funds made for the use of the Board during the year. (1965 Code, Sec. 23-486)

Sec. 23-463 MEETING TO ELECT OFFICERS; ADOPTION OF RULES OF PROCEDURE.

At the first meeting held in any calendar year, the members of the Board of Adjustment shall elect a chairman and a vice-
chairman. The Board shall adopt rules and regulations for its own government, not inconsistent with law or with the provisions of this article and of any other ordinance of the city. The Board shall adopt rules and regulations for its own government which are consistent with the law and the provisions of this article. To the extent that any such rules and regulations conflict with the provisions of this article, these provisions are the exclusive source for final determination.

Sec. 23-464 WHEN MEETINGS HELD; INVESTIGATORY AUTHORITY

Meetings of the Board shall be held at the call of the chairman and at such other times as the Board may determine. The chairman, or, in his absence, the vice-chairman, may administer oaths, take evidence and compel the attendance of witnesses. (1965 Code, Sec. 23-488)

Sec. 23-465 MEETINGS TO BE PUBLIC; MINUTES REQUIRED

All meetings of the Board shall be open
to the public. The Board shall keep minutes of its proceedings, showing the action of the Board and the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the Board and shall then be a public record. (1965 Code, Sec. 23-489)

Sec. 23-466 QUORUM; METHOD OF ACTION; VOTE NECESSARY; FINDING OF FACT.

The presence of four members shall constitute a quorum. The Board shall act by written resolution. The concurring vote of four members of the Board shall be necessary to reverse any order, requirement, decision, or determination of the building inspector, or to decide in favor of the applicant on any matter upon which it is required to pass under this article or to effect any variation in this article.
The grant or denial of a variance, special exception or any other permit by the Board of Adjustment by written resolution shall include not only conclusions but also findings of fact made by the Board related to specific proposals and shall set forth the reasons for the grant, with or without conditions, or for the denial, and said resolution shall set forth with particularity in what respects the proposal or plan would or would not be in the public interest.

Sec. 23-467 COOPERATION OF OTHER DEPARTMENTS.

The Board may call on the city departments for assistance in the performance of its duties, and it shall be the duty of such departments to render such assistance to the Board as may be reasonably required. (1965 Code, Sec. 23-491)

Sec. 23-468 APPLICATIONS TO THE BOARD; ORIGINAL JURISDICTION.

An application to the Board of Adjustment, in cases in which it has original jurisdiction under the provisions of this article,
may be taken by any property owner, including a tenant, or by any governmental officer, department, board or bureau. Such application shall be filed with the building inspector Planning Director who, upon a finding of original jurisdiction, shall transmit the same, together with all the plans, specifications and other papers pertaining to the application, to the Board. Original jurisdiction under this section shall be determined according to the strict wording of this article. The Planning Director or Board of Adjustment cannot create jurisdiction by a finding of fact upon which jurisdiction depends without evidence in support thereof.

Sec. 23-469 APPEALS TO THE BOARD.

An appeal to the Board of Adjustment may be taken by any person aggrieved, or by any governmental officer, department, board or bureau affected by any decision of the building inspector in the enforcement of this article. Such appeal shall be
taken within a reasonable time, as provided by the rules of the Board, by filing with the building-inspector Planning Director and with the Board a notice of appeal specifying the grounds thereof. The building-inspector Planning Director, upon a finding of the requisite original jurisdiction, shall forthwith transmit to the Board all papers constituting the record upon which the action appealed from was taken.

Sec. 23-470 HEARINGS ON APPLICATIONS OR APPEALS.

The Board of Adjustment shall fix a reasonable time for the hearing of an application or of an appeal. Public notice of such hearing shall be deemed to have been given when a notice setting forth the general purpose of the hearing, together with the time and place thereof, has been published one time in a newspaper of general circulation in the city not less than seven days prior to the date of the hearing. The Board shall also mail notices to the applicant or appellant, and other parties in interest as determined
by rule-of-the-Board applicable law, and
to the building-inspector, Planning Director,
at least five days before the time when
such application or appeal shall be con­sidered by the Board. Any party may
appear at such hearings in person or by
agent or by attorney. The Board shall
decide an application or appeal within
a reasonable time.

Sec. 23-471 APPEALS TO STAY PROCEEDINGS; EXCEPTION.
An appeal shall stay all proceedings in
furtherance of the action appealed from,
unless the building-inspector Planning
Director certifies to the Board of Adjust­
ment, after notice of appeal shall have
been filed with him, that by reason of
facts stated in the certificate, a stay
would, in his opinion, cause imminent
peril to life or property. In such cases,
proceedings shall not be stayed otherwise
than by a restraining order which may
be granted by the Board or by a court of
record, on application, on notice to the
building-inspector Planning Director and
on due cause shown.
Sec. 23-472 POWERS OF BOARD.

The Board of Adjustment shall have jurisdiction and shall have the specific and general powers provided in this article in accordance with A. R. S. § 9-461 et seq.

A. SPECIAL EXCEPTIONS AND INTERPRETATION OF MAP.

The Board of Adjustment shall have the power to hear and decide, in accordance with the provisions of this article and filed hereinbefore provided, requests for applications for special exceptions or for interpretation of the building zone map or for decisions on other special questions on which the Board is authorized by this article to pass. Where the street or lot lines as shown on the building zone map, the Board of Adjustment, after notice to the owners of the property and after public hearing, shall interpret the map in such a way as to carry out the intent and purposes of this article for the particular section or district in question.
In addition to having authority to permit, under the conditions stipulated, the special exceptions hereinbefore specified in section 23-26, section 23-97, section 23-111, section 23-131, section 23-146, section 23-201, section 23-217, section 23-231, section 23-232, section 23-253, section 23-254, section 23-281, section 23-311, section 23-322, section 23-372, section 23-383, section 23-404, and section 23-426, the Board of Adjustment shall have the authority to permit the following:

1. **NONCONFORMING USES.**

   a. The substitution for a non-conforming use existing at the time of enactment of this article, of another non-conforming use, if no structural alternations, except those required by law or ordinance, are made; provided, however, that the new non-conforming use shall be of a similar or higher classification as set forth in the arrangement of and classification of permitted uses in divisions four through twenty-four, inclusive of this article.

   b. The extension of a non-conforming building upon the lot occupied by such building or on a lot adjoining; provided, that such lot was under the same ownership as the
lot in question at the time of the enactment of this article and that such extension is a necessary incident to the existing non-conforming use; and provided, that the extension shall not exceed in all fifty per cent of the floor area of the existing buildings devoted to a non-conforming use, and that such extension shall adjoin the existing building or premises, and provided further, that such extension shall in any case be undertaken within five years of the enactment of this article.

c. The extension of a use or building within the same lot existing and of record at the time of enactment of this article into a contiguous, more restricted district, but not more than twenty-five feet beyond the dividing line of the two districts. In borderline cases, the Board of Adjustment may recommend to the council the redistricting of any lot, plot or part thereof where, in its opinion, this will not cause hardship and will not impair the intent and purpose of this article.

2. PROHIBITED INDUSTRIES.

a. To permit in any "B-2" business district any manufacturing or processing as provided under section 23-232, of this chapter but only as a necessary incidental accessory to a principal use permitted in the district on the same lot with such principal use, subject to such conditions as will safeguard the public health, safety, convenience and welfare; provided also, that the entire product of such use is utilized in the principal use to which it is accessory.
b. To permit in any "I-1" industrial district any of the industries or uses listed in section 23-311, B., and in doing so, may require the installation, operation, and maintenance in connection with the proposed use such devices or such methods of operation as may, in the opinion of the Board, be reasonably required to prevent or reduce fumes, gas, dust, smoke, odor, water-carried waste, noise, vibration or similar objectionable features, and may impose such conditions regarding the extent of open spaces between it and surrounding properties as will tend to prevent or reduce the harm which might result from the proposed use to surrounding properties and neighborhoods.

3. TEMPORARY USES AND PERMITS.

a. The temporary use of a building or premises in any district for a purpose that does not conform to the regulations prescribed by this article for the district in which it is located, provided that such use be of a true temporary nature and does not involve the erection of substantial buildings. Such permit shall be in the form of a temporary and revocable permit for not more than a twelve month period, subject to such conditions as will safeguard the public health, safety, convenience and general welfare.

b. The temporary use of a building or land in undeveloped sections for a purpose that does not conform to the regulations prescribed by this article, provided that such structure
or use is of a true temporary nature, is promotive of or incidental to the development of such undeveloped section and does not involve the erection of substantial buildings. Such permit shall be granted in the form of a temporary and revocable permit as will safeguard the public health, safety, convenience, and general welfare. (1965 Code, Sec. 23-496)

B. ADMINISTRATIVE REVIEW AND VARIANCES.

The Board of Adjustment shall also have the power:

1. To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement decision, grant or refusal made by the building inspector in the enforcement of the provisions of this article.

2. To authorize upon appeal in specific cases such variance from the terms of this article as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of this article will result in unnecessary hardship, and so that the spirit of this article shall be observed and substantial justice done.

In accordance with the above, the Board of Adjustment shall have the following general powers:

a. To permit in any case such modification of the requirements of this article as such Board may deem necessary to secure
an-appropriate-development-of-a-lot, where
adjacent-to-such-lot-there-are-buildings
or-uses-that-do-not-conform-to-regulations
prescribed-by-this-article-for-the-district
in-which-these-are-located.

a. To permit the projection of a building
into a required front yard, side yard, or
rear yard, but only to an extent necessary
to secure a building or structure practicable
in construction and arrangement for an
exceptionally narrow, shallow or irregular
lot, er-fer-exceptional-topography, so
existing at the time of enactment of this
article.

b. Where, by-reason-of-exceptional-narrowness,
shallowness-or-shape-of-a-specified-piece
of-property-at-the-time-of-the-enactment
of-this-article-or by reason of exceptional
topographic conditions, or other extra-
ordinary and exceptional situation or
condition of such piece of property, the
strict application of any provision of
this article would result in-severe
and-exceptional-practical-difficulties-or
exceptional and undue hardship upon the
owner of such property, the Board shall
have the power to authorize, upon an appeal relating to such property, a variance from such strict application, so as to relieve such difficulties or unnecessary hardships, provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of this article. To justify the grant of a variance, the Board must find that the hardship is substantial, or compelling force and relates to the particular property for which the variance is sought. Such a hardship cannot arise from conditions created by the applicant. Similarly, any condition, such as convenience or profit, not arising by the oppressive working of the provisions of this article on the particular piece of property cannot justify the grant of a variance.

No grant or variance shall be authorized unless the Board specifically finds that the condition or situation of the specific property for which the variance is sought
is not of so typical or recurrent nature as to make reasonably practicable the formulation of a general regulation for such conditions or situations.

c. In granting a variance the Board may attach thereto such conditions regarding the location, character and other features of the proposed building or structure as it may deem advisable in the interest of the furtherance of the purposes of this article.

d. The variance, if authorized, must represent the minimum variance that will afford relief and will represent the least modification of the terms of this article.

e. Each case decided by the Board shall be decided upon its merits and the circumstances attendant thereto. No action of the Board in granting a variance will set a precedent.

*Note: § 23-473 through 23-475 remain the same.
§ 9-461. Zoning powers of cities and towns

A. For the purpose of promoting the health, safety, morals or the general welfare of the community, the governing body of an incorporated city or town may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of a lot that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industrial, residential or other purposes, and may establish setback lines, and for such purposes may divide the municipality into districts of such number, shape and area as may be deemed best suited for such purposes.

B. A city or town may, within an established district, regulate and restrict the creation, construction, reconstruction, alteration, repair or use of buildings, structures or land.

C. All regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.
Notes of Decisions

1. Construction and application
   Property owners are entitled to notice before passage of a zoning ordinance which would limit use of their property. Wood v. Town of Avondale (1931) 72 Ariz. 217, 231 P.2d 935.

   Action of town in enacting ordinance under Code 1929, § 16-207, prescribing 10-foot setback for improvements on lots abutting highway, without regard to Code 1939, § 16-1401 ct seq., dealing with the establishment of setback lines, and requiring notice in newspaper of public hearing, action by common council, and creation of zoning commission and board of adjustment, was illegal and without effect and unconstitutional for depriving property owners of their property without due process of law. Id.

2. Business use
   Operation of automobile wrecking plant in Business B District was permissible under zoning ordinance prohibiting use of premises in such district for any industrial or manufacturing purpose, but permitting lawful business use and other commercial activities. Kubby v. Hammond (1915) 63 Ariz. 17, 195 P. 2d 134.

3. Churches in residential districts
   Zoning ordinance of city of Mesa which excluded churches from class A residential districts, although permitting other nonresidential uses, was arbitrary and unreasonable as having no substantial relation to public health, safety, morals or general welfare and, to extent it excluded churches, ordinance was unconstitutional. Ellsworth v. Gercke (1945) 62 Ariz. 195, 150 P.2d 242.

   Zoning ordinance of city of Mesa could not constitutionally prohibit erection of churches in class A residential district in which storage of fertilizer, maintenance of horses, cows, swine, farms, greenhouses, swimming pools, polo fields and golf courses as well as schools and the like was permitted. Id.

4. Mortuaries
   That corporation had purchased property outside strictly business district of city, received permit to construct mortuary thereon, and paid license for conducting such business at that location, did not estop city to pass zoning ordinance prohibiting maintenance of such business thereat, where all mortuaries in city had been conducted in business district before purchase, no ordinance regulating location thereof had been considered necessary, protest was filed as soon as corporation's intent was known, and city council notified corporation thereof and immediately began consideration of ordinance. City of Tucson v. Arizona Mortuary (1928) 34 Ariz. 495, 272 P. 923.

   "Mortuaries," which is modern term applied to undertaking and embalming establishments, are subject to reasonable police regulation as to their location as well as the manner in which they are conducted. Id.

   Municipality can pass any reasonable ordinance compelling proprietors of undertaking and embalming establishments to conduct them in as sanitary and inoffensive a manner as possible, without defeating the necessary purpose of their maintenance. Id.

   Corporation purchasing land outside strictly business district of city and letting contract for building mortuary thereon before adoption of zoning ordi-
nance prohibiting maintenance of such business at that location, but fully ad­vised before any material amount of construction was actually done that or­dinance was contemplated, had no vested rights entitling it to set up any loss aris­ing from proceeding with construction thereafter. Id.

Ordinance limiting mortuary establish­ments to district comprising 5 per cent. of total area of city and containing 95 per cent. of buildings used for business purposes, while 98 per cent. of buildings in excluded district are used for residences, was not inherently so unreasonable and discriminatory as to be unconstitutional, though adopted after erection of mortuary building in resi­dence district was commenced. Id.

5. Variance

The authority given by state zoning law to a board of adjustment, under an ordinance which expressly limits erection and use of structures within a given district to certain specified purposes, to decide special exceptions to terms of or­dinance and to authorize in specific cases, a variance such as would not be con­trary to public interest, docs not permit board to authorize a prohibited use of a building, but merely to grant excep­tions to the general rule governing the erection and maintenance of buildings which are used for an authorized pur­pose. Nicolai v. Board of Adjustment of City of Tucson (1910) 55 Ariz. 283, 101 P.2d 199, followed 50 Ariz. 82, 105 P.2d 1119.

Where, under zoning ordinance, erection of warehouse was permitted only in industrial districts, board of adjust­ment was not authorized, under statute, to permit building of warehouse as a “special exception” in a business dis­trict. Id.

§ 9-462. Zoning ordinances; adoption; limitations

A. The governing body may provide by ordinance for the manner in which regulations and restrictions and the boundaries of districts shall be determined, established and enforced. No ordinance shall be enacted nor any amendments made thereto until after a public hearing—
in relation thereto at which parties in interest and citizens shall have an opportunity to be heard.

B. Nothing in an ordinance or regulation authorized by this section shall affect existing property or the right to its continued use for the purpose used at the time the ordinance or regulation takes effect, nor to any reasonable repairs or alterations in buildings or property used for such existing purpose.

C. At least fifteen days notice of the time and place of the hearing shall be published in an official paper, or a paper of general circulation, in the municipality.

D. If the owners of twenty per cent or more either of the area of the lots included in a proposed change, or of those immediately adjacent in the rear thereof extending one hundred and fifty feet therefrom, or of those directly opposite thereto extending one hundred and fifty feet from the street frontage of the opposite lots, file a protest in writing against a proposed amendment, it shall not become effective except by the favorable vote of three fourths of all members of the governing body of the municipality.

Historical Note

Source:

§§ 4, 5, Ch. 80, L. ’25; § 403, R.C. ’28;
16-1402, C. ’30, In part.

Notes of Decisions

1. In general
Under Tucson City Charter 1883, § 1, providing that all acts of presiding officer, chosen by four members of city council in absence of mayor at time of meeting, should have same validity as if done by mayor, such presiding officer had power given mayor to approve zoning ordinance during meeting at which passed; ten days’ time allowed mayor for consideration thereof being permissive, not mandatory. City of Tucson v. Arizona.”(1915) 42 Ariz. 134, 272 P. 923.

2. Notice
Action of town in enacting ordinance under Code 1939, § 16-207 prescribing 10 foot setback for improvements on lots abutting highway, without regard to Code 1939, § 16-1401 et seq., dealing with the establishment of setback lines, and requiring notice in newspaper of public hearing, action by common council, and creation of zoning commission and board of adjustment, was illegal and without effect and unconstitutional for depriving property owners of their property without due process of law. Wood v. Town of Avondale (1931) 72 Ariz. 217, 232 P.2d 963.

3. Construction of ordinances
Zoning ordinances, being in derogation of common-law property rights, will be strictly construed and any ambiguity decided in favor of property owners. Kubby v. Hammond (1918) 63 Ariz. 17, 193 P. 2d 131.

Zoning ordinances will not be declared unconstitutional, unless clearly arbitrary and unreasonable. City of Tucson v.
Ch. 4  GENERAL POWERS

§ 9-463

Arizona Mortuary (1920) 34 Ariz. 455, 272 P. 923.

4. Classification of property

Prior establishment of few isolated business houses in district, natural industrial development thereof, and greater value of property therein for business purposes, does not invalidate ordinance classifying district as residential. City of Tucson v. Arizona Mortuary (1929) 34 Ariz. 495, 272 P. 923.

City was not estopped to pass ordinance prohibiting maintenance of mortuary at certain location after purchase of property and receipt of permit to construct mortuary thereat. Id.

Ordinance limiting mortuaries to district containing 95 per cent. of business buildings in city was not unconstitutional, though adopted after erection of mortuary building in excluded residence district was commenced. Id.

5. Rezoning

Where amount of work done toward construction of service station under building permit was of small consequence, no vested right to complete construction of such building, and permittee having acquired no vested right, board of supervisors had power to rezone property, changing its classification from commercial to residential. Verner v. Redman (1954) 77 Ariz. 310, 271 P.2d 468.

Established use of premises for purposes permitted under existing zoning ordinance was not affected by enactment of ordinance, which was not retroactive, rezone the area. Kubby v. Hammond (1946) 65 Ariz. 17, 198 P.2d 134.

An "existing use" which will not be affected by subsequently enacted zoning ordinance means the utilization of premises so that they may be known in the neighborhood as being employed for a given purpose, which combines adaptability of the land for the purpose and employment of it within such purpose, regardless of the amount or continuity of the business transacted. Id.

Uncontroverted evidence that operator of automobile wrecking plant had procured a license to operate a branch wrecking business on premises recently acquired across the street, had applied for permit to construct temporary office structure thereon, had moved several automobiles and trailers onto premises, had commenced construction of fence to inclose premises, and had made sales of used automobile parts thereon, established an "existing use" which was not affected by subsequently enacted ordinance rezone the area, notwithstanding jury finding to the contrary in answer to interrogatory. Id.

§ 9-463. Zoning commission; duties

The ordinance shall create, and the governing body shall appoint, a zoning commission which shall recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. The commission shall make a preliminary report and hold public hearings thereon before submitting its final report. The governing body shall not hold its public hearings or take action until it has received the final report of the commission.

Historical Note:
§ 6, Ch. 80, L. '25; § 463, R.C. '28; 16-1402, C. '35, in part.
§ 9-464  CITIES AND TOWNS  Tit. 9

§ 9-464.  Board of adjustment; membership; meetings

A. The ordinance may also provide for the appointment of a board of adjustment with powers in an appropriate case to make special exceptions to the terms of the ordinance in accordance with provisions therein contained.

B. The board shall consist of not less than five nor more than seven members, each to be appointed for a term of three years. It shall adopt rules in accordance with the provisions of the ordinance creating it.

C. The ordinance shall provide for meetings of the board which shall be open to the public, for a chairman with power to administer oaths and take evidence, and that minutes of its proceedings, showing the vote of each member and records of its examinations and other official actions, be filed in the office of the board as a public record.

Historical Note

Source:  
§ 7, Ch. 80, L. '25; § 464, R.C. '28, am.,  
§ 1, Ch. 20, L. '52; 16-1403, C. '30,  
Supp. '52, in part.

Notes of Decisions

1. Construction and application

In the case, Nicolai v. Board of Adjustment of City of Tucson (1940) 53 Ariz. 283, 101 P.2d 159, followed 50 Ariz. 82, 105 P.2d 1119, the court said: "It is evident that this statute, which was originally adopted as chapter 80 of the regular session laws of 1925, was copied from the Standard State Zoning Enabling Act prepared under the auspices of the Federal Department of Commerce, which act has been adopted practically verbatim by approximately two-thirds of the states, including Arizona, Utah, Oklahoma, Texas, Missouri, North Dakota and Iowa."

§ 9-465.  Appeals to board; stay of proceedings; hearing; review

A. Appeals to the board of adjustment may be taken by persons aggrieved or by any officer, department, board or bureau of the municipality affected by a decision of an administrative official, within a reasonable time, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit all papers constituting the record upon which the action appealed from was taken.

B. The appeal shall stay all proceedings in the matter appealed from, unless the officer from whom the appeal is taken certifies to the board that, by reason of the facts stated in the certificate, a stay would,
in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed, except by a restraining order granted by the board or by a court of record on application and notice to the officer from whom the appeal is taken. The board shall fix a reasonable time for hearing the appeal and give notice thereof to the parties in interest and the public.

C. The board shall:
1. Hear and decide appeals when there is error in an order, requirement or decision made by an administrative official in the enforcement of an ordinance adopted pursuant to this article.
2. Hear and decide special exceptions to the terms of the ordinance upon which the board is required to pass under such ordinance.
3. Authorize in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest where, due to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship.
4. Reverse or affirm, wholly or partly, or modify the order or decision appealed from and make such order or decision as ought to be made, and to that end shall have the powers of the officer from whom the appeal is taken.

D. The concurring vote of a majority of the board shall be necessary to reverse an order or decision of an administrative official, or to decide in favor of the applicant, on any matter upon which it is required to pass under such ordinance, or to effect any variation in the ordinance.

E. A person aggrieved by a decision of the board, or a taxpayer, or municipal officer may, at any time within thirty days after the filing of the decision in the office of the board, petition a writ of certiorari for review of the board's decision. Allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and for good cause shown, grant a restraining order, and on final hearing may reverse or affirm, wholly or partly, or may modify the decision reviewed.

Historical Note

Sources: § 7, Ch. 50, L. '25; § 461, R.C. '25, am., § 1, Ch. 20, L. '52; 10-1403, C. '39, Supp. '52, in part.

The concurring vote of a majority of the board, instead of four members of the board, was required to reverse an order or decision or to decide in favor of the applicant, by Laws 1952, Ch. 20, § 1.
§ 9-465. CITIES AND TOWNS

Notes of Decisions

1. In general

Ordinances dividing cities into residential and business districts and limiting use of realty in each district to certain purposes will not be declared unconstitutional unless it affirmatively appears that restriction is clearly arbitrary and unreasonable and without any substantial relation to public health, safety, morals, or general welfare. Ellsworth v. Gercke (1945) 62 Ariz. 195, 156 P.2d 242.

Courts will interfere with exercise of police power only when ordinance is plainly unreasonable, arbitrary, and discriminatory. City of Tucson v. Arizona Mortuary (1929) 31 Ariz. 495, 272 P. 923.

Courts will not interfere unless value of property rights destroyed by zoning ordinance is so great, as compared with benefit, that ordinance is clearly arbitrary and unreasonable. Id.

§ 9-466. Violations; remedies

If a building or structure is erected, constructed, reconstructed, altered, repaired, converted or maintained, or a building, structure or land is used in violation of this article or of an ordinance or other regulation made under authority conferred by this article, the municipality may institute an action to prevent, restrain, abate or punish the violation.

Historical Note

Source:
§ 8, Ch. 80, L. '23; § 2, Ch. 27, L. '27;

ARTICLE 7. EXTENSION OF CORPORATE LIMITS; PLATTING ADJACENT SUBDIVISIONS

§ 9-471. Annexation by petition

A. A city or town may extend and increase its corporate limits in the following manner:

On presentation of a petition in writing signed by the owners of not less than one half in value of the real and personal property as would be subject to taxation by the city or town in the event of annexation, in any territory contiguous to the city or town, as shown by the last assessment of the property, and not embraced within the city or town limits, the governing body of the city or town may, by ordinance, annex the territory 'to such city or town' upon filing and recording a copy of the ordinance, with an accurate map of the territory annexed, certified by the mayor of the city or town, in the office of the county recorder of the county where the annexed territory is located.
ARTICLE 1, DIVISION 28. BOARD OF ADJUSTMENT

Sec. 23-461 MEMBERSHIP. The board of adjustment as constituted at the time of enactment of this article shall continue in power.

The membership of the board shall consist of seven members each to be appointed for three years. Future appointments shall be made in the manner prescribed by A. R. S. § 9-461 et seq.; provided, however, that one of the members shall be a member of the city planning and zoning commission, one shall be a person engaged in the real estate business and one shall be a builder or architect. The term of the member of the city planning and zoning commission shall expire at the same time as his term on such commission, if this occurs prior to the expiration of his term as a member of the board of adjustment. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant. (1965 Code, Sec. 23-485)

Sec. 23-462 REMOVAL OF MEMBERS; COMPENSATION; EMPLOYEES; EXPENDITURES. A member of the board may be removed for cause, by the appointing authority, upon the filing of written charges and after a public hearing, and vacancies shall be filled as herein specified. The members of the board shall serve without compensation, but the board shall have the power and authority to employ a secretary and other necessary clerical assistance and to incur such other expenses as may be necessary in the performance of its duties; provided, however, that the total amount of obligations incurred against the city in any one year shall not exceed the appropriation of city funds made for the use of the board during the year. (1965 Code, Sec. 23-486)

Sec. 23-463 MEETING TO ELECT OFFICERS; ADOPTION OF RULES OF PROCEDURE. At the first meeting held in any calendar year, the members of the board of adjustment shall elect a chairman and a vice-chairman. The board shall adopt rules and regulations for its own government, not inconsistent with law or with the provisions of this article and of any other ordinance of the city. (1965 Code, Sec. 23-487)

Sec. 23-464 WHEN MEETINGS HELD; INVESTIGATORY AUTHORITY. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. The chairman, or, in his absence, the vice-chairman, may administer oaths, take evidence and compel the attendance of witnesses. (1965 Code, Sec. 23-486)

Sec. 23-465 MEETINGS TO BE PUBLIC; MINUTES REQUIRED. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing the action of the board and the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall then be a public record. (1965 Code, Sec. 23-489)
ARTICLE 1, DIVISION 28. BOARD OF ADJUSTMENT

Sec. 23-466 QUORUM; METHOD OF ACTION; VOTE NECESSARY. The presence of four members shall constitute a quorum. The board shall act by motion or resolution. The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision or determination of the building inspector, or to decide in favor of the applicant on any matter upon which it is required to pass under this article or to effect any variation in this article. (1965 Code, Sec. 23-490)

Sec. 23-467 CO-OPERATION OF OTHER DEPARTMENTS. The board may call on the city departments for assistance in the performance of its duties, and it shall be the duty of such departments to render such assistance to the board as may be reasonably required. (1965 Code, Sec. 23-491)

Sec. 23-468 APPLICATIONS TO BOARD. An application to the board of adjustment, in cases in which it has original jurisdiction under the provisions of this article, may be taken by any property owner, including a tenant, or by any governmental officer, department, board or bureau. Such application shall be filed with the building inspector who shall transmit the same, together with all the plans, specifications and other papers pertaining to the application, to the board. (1965 Code, Sec. 23-492)

Sec. 23-469 APPEALS TO BOARD. An appeal to the board of adjustment may be taken by any person aggrieved, or by any governmental officer, department, board or bureau affected by any decision of the building inspector in the enforcement of this article. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the building inspector and with the board a notice of appeal specifying the grounds thereof. The building inspector shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. (1965 Code, Sec. 23-493)

Sec. 23-470 HEARINGS ON APPLICATIONS OR APPEALS. The board of adjustment shall fix a reasonable time for the hearing of an application or of an appeal. Public notice of such hearing shall be deemed to have been given when a notice setting forth the general purpose of the hearing, together with the time and place thereof, has been published once in a newspaper of general circulation in the city not less than seven days prior to the date of the hearing. The board shall also mail notices to the applicant or appellant, and other parties in interest as determined by rule of the board, and to the building inspector, at least five days before the time when such application or appeal shall be considered by the board. Any party may appear at such hearings in person or by agent or by attorney. The board shall decide an application or appeal within a reasonable time. (1965 Code, Sec. 23-494)
Sec. 23-471 APPEALS TO STAY PROCEEDINGS; EXCEPTION. An appeal shall stay all
proceedings in furtherance of the action appealed from, unless
the building inspector certifies to the board of adjustment, after
notice of appeal shall have been filed with him, that by reason of
facts stated in the certificate, a stay would, in his opinion,
cause imminent peril to life or property. In such case, proceed­
ings shall not be stayed otherwise than by a restraining order
which may be granted by the board or by a court of record, on
application, on notice to the building inspector and on due cause
shown. (1965 Code, Sec. 23-495)

Sec. 23-472 POWERS OF BOARD. The board of adjustment shall have jurisdiction
in matters and shall have the specific and general powers provided
in this article in accordance with A. R. S. § 9-461 et seq.

A. SPECIAL EXCEPTIONS AND INTERPRETATION OF MAP. The board of
adjustment shall have the power to hear and decide, in accord­
ance with the provisions of this article and filed as herein­
before provided, requests for applications for special excep­
tions or for interpretation of the building zone map or for
decisions on other special questions on which the board is
authorized by this article to pass.

Where the street or lot layout actually on the ground, or as
recorded, differs from the street and lot lines as shown on
the building zone map, the board of adjustment, after notice
to the owners of the property and after public hearing, shall
interpret the map in such a way as to carry out the intent
and purposes of this article for the particular section or
district in question.

In addition to having authority to permit, under the conditions
stipulated, the special exceptions hereinbefore specified in
section 23-26, section 23-97, section 23-111, section 23-131,
section 23-146, section 23-201, section 23-217, section 23-231,
section 23-232, section 23-253, section 23-254, section 23-284,
section 23-311, section 23-322, section 23-372, section 23-383,
section 23-404, and section 23-426, the board of adjustment
shall have authority to permit the following:

1. NONCONFORMING USES

a. The substitution for a nonconforming use existing at
the time of enactment of this article, of another non-
conforming use, if no structural alterations, except
those required by law or ordinance, are made; provided,
however, that the new nonconforming use shall be of
similar or higher classification as set forth in the
arrangement of and classification of permitted uses in
divisions 4 through 24, inclusive, of this article.
ARTICLE 1, DIVISION 28. BOARD OF ADJUSTMENT

b. The extension of a nonconforming building upon the lot occupied by such building or on a lot adjoining; provided, that such lot was under the same ownership as the lot in question at the time of enactment of this article and that such extension is a necessary incident to the existing nonconforming use; and provided, that the extent of such extension shall not exceed in all fifty per cent of the floor area of the existing buildings devoted to a nonconforming use, and that such extension shall adjoin the existing building or premises, and provided further, that such extension shall in any case be undertaken within five years of the enactment of this article.

c. The extension of a use or building within the same lot existing and of record at the time of enactment of this article into a contiguous, more restricted district, but not more than twenty-five feet beyond the dividing line of the two districts. In borderline cases the board of adjustment may recommend to the council the redistricting of any lot, plot or part thereof where, in its opinion, this will cause no hardship and will not impair the intent and purpose of this article.

2. PROHIBITED INDUSTRIES.

a. To permit in any "B-2" business district any manufacturing or processing as provided under section 23-232, of this chapter but only as a necessary incidental accessory to a principal use permitted in the district on the same lot with such principal use, subject to such conditions as will safeguard the public health, safety, convenience and welfare; provided also, that the entire product of such use is utilized in the principal use to which it is accessory.

b. To permit in any "I-1" industrial district any of the industries or uses listed in section 23-311.B., and in doing so, may require the installation, operation and maintenance in connection with the proposed use of such devices or such methods of operation as may, in the opinion of the board, be reasonably required to prevent or reduce fumes, gas, dust, smoke, odor, water-carried waste, noise, vibration or similar objectionable features, and may impose such conditions regarding the extent of open spaces between it and surrounding properties as will tend to prevent or reduce the harm which might result from the proposed use to surrounding properties and neighborhoods.
ARTICLE 1, DIVISION 23. BOARD OF ADJUSTMENT.

3. TEMPORARY USES AND PERMITS.

a. The temporary use of a building or premises in any district for a purpose that does not conform to the regulations prescribed by this article for the district in which it is located, provided that such use be of a true temporary nature and does not involve the erection of substantial buildings. Such permit shall be in the form of a temporary and revocable permit for not more than a twelve month period, subject to such conditions as will safeguard the public health, safety, convenience and general welfare.

b. The temporary use of a building or land in undeveloped sections for a purpose that does not conform to the regulations prescribed by this article for the district in which it is to be located, provided that such structure or use is of a true temporary nature, is promotive of or incidental to the development of such undeveloped sections and does not involve the erection of substantial buildings. Such permit shall be granted in the form of a temporary and revocable permit as will safeguard the public health, safety, convenience and general welfare. (1965 Code, Sec. 23-496)

B. ADMINISTRATIVE REVIEW AND VARIANCES. The board of adjustment shall also have the power:

1. To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, grant or refusal made by the building inspector in the enforcement of the provisions of this article.

2. To authorize upon appeal in specific cases such variance from the terms of this article as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of this article will result in unnecessary hardship, and so that the spirit of this article shall be observed and substantial justice done.

In accordance with the above, the board of adjustment shall have the following general powers:

a. To permit in any zone such modification of the requirements of this article as such board may deem necessary to secure an appropriate development of a lot, where adjacent to such lot there are buildings or uses that do not conform to regulations prescribed by this article for the district in which these are located.
b. To permit the projection of a building into a required front yard, side yard or rear yard, but only to an extent necessary to secure a building or structure practicable in construction and arrangement for an exceptionally narrow, shallow or irregular lot, or for exceptional topography, so existing at the time of enactment of this article.

c. Where, by reason of exceptional narrowness, shallowness or shape of a specified piece of property at the time of enactment of this article or by reason of exceptional topographic conditions, or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any provision of this article would result in peculiar and exceptional practical difficulties or exceptional and undue hardship upon the owner of such property, the board shall have the power to authorize, upon an appeal relating to such property, a variance from such strict application, so as to relieve such difficulties or hardships, provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of this article.

No grant or variance shall be authorized unless the board specifically finds that the condition or situation of the specific piece of property for which the variance is sought is not of so typical or recurrent a nature as to make reasonably practicable the formulation of a general regulation for such conditions or situations.

In granting a variance the board may attach thereto such conditions regarding the location, character and other features of the proposed building, structure or use as it may deem advisable in the interest of the furtherance of the purposes of this article. (1965 Code, Sec. 23-473)

Sec. 23-473 ACTION OF BOARD. In exercising the above-mentioned powers, the board of adjustment may, in conformity with the provisions of A. R. S. § 9-461 et seq., and of this article, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken. (1965 Code, Sec. 23-473)

Sec. 23-474 APPEAL FROM BOARD. Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board or bureau of the city,
ARTICLE 1, DIVISION 28. BOARD OF ADJUSTMENT

may at any time within thirty days after the filing of the decision in the office of the board, review the same by petition for a writ of certiorari. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order and on final hearing may reverse or affirm, wholly or partly, or may modify the decision reviewed. (1965 Code, Sec. 23-499)

Sec. 23-475 BOARD OF ADJUSTMENT FEES.

A. The fees for planning and zoning matters before the Board of Adjustment shall be paid in accordance with the following schedule:

1. For applications or appeals involving construction of any nature, the fee shall be determined upon the total valuation of the improvement to be made, as follows:

   To and including $2,000 ................ $ 20.00
   Each additional $1,000 or fraction, to
   and including $12,000 ................ 3.00
   Each additional $1,000 or fraction,
   exceeding $12,000 .................. 5.00
   Maximum fee ................................ 100.00

2. For applications or appeals not involving construction of any nature .................. $ 35.00

3. For each request for rehearing .............. 25.00

4. For each granted request for delay or deferment of a matter to another meeting of the Board, if not initiated by the Board .. 25.00

B. Valuation of the improvement shall not include the valuation of the structure to which the improvement is to be made.

C. More than one variance or exception may be requested in the same matter for the same fee.

D. No fee or part thereof shall be returnable after a case is filed.

E. Fees shall be waived for the City of Tucson, the County of Pima, the State of Arizona, the United States government, or their departments, agencies and divisions.
ARTICLE 1, DIVISION 28. BOARD OF ADJUSTMENT

F. Fees shall be assessed and collected upon filing of an application or appeal or a request for rehearing. (Ordinance No. 3064, 12-18-67)

Sec. 23-476 RESERVED
-- 23-480
THE CITY OF TUCSON, Appellant, v. ARIZONA MORTUARY, a Corporation, Appellee.

1. Health—“Mortuaries” are subject to reasonable police regulation as to location and conduct. “Mortuaries,” which is modern term applied to undertaking and embalming establishments, are subject to reasonable police regulation as to their location as well as the manner in which they are conducted.

2. Health—Municipality can pass any reasonable ordinance compelling conduct of undertaking establishments in a sanitary and inoffensive manner as possible. —Municipality can pass any reasonable ordinance compelling proprietors of undertaking and embalming establishments to conduct them in as sanitary and inoffensive a manner as possible, without defeating the necessary purpose of their maintenance.

3. Municipal Corporations—Zoning ordinances will not be declared unconstitutional, unless clearly arbitrary and unreasonable. —Ordinances dividing cities into residential and business districts and limiting use of realty in each district to certain purposes will not be declared unconstitutional, unless it affirmatively appears that restriction is clearly arbitrary and unreasonable and without any substantial relation to public health, safety, morals or general welfare.

4. Municipal Corporations—Prior establishment of few isolated business houses in district, natural industrial development thereof, and greater value of property therein for business purposes, does not invalidate ordinance classifying district as residential. —Mere fact that few isolated business houses have been established in district sought to be classified as residential, that natural development of such district is toward industrial enterprise, that normal and reasonably to be expected future use of certain property therein is for industry and trade

1. Validity of statute in relation to undertakers or embalmers, see note in 13 A. L. R. 71. See also, 12 R. C. J. 1278.
2. Restrictions on use of real property as affected by zoning laws, see notes in 48 A. L. R. 1137; 54 A. L. R. 818. See also, 18 Cal. Jur. 856, 861.
purposes, or that property would be of more value for business than residential purposes, will not justify court in finding ordinance checking, defeating or diverting such development unconstitutional.

5. MUNICIPAL CORPORATIONS—COURTS WILL INTERFERE WITH EXERCISE OF POLICE POWER ONLY WHEN ORDINANCE IS PLAINLY UNREASONABLE, ARBITRARY, AND DISCRIMINATORY.—In all cases involving validity of exercise of police power, courts will interfere with legislative authority's action only when it is plain and palpable that ordinance has no real or substantial relation to general welfare and is unreasonable, arbitrary and discriminatory.

6. MUNICIPAL CORPORATIONS—CITY HELD NOT ESTOPPED TO PASS ORDINANCE Prohibiting MAINTENANCE OF MORTUARY AT CERTAIN LOCATION AFTER PURCHASE OF PROPERTY AND RECEIPT OF PERMIT TO CONSTRUCT MORTUARY THEREAT.—That corporation had purchased property outside strictly business district of city, received permit to construct mortuary thereon, and paid license for conducting such business at that location, did not estop city to pass zoning ordinance prohibiting maintenance of such business thereon, where all mortuaries in city had been conducted in business district before purchase, no ordinance regulating location thereof had been considered necessary, protest was filed as soon as corporation's intent was known, and city council notified corporation thereof and immediately began consideration of ordinance.

7. CONSTITUTIONAL LAW—CORPORATION FULLY ADVISED THAT ZONING ORDINANCE WAS CONTEMPLATED BEFORE ANY MATERIAL AMOUNT OF CONSTRUCTION WAS DONE ON PROHIBITED BUILDING HAD NO VESTED RIGHTS ENTITLING IT TO SET UP LOSS FROM PROCEEDING WITH CONSTRUCTION.—Corporation purchasing land outside strictly business district of city and letting contract for building mortuary thereon before adoption of zoning ordinance prohibiting maintenance of such business at that location, but fully advised before any material amount of construction was actually done that such was contemplated, had no vested right to continue building thereon.

8. CONSTITUTIONAL LAW—FINANCIAL LOSS GIVES NO VESTED RIGHT TO BUSINESS, LOCATION OF WHICH MAY BE REGULATED BY POLICE POWER.—Financial loss, however severe, does not give to parties a vested right to continue a business, no matter how long it has been conducted, if it is one whose location is regulated by city under police power.
9. Municipal Corporations—Courts will not interfere unless value of property rights destroyed by zoning ordinance is so great, as compared with benefit, that ordinance is clearly arbitrary and unreasonable. While municipalities should consider loss to property owners in determining whether general welfare requires interference with property rights of zoning ordinance, courts will not interfere with legislative will, unless value of rights destroyed is so great, as compared with benefit, that ordinance is clearly arbitrary and unreasonable.

10. Municipal Corporations—Ordinance Limiting Mortuaries to District Containing Ninety-Five Per Cent of Business Buildings in City Held Not Unconstitutional, Though Adopted After Erection of Mortuary Building in Excluded Residence District Was commenced. Ordinance limiting mortuary establishments to district comprising five per cent of total area of city and containing ninety-five per cent of buildings used for business purposes, while ninety-eight per cent of buildings in excluded district are used for residences, held not inherently so unreasonable and discriminatory as to be unconstitutional, though adopted after erection of mortuary building in residence district was commenced.

11. Municipal Corporations—Presiding Officer of Tucson City Council in Mayor's Absence May Approve Ordinance During Meeting at Which Passed (Tucson City Charter 1883, § 1). Under Tucson City Charter 1883, section 1, providing that all acts of presiding officer, chosen by four members of city council in absence of mayor at any meeting, shall have same validity as if done by mayor, such presiding officer has power given mayor to approve zoning ordinance during meeting at which passed; ten days' time allowed mayor for consideration thereof being permissive, not mandatory.

12. Municipal Corporations—Mayor Pro Tempore Under City Charter Has All of Mayor's Powers, in Absence of Special Charter Exception. The general rule is that one made mayor pro tempore by city charter has all the powers of the mayor himself during the period in which he may act, unless some special exception appear in charter.

13. Municipal Corporations—Ordinance Receiving Votes of Five Members of Tucson City Council Need Not Be Retained for Repassage After Mayor's Failure to Approve It? (Tucson City Charter 1883, § 1).—Under provision of Tucson City Charter 1883, section 1, that ordinance must receive no less than four votes and mayor's approval, or votes of five councilmen, if he fails to approve it within ten days after its passage, ordinance receiving votes of five councilmen on its original passage need not be...
Lockwood, J.—Arizona Mortuary, a corporation, hereinafter called plaintiff, brought suit against the City of Tucson, a municipal corporation, hereinafter called defendant, to enjoin the latter from enforcing the provisions of Ordinance 600 of the City of Tucson, which regulates the location of mortuaries. The trial court granted the injunction, and from the decision of that court this appeal has been taken.

The facts of the case are as follows: On the twelfth day of May, 1926, there was no ordinance in the City of Tucson regulating the location of mortuaries. All existing establishments of that nature were and had been for many years located in what is unquestionably the business district of the City, and within the limits of the mortuary district thereafter established by ordinance 600. About the date mentioned plaintiff purchased for the price of five thousand dollars a certain lot on the northeast corner of Stone Avenue and Third Street, applied for and received from the building inspector of Tucson a permit authorizing it to construct on said lot a mortuary building, entered into a contract for its erection, the estimated cost being five thousand dollars. As soon as the mortuary was to be opened for business owners in the neighborhood complained that the location would be objectionable and the city attorney was accordingly instructed to return the matter to the council for reconsideration or repassage after mayor's failure to approve it, but it is valid without further action, in absence of special provision therefor.

Constitutional Law, 12 C. J., sec. 529, p. 967, n. 74.

APPEAL from a judgment of the Superior Court of the County of Pima. C. C. Faires, Judge. Judgment reversed and cause remanded with instructions.

Mr. Ben C. Hill, City Attorney, for Appellant.

Messrs. Campbell & Conner, for Appellee.

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cost being in the neighborhood of twenty-five thousand dollars, and actually commenced work thereon. As soon as it became generally known that the mortuary was to be established, some fifty property owners in the vicinity thereof requested the mayor and common council to pass an ordinance regulating the location of the undertaking business, which would prevent plaintiff from using the site above referred to for that purpose. This petition was first presented to the council on May 21st, and the matter was discussed by the interested parties and referred to the city attorney for the purpose of investigation as to the law. While this investigation was under way plaintiff applied to the city license collector for a license to conduct an undertaking business at the location described, although the building was not then ready for use, and would not be for some months, and paid a license tax for the remainder of the current year in advance, although under the ordinances of Tucson such taxes are only payable quarterly, and proceeded with the construction of the mortuary. On the sixth day of July, Ordinance 600 was finally passed. At that time a number of the citizens who had previously protested against the location of the mortuary withdrew their objections, though the majority did not. The ordinance was adopted in the manner we shall hereafter describe, and thereafter this suit was commenced to enjoin its enforcement.

There are some thirty assignments of error, but we shall discuss them under four heads. The first is the general right of municipalities to regulate mortuaries; the second, the nature of the regulations permissible; the third, whether the ordinance in question goes beyond the permissible limits; and, the fourth, whether it was adopted as provided by law. It is generally conceded that mortuaries, to use the modern term applied to undertaking and embalming establishments,
are subject to reasonable police regulation as to their location as well as to the manner in which they are conducted. The Supreme Court of Minnesota, in the case of Meagher et al. v. Kessler, 147 Minn. 182, 179 N. W. 732, says:

"It has been held, in a number of well considered cases, that undertaking and embalming establishments may be deemed nuisances, depending largely on the locality in which they are conducted.

"The general principles involved in these cases fully justify the conclusions arrived at by the learned trial court in the case at bar. The feelings and sentiments of the respondents are those of the ordinary, normal individual living under similar conditions, that is, being compelled, by day and night, to look out from their homes upon an institution devoted solely to the carrying in and out of dead bodies, and the conducting of obsequies. It is the almost universal rule that an undertaking business is not a nuisance per se, but, as generally held, the ordinary person can hardly live next door to such an establishment without becoming depressed and more or less deprived of the comforts and enjoyment of his surroundings and when long continued it is liable to affect his general health.

"We conclude that the rule must be considered as well settled, and when the prosecution of a business, of itself lawful, in a strictly residential district, impairs the enjoyment of homes in the neighborhood, and infringes upon the well being and comfort of the ordinary, normal individual residing therein, the carrying on of such business, in such locality, becomes a nuisance and may be enjoined. There is no fixed or arbitrary rule, however, governing cases of this kind. Each must be determined by the particular facts and circumstances therein."

To the same general effect are the cases of: Goodrich v. Starrett, 108 Wash. 437, 154 Pac. 220; Osborn v. Skeen, 332 Ky. 22, 126 S. W. 2d 542; Spencer-Starita Co. v. Memphis, 155 Tenn. 70, 290 S. W. 608; Brown v. Los Angeles, 183 Cal. 783,
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192 Pac. 716; Odd Fellows' Cemetery Assn. v. San Francisco, 140 Cal. 236, 73 Pac. 957; Laurel Hill
Cemetery Assn. v. San Francisco, 152 Cal. 464, 14
Ann. Cas. 1050, 27 L. R. A. (N. S.) 260, 93 Pac. 70.

The second question is, what limit is there to the
regulating power of a municipality, or, in other words,
what would be considered reasonable? So far as the
operation of the business itself is concerned, it will
doubtless be conceded that the municipality could pass
any reasonable ordinance compelling the proprietors
of such establishments to conduct them in as sanitary
and inoffensive a manner as possible without defeating
the obviously necessary purpose of their maintenance.
The particular question is as to the reasonableness of limiting the places where they may be
maintained.

The leading case in the United States on the gen-
eral regulation of the location of business establish-
ments is undoubtedly that of Euclid v. Ambler Realty
Co., 272 U. S. 365, 54 A. L. R. 1016, 71 L. Ed. 303, 47
Sup. Ct. Rep. 114. In that case the village of Euclid
had attempted to regulate the location of practically
all classes of business within its limits by what is
known as a "general zoning ordinance." The entire
village was divided into some six classes of "use"
districts, and these districts were classified rigidly
in respect to the use to which buildings erected therein
could be put. The Supreme Court of the United
States, in discussing the constitutionality of such an
ordinance, said:

"Building zone laws are of modern origin. They
began in this country about twenty-five years ago.
Until recent years, urban life was comparatively
simple; but with the great increase and concentration
of population, problems have developed, and con-
stantly are developing, which require, and will con-
tinue to require, additional restrictions in respect of
the use and occupation of private lands in urban.
communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

"The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim 'sic utere tuo ut alienum non laedas,' which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clue. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies, in the process of ascertaining the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind on for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered
apart, but by considering it in connection with the circumstances and the locality. *Sturges v. Bridgman, L. R. 11 Ch. Div. 852, 855.* A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. *Radice v. New York,* 264 U. S. 292, 294, 68 L. Ed. 690, 694, 44 Sup. Ct. Rep. 325."

We think the principles above set forth are accepted as being the best general exposition of the police power on the subject of the regulation of business by zoning yet made. The court found on the facts of the case as follows:

"The record goes no farther than to show, as the lower court found, that the normal and reasonably to be expected, use and development of that part of appellee’s land adjoining Euclid avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal, and reasonably to be expected, use and development of the residue of the land is for industrial and trade purposes."

It was contended, among other things, in the case cited that the ordinance was unreasonable, for the following reasons:

"It is said that the village of Euclid is a mere suburb of the City of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village and, in the obvious course of things, will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere with the consequent loss of increased values to the owners of the lands within the village borders."

Answering this, the court said:

"But the village, though physically a suburb of Cleveland, is politically a separate municipality with powers of its own and authority to govern itself as it
sees fit within the limits of the organic law of its creation and the state and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

"We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny altogether or narrowly limit it; and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all." (Citing cases.)

We give these quotations somewhat at length, because they are peculiarly applicable to the findings of the trial court and the contentions of plaintiff herein.
Quoting from the Supreme Court of Illinois in Aurora v. Burns, 319 Ill. 93, 149 N. E. 784, 788, the court continues:

"The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the state the police power necessarily develops, within reasonable bounds, to meet the changing conditions."

"... The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries, commercial pursuits and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residential districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires and the enforcement of traffic and sanitary regulations. The danger of fire and the risk of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted."

"... The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder and dangers which often inhere in unregulated municipal development."

And, in finally disposing of the case, the court said as follows:

"The relief sought here is of the same character, namely, an injunction against the enforcement of any of the restrictions, limitations, or conditions of the..."
ordinance. And the gravamen of the complaint is that a portion of the land of the appellee cannot be sold for certain enumerated uses because of the general and broad restraints of the ordinance. What would be the effect of a restraint imposed by one or more of the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it or they would have any appreciable effect upon those matters. Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

"And this is in accordance with the traditional policy of this court. In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned."


It therefore appears that the highest authority in the land has held that ordinances dividing cities into districts on the basis of whether they are residential or business and limiting the use of real estate within
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tively appear the restriction is clearly arbitrary and
unreasonable, and has not any substantial relation to
the public health, safety, morals or general welfare.
With this principle before us as the guiding star,
next consider the reasonableness of the par-
ticular ordinance in question.
Under its terms, mortuary establishments in the
city of Tucson are limited to a certain district set
forth in the ordinance, which comprises some five
per cent of the total area of the City of Tucson,
within which district ninety-five per cent of the build-
ings are used for business purposes; the available
business frontage in said district being some eighty-
five thousand linear feet, of which something less
than six hundred is now occupied by mortuaries
while in the excluded district in which plaintiff’s
establishment is proposed to be located, ninety-eight
per cent of the buildings are used for residences.
On these facts it would certainly appear that the
prohibited area as a whole is most emphatically a
residence district. The court found, however, in
addition, that the immediate vicinity of plaintiff’s
establishment was not strictly a residential district,
but was mixed and rapidly giving way to business,
and that it was a very suitable and convenient place
for a mortuary. It is obvious that it would be ex-
tremely difficult, if not impossible, to find any con-
siderable district in a growing city which was one hun-
dred per cent either business or residential. Even in
the business district of Tucson there are doubtless a
few isolated residences surviving. Even in the most
exclusively aristocratic residence districts of the va-
rious cities of our country there are frequently found
a few neighborhood corner groceries, drug stores and
filling stations. The line must be drawn somewhere.
To hold that for zoning purposes a district could not be classified as residential merely because a few isolated business houses had been already established therein would practically prohibit the exercise of the right of zoning. As we have seen by the foregoing quotations from the Euclid case, neither the mere fact that the natural development of a district was toward industrial enterprise and that the normal and reasonably to be expected future use of certain property was for industry and trade purposes, nor the fact that property, if used for business purposes, would be of more value than if used for residential, will justify a court in finding unconstitutional an ordinance which checks or defeats such development or diverts it to another district.

It is the rule in all cases involving the validity of the exercise of the police power that courts will interfere with the action of the legislative authority only when it is plain and palpable that the ordinance has no real or substantial relation to the general welfare, and that it is unreasonable, arbitrary, and discriminatory. Radice v. New York, supra; Euclid v. Ambler Realty Co., supra; Thomas Cusack v. Chicago, 242 U. S. 526, Ann. Cas. 1917C 594, L. R. A. 1918A 136, 61 L. Ed. 472, 37 Sup. Ct. Rep. 190. We are of the opinion that it does not appear affirmatively the ordinance in question was so unreasonable, arbitrary, and discriminatory that it would have been unconstitutional if it had been adopted before plaintiff had commenced the erection of its building.

It is urged, however, that since plaintiff had purchased the property in question, had received a permit to construct a mortuary there from the city, and had paid its license for conducting such a business at that location, the defendant was estopped from prohibiting it from proceeding to maintain its business. And in support of such contention the case of Dobbin
Dec. 1028.

CITY OF TUCSON v. ARIZONA MORTUARY.

Los Angeles, 195 U. S. 223, 49 L. Ed. 169, 25 Sup. Ct. Rep. 18, is cited. The facts in that case were that plaintiff, Dobbins, had commenced the erection of a gas works in a district where such structures were at the time permitted by the express terms of the ordinance and had received a permit from the city so to do. Shortly thereafter the limits were narrowed, leaving plaintiff's property without the district where gas plants were allowed, and she asked for an injunction against the enforcement of the new ordinance. In her complaint she alleged, among other things, that the true purpose of the ordinance was not police regulation in the interest of the public, but the destruction of her rights and the building up of another company within the narrower privileged district. The City demurred to the complaint, and the demurrer was sustained. The Supreme Court of the United States, in discussing the case, held that the mere fact a certain business is in existence does not of itself give it a vested right against the exercise of the police power, stating:

"The prosecution of the business, originally harmless, may become, by reason of the manner of its prosecution, or a changed condition of the community, a menace to the public health and safety. In other words, the right to exercise the police power is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good."

In considering the allegations of the complaint in regard to the sudden and unexplained change of the law, it held, however, that the demurrer should have been overruled, and the City put on its answer, presumably as to the allegation that the ordinance was not meant for the general welfare, but to favor a special competitor. With this holding of the court, we...
heartily agree. If it is alleged and proved that the real purpose of passing an ordinance was an arbitrary and unjust discrimination, it of course cannot stand. But such was not the situation in the case at bar. Up to the time plaintiff purchased its property all mortuaries in the City of Tucson had been conducted in the strictly business district. There had been no attempt on the part of any one of them to enter the residential section, and no ordinance of any kind regulating the location of mortuaries had been considered necessary. As soon as it was known what plaintiff intended to do, a protest was filed; the city council notified plaintiff of that fact, and immediately began consideration of the question of regulating the location of mortuaries, adopting the ordinance in question soon after. Such facts are very far, indeed, from those alleged in the complaint in the Bobbins case, and which the Supreme Court of the United States said required an answer. Counsel for plaintiff argue with much zeal that the meaning of the Bobbins case is that unless there is an actual change in the existing conditions a business once permitted as lawful cannot be excluded, and that no such change had occurred in the present case. We think plaintiff has given the language of that case a meaning and application not contemplated by the court which rendered the opinion. If plaintiff's business had been an established, long-continuing one, acquiesced in with full knowledge of the facts by the city authorities, or if mortuaries had been permitted at the location in question on May 12th by express ordinance, and not merely because the city had not as yet found it necessary to act at all on the subject, the situation would have been very different, and an estoppel might be entitled to consideration. But such was not the case. Up to May 12th, so far as the record shows, it had never occurred to anyone that there would be an attempt to establish a mortuary outside the recognized
proved that the ordinance as an arbitrary enactment cannot stand. As the case at bar is property all proceedings had been conducted there had been no intent to enter the business district. As soon as the attempt was known, proceedings were immediately initiated and carried forward to establish the restricted district. To hold that under circumstances like this the city was estopped would mean that the governing authorities of municipalities, unless they foresaw in advance every condition which might arise and acted before the contingency occurred, would be helpless thereafter to meet the changed situation. We are satisfied that the situation changed within the true meaning of the Dobbins case as soon as plaintiff attempted to locate its mortuary where it did, and that the municipal authorities acted with reasonable promptness under the circumstances.

It is also contended that plaintiff had vested rights which were entitled to protection. Although it had purchased the land in question and let the contract for the building before the ordinance was adopted, yet before any material amount of construction had actually been done, it was fully advised that the ordinance was under contemplation. Instead of awaiting the action of the council, it apparently proceeded on the theory either that the ordinance would not be passed, or that, if passed, it was void. Having taken that chance, it may not now be heard to set up any loss to it which arose from its actions after it had knowledge that the ordinance was being considered. But even if plaintiff suffered some damages through things occurring before the protest, financial loss, no matter how severe, does not of itself give parties a vested right to continue a business, no matter how long it has been conducted, if the business is one whose location may be regulated under the police power. In the case of Hadachock v. Sebastian, 230 U. S. 394, Ann. Cas. 1917B 927, 60 L. Ed. 348, 36 Sup. Ct. Rep. 143, it appeared that plaintiff had long been engaged in the manufacture of bricks in a certain location in Los Angeles, and that his property for that purpose was...
worth some eight hundred thousand dollars. Later the City passed a zoning ordinance which prohibited the use of the property for brickmaking, and in effect lowered its value to less than one hundred thousand dollars. The court, however, held that his vested interest could not be asserted against the police power, stating:

"It is to be remembered that we are dealing with one of the most essential powers of government,—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. Chicago & A. R. Co. v. Tramburger, 238 U. S. 67, 78, 35 L. Ed. 1204, 1211, 35 Sup. Ct. Rep. 678. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground, and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus." (Italics ours.) Atlantic Coast Line R. Co. v. Goldboro, 232 U. S. 548, 35 L. Ed. 721, and cases cited, 34 Sup. Ct. Rep. 361.

It is of course true that in determining whether the general welfare requires interference with property rights by a zoning ordinance, municipalities should, and presumably generally do, consider, among other things, the loss to property owners by a restriction of the use of their property. This, however, is only one of the considerations on which the final decision is to be based. Doubtless, if the value of the property rights destroyed is so great, as compared with the benefit done, that it clearly appears the ordinance is arbitrary and unreasonable, the courts will inter-
ere, but if there can be any reasonable argument on the question the legislative will must prevail.

In the case at bar any loss for money expended after plaintiff had notice of the proposed ordinance was at its peril, and cannot be considered as a vested right, entitled to any consideration. If the ordinance be valid, the contractor would have no action against plaintiff for failing to complete its contract, though he would have one on quantum meruit for what was already done. The only loss which could be considered would be the decreased value of the lot, if any, because it could not be used for a mortuary, and the few dollars expended on the property before the plaintiff had notice of the protest. Since a vested right does not ipso facto defeat an ordinance of this kind, we cannot say affirmatively that Ordinance 600 of the City of Tucson was on its face and on the facts found by the trial court inherently so unreasonable and discriminatory that it is unconstitutional.

We therefore hold that if it was adopted in the manner provided by law it is constitutional. Was it so adopted?

It was stipulated at the trial that the ordinance was passed in the following manner:

"That John E. White is now, and at all times since, on or about January 1st, 1925, has been the duly elected, qualified and acting Mayor of the City of Tucson; that on the 6th day of July, 1926, a regular meeting of the City Council of the City of Tucson was held; that the said John E. White, Mayor of Tucson, was not present at said meeting, he being at that time absent from the City of Tucson; that at said meeting there were present all of the members of the City Council of the City of Tucson, being six in number; that at said meeting of July 6th, 1926, upon motion of Councilman Chambers, duly made, seconded and unanimously carried, Councilman J. P. Pfeiffer was elected president pro tem. to preside at the meeting in the absence of the Mayor. That no other action of any kind was taken by the City Council of the
City of Tucson for the purpose of qualifying any person to discharge the duties of the Mayor during his absence from the City. That at said meeting of July 6th, 1926, the following action was taken, as shown by the minutes of said meeting:

"Councilman Jaastad stated that the Building and Land Committee was ready to report upon the matter of the regulation of funeral parlors, and called upon the City Attorney to read the Ordinance which they had instructed him to prepare, and thereupon Ordinance No. 600, regulating undertaking or embalming business, or mortuaries, was read the first time in full, and upon motion of Councilman Jaastad, duly made, seconded and carried, read the second and third time by title only, and placed on its final passage. The roll call resulted as follows: Chambers, Cordis, Holbert, Jaastad, Pfeiffer and Pilcher, Aye, and Ordinance No. 600 was declared duly passed and adopted."

"That the minutes of said meeting of July 6th, 1926, were signed as follows: 'J. F. Pfeiffer, President pro tem.' That during the course of said meeting of July 6th, 1926, and immediately after the passage of said Ordinance, said Ordinance No. 600 was signed by the said J. F. Pfeiffer as follows: 'Approved this 6th day of July, J. F. Pfeiffer, President pro tem.' That said ordinance No. 600 was at no time submitted to the said John E. White for his approval or disapproval. That the said John E. White had returned to and was in the City of Tucson and discharging the duties of his office as Mayor of said City on the 13th day of July, 1926, and attended a meeting of the Common Council of the City of Tucson held July 13th, 1926. That said Ordinance No. 600 was not at any time subsequent to July 6th, 1926, repassed by the Common Council of the City of Tucson."

It is the contention of plaintiff that the ordinance was invalid on the foregoing facts, as not having been approved by the mayor or passed over his veto.
general statute. The City of Tucson as at the time in question was acting under a special charter originally adopted in 1883. This charter, so far as it relates to the method of passage and approval of ordinances, reads as follows:

"Section 1. The Mayor and Common Council shall hold their regular meetings on the first Monday in each month. A majority of all the members elected shall be a quorum; and a less number may adjourn from time to time and may compel the attendance of absent members. The Mayor shall preside at all meetings of the Common Council, but shall be entitled to no vote unless in case of a tie. In the absence of the Mayor at any regular, or adjourned, or called meeting of the Common Council, if four members are present they may choose one of their own number to preside at such meeting, and all acts of such presiding officer shall have the same validity as if done by the Mayor; and such Mayor pro tempore shall not thereby lose his vote as Councilman. Every order made and ordinance passed by the Mayor and Common Council, in order to have legal force, must receive not less than four votes and the approval of the Mayor; or if he fail or refuse to approve the same within ten days after its passage, to render such order or ordinance valid, it must receive the votes of five of the Councilmen."

It appears therefrom that in the absence of the mayor at any meeting four members of the council may choose one of their own number to preside at such meeting, and "all acts of such presiding officer shall have the same validity as if done by the mayor." If, therefore, the mayor may approve an ordinance adopted at such meeting immediately upon its adoption and during the meeting, and his approval be valid, it would seem there can be no question that such action on the part of the mayor pro tempore would be equally valid. Plaintiff argues, however, that such is not the spirit of the charter; that it was meant the presiding officer should only exercise the
ordinary procedural duties of the mayor as presiding officer over the meetings of the council, to the exclusion of his independent duties as mayor of the City, such as approving ordinances, making appointments, etc. It claims that the subsequent provision of the section, "or if he fail or refuse to approve the same within ten days after its passage, to render such order or ordinance valid, it must receive the votes of five of the councilmen" means that the mayor has ten full days' time to consider an ordinance, and that any action thereon by the president pro tempore before the expiration of the ten days is unauthorized.

We cannot concur in this view. If plaintiff's position be correct, when, if at all, may a mayor pro tempore approve an ordinance? By the process of elimination, since the mayor has every minute of the ten days in which to consider his action, the former could not act at all. In other words, although the charter gives him all the powers of the mayor during the meeting, nevertheless he could never exercise one of the most important, that of approving or disapproving ordinances. The general rule of law unquestionably is that a mayor pro tempore, made such by the charter, has all the powers of the mayor himself during the period in which he may act, unless some special exception appear in the charter. McQuillin, Municipal Ordinances, par. 691; O'Malley v. Metcalf, 53 Wis. 353, 10 N. W. 515; Barton v. Recorder's Court, 60 Or. 273, 119 Pac. 349; Hunter v. Louisville, 208 Ky. 562, 271 S. W. 690; Seattle v. Doran, 5 Wash. 482, 32 Pac. 105, 1002. Counsel for plaintiff has cited us to a number of cases holding to the contrary. In most, if not all of these, it appears that the acting mayor in what he did proceeded against the protest of the mayor. The old adage is that "hard cases make poor law" and the reasoning of the cases last referred to seems to follow that adage. We are of the opinion that on the stipulation filed, since considera-
tion for ten days before acting was permissive and not mandatory, the mayor would have had the right to approve the ordinance immediately after its passage and at the meeting when it was passed, and therefore it was within the power of the mayor pro tempore to approve it then, and his approval had the same effect as would that of the actual mayor.

Counsel urges upon us that the final decision in this case will be a precedent and that its reasoning will be as applicable to a case of the absence of a Governor as to the absence of a mayor. We agree with this statement. This court has recently had before it a very similar situation. Under our Constitution the Secretary of State, when the Governor is absent from the state, has all the powers and duties of the latter. During the temporary absence of the Governor on public business the Secretary of State made an appointment to one of the most important offices under the control of the Governor. Immediately upon learning of this appointment the Governor publicly repudiated such action, and bitterly criticised the Secretary of State for his conduct. The validity of the appointment was litigated in this court, and was passed on in the case of *McCloskey v. Hunter*, 33 Ariz. 513, 266 Pac. 18, wherein we affirmed its validity. In that case we said:

"It might be well to say here that under section 6, article 5, of the Constitution of Arizona, the powers and duties of the Governor, when that officer is absent from the state, devolve upon the Secretary of State and his acts at such times, whatever they may be, are just as valid and binding as though they had been performed by the Governor himself. Hence, if a condition existed in Arizona on January 20, 1928, that gave the chief executive of the state the right to appoint a member of the Industrial Commission there can be no question but that the acting Governor could have exercised this right just as effectively as could the Governor himself had he been within the
Whether, however, it was good policy under the circumstances for him to do so or in keeping with the proprieties which an acting Governor might be supposed to observe is a matter which cannot be considered by the court.”

Even were the mayor pro tempore not authorized to approve the ordinance as he did, there is another reason why it was valid. The charter provisions above quoted do not provide for the ordinary veto, by returning the ordinance to the council with the mayor’s disapproval, nor do they set forth any method of passing an ordinance over a veto. They simply say that an ordinance, to have legal force, “must receive not less than four votes and the approval of the mayor or if he fail or refuse to approve the same within ten days after its passage, to render such order or ordinance valid it must receive the votes of five of the Councilmen.” We are of the opinion that in the absence of any special provision requiring such action an ordinance, after the mayor has failed to approve it, need not be returned for reconsideration or repassage if it has received the votes of five of the members of the council on its original passage. In such case it is valid without any further action, regardless of whether or not the mayor has approved. Rhodes v. People, 67 Colo. 4, 185 Pac. 264.

For both the foregoing reasons we hold that the ordinance was adopted in manner and form as provided by the charter of the City of Tucson, and, since it does not affirmatively appear it is unconstitutional, it is valid. The order of the superior court granting an injunction is reversed and the case remanded, with instructions to deny the injunction, and for such proceedings as may be proper.

ROSS, C. J., and McALISTER, J., concur.
LOCKWOOD, Judge.

This is an appeal from an order of the superior court of Pima County quashing a writ of certiorari. The circumstances out of which the case arose may be stated as follows:

Robert Nicolai and Mrs. W. F. Christman, hereinafter called petitioners, are the owners of Lots 1, 2, 3 and 4 in block 190 of the city of Tucson. On December 12, 1938 they applied to the building inspector of Tucson for the issuance of a building permit to construct on said property a warehouse and freight terminal, which application was refused by the inspector. Thereafter they filed an appeal to the board of adjustment of Tucson, hereinafter called the board, asking that the decision of the building inspector be overruled, and that a permit for the erection and operation of said warehouse and terminal be granted. On January 18, 1939 the board held a hearing, and took evidence, and overruled the decision of the building inspector and granted the permit as prayed for. Some nine days later the board, without notice to petitioners, decided that a public rehearing was necessary, and so notified the latter. On the date last named, the hearing was postponed until March 15, but before that date petitioners filed in the superior court of Pima County an application for a writ of certiorari, claiming that a rehearing was in excess of the jurisdiction of the board. The record was brought up and on April 27 the court rendered a judgment quashing the writ of certiorari, whereupon this appeal was taken.

The case involves the construction and effect of article 14 of chapter 12, R. C. 1928, being the state zoning law, and ordinance No. 647 of the city of Tucson, which is an ordinance adopted under the authority of said article 14. The zoning law, so far as material to this case, reads as follows:

"§ 462. Grant of power. For the purpose of promoting the health, safety, morals, or the general welfare of the community, the legislative body of incorporated cities and towns may regulate and restrict the height, number of stories, and size of
buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industrial, residence or other purposes, and may establish setback lines; and for such purposes may divide the municipality into districts of such number, shape, and area as may be deemed best suited for the purposes hereof. Within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts."

"§ 463. Method of procedure by ordinance. The legislative body may provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced. * * *"

"§ 464. Board of adjustment. The ordinance may also provide for the appointment of a board of adjustment, with powers in an appropriate case to make special exceptions to the terms of the ordinance, in accordance with provisions therein contained. * * * Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of any administrative official. * * * *

"The board shall fix a reasonable time for the hearing of the appeal and give notice thereof to the parties in interest and the public. The board shall: Hear and decide appeals when there is error in any order, requirement or decision, made by an administrative official in the enforcement of any ordinance adopted pursuant hereto; hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance; authorize in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship; reverse or affirm, wholly or partly or modify the order or decision, appealed from and to make such order or decision, as ought to be made, and to that end shall have the powers of the officer from whom the appeal is taken. * * *"

It is evident that this statute, which was originally adopted as chapter 80 of the regular session laws of 1925, was copied from the Standard State Zoning Enabling Act prepared under the auspices of the Federal Department of Commerce, which act has been adopted practically verbatim by approximately two-thirds of the states, including Arizona, Utah, Oklahoma, Texas, Missouri, North Dakota and Iowa. Under its authority the city of Tucson adopted ordinance No. 647. It is lengthy, and we, therefore, summarize its provisions as follows, quoting it only when necessary: The ordinance, as amended, divides the city of Tucson into nine classes of use districts, A, B and C residence districts, A, B and C business districts, and A, AA and B industrial districts. The boundaries of these districts are set forth on certain maps declared to be a part of the ordinance. Section 3 reads, in part, as follows: "In any Class 'A' residence district, no building or premises not already so utilized shall be used, and no building or structure shall be erected, which is arranged, intended or designed to be used, in whole or in part, for any industrial, manufacturing, trade, or commercial purposes, unless herein otherwise provided, or for any other than one or more of the following specified purposes: * * *" and then describes the uses to which buildings in the district may be put, and follows with many regulations as to the buildings so to be erected therein. Similar provisions are found referring to each of the other eight districts.

It will be seen that it is expressly stated that no building in a district shall be used for any purpose except that for which specific permission is granted by the ordinance. Upon examining the ordinance further it appears that the use to which petitioners intended to put the building which they desired to erect was limited to classes A, AA and B industrial districts only, and that such erection or use within any other district was expressly prohibited. It also appears from the record that the district in which the property of petitioners is situated is a class C business district.

The ordinance grants the following powers to the board:

"Sec. 12. Powers of the Board of Adjustment. The Board shall have the following powers:

1. To hear and decide after public notice and hearing, appeals where it is al-
In each of these cases it was held that authority such as is given by our statute to a board of adjustment, under an ordinance which expressly limited the erection and use of structures within a given district to certain specified purposes, to decide special exceptions to the terms of the ordinance and to authorize in specific cases a variance such as would not be contrary to the public interest, did not warrant such boards to authorize a prohibited use of a building, but merely to grant exceptions to the general rules governing the erection and maintenance of buildings which were used for an authorized purpose. The court, in Walton v. Tracy L. & T. Co., supra, passing on a statute almost verbatim like ours, said [92 P.2d 726]: "Can the Board then grant a variance in use or is it confined in its powers to variances in building and construction details within the specified uses? If the Board can grant a nonconforming use, that is, can authorize a prohibited use on one plot of ground within a district, it can as to all other plots of ground. Any variance in use is in the extent of such land in effect a rezoning or the placing of such land in a different zone than that in which the Commission by ordinance had placed it for the purpose of promoting the health, safety, morals and general welfare of the community. Such interpretation would permit the Board, an administrative agent merely, to set aside and in effect annul an ordinance, a legislative act of the Commission, and to do all the Commission itself might do. * * * If however the powers of the Board are limited to minor and practical difficulties, to such variations in detail and construction as the Inspector himself might have allowed rather than to use, the statute and set up are harmonious throughout, the hiatus is gone, and the purpose and spirit of zoning laws preserved so the City might develop according to a comprehensive plan and land be utilized to the best advantage consistent with the public policy and welfare. And this interpretation of the statute is in accordance with the great weight of authority. * * *

[2] It is true there are a few states which do permit a slight use extension, such as In re Mark Block Holding Corp., 141 Misc. 818, 253 N.Y.S. 321; Prusik v. Board of Appeal, 262 Mass. 451, 160 N.E. 312, but they are the older cases and are in the minority. We are of the opinion that the later and better rule is that when an ordinance passed under a statute like ours expressly prohibits the use of property within certain districts for certain purposes, a board of adjustment created by authority of the statute may not change the use established by the legislative body of the city through its ordinance, and that any such change must be by the legislative body itself through a new ordinance rezoning the property involved.

[3] The action of the board at its first hearing when it granted a nonconforming permit to petitioners was, therefore, on its face in excess of its jurisdiction, and null and void. This being the case, we think it unnecessary for us to consider the question of whether boards of adjustment established under the statute may grant rehearings on valid orders made within their jurisdiction. If the first order was void, the
second hearing was in law an original one and not a rehearing.

The judgment of the lower court is affirmed.

ROSS, C. J., and McALISTER, J., concur.

JACK WAITE MINING CO. v. WEST.
No. 4121.
Supreme Court of Arizona.
April 15, 1940.

1. Limitation of actions \(\Rightarrow 103(4)\)
Where the trustee of an express trust, to the knowledge of his cestui que trust, repudiates the trust and converts the property, limitations then begin to run. Rev. Code 1928, § 2009, subds. 3, 4; § 2060, subd. 3.

2. Limitation of actions \(\Rightarrow 103(4)\)
A cestui que trust, who does not have notice of specific repudiation of trust by trustee, but who knows facts from which a reasonable man would be put on notice that the trust has been or is about to be repudiated, is deemed to have actual notice, as respects limitations. Rev. Code 1928, § 2002, subds. 3, 4; § 2003, subd. 3.

3. Limitation of actions \(\Rightarrow 103(4)\)
A cestui que trust may not shut his eyes and refuse to recognize a plain warning of danger that trust has been or is about to be repudiated, and then claim that he had no knowledge of the catastrophe when it comes, so as to avoid bar of limitations. Rev. Code 1928, § 2030, subds. 3, 4; § 2060, subd. 3.

4. Limitation of actions \(\Rightarrow 103(4)\)
A stockholder who has notice of stock assessment and that his mining stock would be sold for nonpayment thereof if it were not paid by certain date, and who mailed a check on a private firm of which he was a member covering the assessments, but after being notified that his account with firm had been closed, failed to compare statement and check stubs from which he would have ascertained that check had not been paid would be deemed to have notice of repudiation by corporation of any trust which may have existed, so as to be precluded from maintaining action against corporation for conversion, after two year statute of limitations had run, based on corporation's sale of the stock. Rev. Code 1928, § 2030, subd. 3.

Appeal from Superior Court, Maricopa County; Howard C. Speakman, Judge.

Action by Charles C. West against the Jack Waite Mining Company for reinstatement in plaintiff's name of certain shares of defendant's capital stock, upon the stock record books of defendant. Judgment for plaintiff and defendant appeals.

Reversed and case remanded with instructions.

Baker & Whitney, and Lawrence L. Howe, all of Phoenix, for appellant.

Townsend, Jenckes & Wildman, of Phoenix, for appellee.

LOCKWOOD, Judge.

This is an appeal by Jack Waite Mining Company, a corporation, hereinafter called defendant, from a judgment in favor of Charles C. West, hereinafter called plaintiff, directing defendant to reinstate certain shares of its capital stock upon the stock record books in the name of plaintiff, or in lieu thereof, to pay him the sum of $1,200. The facts material to a decision of the case may be stated as follows:

Defendant, prior to 1932, was a mining corporation in which plaintiff was the owner of 4,000 shares of fully paid capital stock. Under the articles of incorporation this stock was expressly declared to be assessable, but the articles provided no specific manner by which the assessment could be levied and collected. On March 21, 1932, the board of directors of defendant, hereinafter called the board, amended its by-laws by setting up a method for levying and collecting an assessment. It provided that the board might order an assessment payable at certain dates, notify the stockholders, and if the assessment remained unpaid, the stock of the delinquent stockholder would be sold at public auction in the manner set forth in the by-laws. On the same date the board levied an assessment of 46 per share on all of its outstanding capital stock, providing that it should be paid on or before May 6, 1932, and that any stock upon which the assessment remained unpaid at that date would be delin-
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<td>R. BURKE &amp; HIL ADAMSON JR.</td>
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<td>9/18 Cancelled by the applicant on October 1, 1970</td>
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<td>E. ALAN CLAY, INC.</td>
<td>by Charles A. Surviver</td>
<td>4405 E. Pima St.</td>
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<td>by Peggy C. Brown</td>
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Continued to meeting Jan. 27, '71

Denied

Granted with a condition

Granted for one year

Continued to meeting Jan. 27, '71

 Granted for one year
SECTION 9507 COUNCIL ACTION. Upon receipt of an appeal by a private party, or upon receipt of a recommendation from the City Planning Commission, the City Council shall set the time for consideration of the matter. In the case of an appeal by a private party, the City Clerk shall notify the Secretary of the Commission of the receipt of the appeal and of the time set for consideration thereof; and said Secretary shall, not less than five days prior to the date set for the hearing on the appeal, give written notice to the appellant and to any known adverse parties, or to their representatives, of the time and place of the hearing. Upon an appeal by a private party, or upon the receipt of a recommendation from the City Planning Commission, the Council may approve, modify, or reverse the decision, or may approve, modify, or disapprove the Commission's recommendation, as the case may be. The decision of the Council shall be final.

SECTION 9508 LIMITATION ON RESUBMISSION. Whenever a private party application has been denied by the City Council, no such application for the same proposal affecting the same property, or any portion thereof, shall be filed within one year after the date of denial.

VARIANCE PROCEDURE

SECTION 9600. TITLE, PURPOSE, AND APPLICABILITY. The provisions of Section 9600 through Section 9624, inclusive, shall be known as the VARIANCE PROCEDURE. The purpose of these provisions is to prescribe the procedure for the relaxation of any substantive provision of the ZONING REGULATIONS, under specified conditions, so that the public welfare is secured and substantial justice done most nearly in accord with the intent and purposes of the ZONING REGULATIONS, under specified conditions, so all proposals to vary the strict requirements of the ZONING REGULATION.

SECTION 9601 APPLICATION. Application for a variance shall be made by the owner of the affected property, or his authorized agent, on a form prescribed by the City Planning Department and shall be filed with such Department. The application shall be accompanied by such information including, but not limited to, site and building plans, drawings and elevations, and operational data, as may be required to permit the review of the proposal in the context of the required findings, and by the fee prescribed in the Fee Schedule at Section 9600.

SECTION 9602 PROCEDURE FOR CONSIDERATION.

(a) Major Variances. An application for a variance from a provision of the ZONING REGULATIONS with respect to permitted activities or facilities, number of required off-street parking spaces or loading berths, performance standards, maximum number of living units, maximum floor-area ratio, restrictions on the vertical location of activities within a structure, or maximum size of the activities conducted by a single firm (collectively referred to herein as "major variance") shall be considered by the Board of Adjustments. However, the Board may, at its discretion, refer any application to the City Planning Commission for consideration rather than acting on it itself. A public hearing shall be held on each application. Notice of such public hearing shall be given by posting at least five notices thereof in the vicinity of the property involved in the petition, at least five days prior to the date of the hearing. The Board or the Commission, as the case may be, shall determine whether the conditions required in Section 9603 or Section 9604 are present, and may grant or deny an application for a variance or require such changes in the proposed use or impose such reasonable conditions or approval as are in its judgment necessary to promote the purposes of the ZONING REGULATIONS. The determination of the Board or the Commission, as the case may be, shall become final 10 days after the date of decision unless appealed to the City Council in accordance with Section 9605.

(b) Minor Variances. An application for a variance from a provision of the ZONING REGULATIONS other than those listed in subsection (a) (referred to herein as "minor variance") shall be considered by the Director of City Planning. However, the Director may, at his discretion, refer any application to the Board of Adjustments for consideration rather than acting on it himself. At his or its discretion, the Director or the Board, as the case may be, may give such notice as is deemed appropriate to adjacent property owners or other affected parties; and, in cases referred by the Director to the Board, a public hearing may be held before the Board. The Director or the Board, as the case may be, shall determine whether the conditions required in Section 9603 or Section 9604 are present, and may grant or deny an application for a variance or require such changes in the proposed use or impose such reasonable conditions of approval as are in his or its judgment necessary to promote the purposes of the ZONING REGULATIONS. A determination by the Director of City Planning shall become final five days after the date of decision unless appealed to the Board of Adjustments in accordance with Section 9606. In cases which the Director refers to the Board, the decision of the Board shall be final.

(c) Period of Consideration. Should a decision not be rendered pursuant to subsections (a) and (b) within 60 days after filing, the application shall be deemed approved unless said time has been extended by agreement between the Director of City Planning, the Board of Adjustments, or the City Planning Commission, as the case may be, and the applicant.

SECTION 9603 FINDINGS REQUIRED. Except as otherwise provided in Section 9604, a variance may be granted only upon determination that all of the following conditions are present:

(a) That strict compliance with the specified regulation would result in practical difficulty or unnecessary hardship inconsistent with the purposes of the ZONING REGULATIONS, due to unique physical or topographic circumstances or conditions of design; or, as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution improving livability, operational efficiency, or appearance.

(b) That strict compliance with the regulation would deprive the applicant of privileges enjoyed by owners of
similarly zoned property; or, as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution fulfilling the basic intent of the applicable regulation.

(c) That the variance, if granted, will not adversely affect the character, livability, or appropriate development of abutting properties or the surrounding area, and will not be detrimental to the public welfare or contrary to adopted plans or development policy.

(d) That the variance will not constitute a grant of special privilege inconsistent with limitations imposed on similarly zoned properties or inconsistent with the purposes of the Zoning Regulations.

SECTION 9604 ALTERNATIVE FINDINGS FOR PRE-ENACTMENT VARIANCE. As an alternative to the findings required in Section 9603, a variance may be granted within one year after the effective date of the Zoning Regulations upon a determination that all of the following conditions are present:

(a) That the applicant has initiated the preparation of plans for development prior to six weeks before the effective date of the Zoning Regulations and in complete adherence to the previously applicable zoning ordinance, so that no variance or other special approval would have been needed thereunder.

(b) That abandonment of such plans or revision in accordance with the Zoning Regulations would result in substantial economic hardship in terms of expenditures on the preparation of plans.

(c) That the variance, if granted, will allow a development of sound and attractive design, which will not adversely affect the character, livability, or appropriate development of abutting property or the surrounding area, and will not be detrimental to the public welfare or contrary to adopted plans or development policy.

SECTION 9605 APPEAL TO COUNCIL—MAJOR VARIANCES. Within 10 days after the date of a decision by the Board of Adjustments or the City Planning Commission, as the case may be, on an application for a variance from one of the provisions referred to in Section 9602(a), or on revocation of such a variance in accordance with Section 9603, an appeal from said decision may be taken to the City Council by the applicant, the holder of the variance, or any other interested party. Such appeal shall be made on a form prescribed by the City Planning Department and shall be filed with such Department. The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Director or wherein his decision is not supported by the evidence in the record. Upon receipt of such appeal the Secretary of the Board shall set the time for consideration thereof and, not less than five days prior thereto, shall give written notice to the appellant and to any known adverse parties, or to their representatives, of the time and place of the hearing on the appeal. In considering the appeal the Board shall determine whether the conditions required in Sections 9603 and 9604 are present, and may grant or deny an application for a variance or require such changes in the proposed use or impose such reasonable conditions of approval as are in its judgment necessary to carry out the purposes of the Zoning Regulations. The decision of the Board shall be final.

SECTION 9606 APPEAL TO BOARD OF ADJUSTMENTS—MINOR VARIANCES. Within five days after the date of a decision by the Director of City Planning on an application for a variance from one of the provisions referred to in Section 9602(b), an appeal from said decision may be taken to the Board of Adjustments by the applicant or any other interested party. Such appeal shall be made on a form prescribed by the City Planning Department and shall be filed with such Department. The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Director or wherein his decision is not supported by the evidence in the record. Upon receipt of such appeal the Secretary of the Board shall set the time for consideration thereof and, not less than five days prior thereto, shall give written notice to the appellant and to any known adverse parties, or to their representatives, of the time and place of the hearing on the appeal. In considering the appeal the Board shall determine whether the conditions required in Sections 9603 and 9604 are present, and may grant or deny an application for a variance or require such changes in the proposed use or impose such reasonable conditions of approval as are in its judgment necessary to carry out the purposes of the Zoning Regulations. The decision of the Board shall be final.

SECTION 9607 ADHERENCE TO APPROVED PLANS. A variance shall be subject to the plans and other specified conditions upon the basis of which it was granted. Unless a different termination date is prescribed, the permit shall terminate one year from the effective date of its granting unless actual construction or alteration, or actual commencement of the authorized activities in the case of a variance not involving construction or alteration, has begun under valid permits within such period. However, such period of time may be extended by the original reviewing officer or body, upon application filed at any time before said period has expired.

SECTION 9608 REVOCATION. In the event of a violation of any of the provisions of the Zoning Regulations, or in the event of a failing to comply with any prescribed condition of approval, or in the event that one year has elapsed since the granting of a variance and no building permit or sign permit has been issued pursuant thereto, or in the event that the authorized activities, in cases not requiring a building or sign permit, have not commenced within said period, the Board of Adjustments, or the City Planning Commission in the case of a variance which was originally acted upon by the Commission, may, after notice and hearing, revoke any variance. In the case of a revocation of a variance from one of the provisions listed in Section 9602(a), the determination of the Board or the Commission, as the case may be, shall become effective.
10 days after the date of decision unless appealed to the City Council in accordance with Section 9003. In the case of a revocation of a variance from one of the provisions referred to in Section 9602(b), the decision of the Board shall be final.

SECTION 9609 VARIANCE RELATED TO CONDITIONAL USE PERMIT, DESIGN REVIEW, PLANNED UNIT DEVELOPMENT, OR SUBDIVISION. Whenever a variance is required for a proposal also requiring a conditional use permit, design review, or a planned unit development permit, application for the variance shall be included in the application for said conditional use permit, design review, or planned unit development permit, and shall be processed and considered as part of same. Whenever a variance is proposed for a facility located within a proposed residential subdivision, the application for the variance may be submitted with the Tentative Map, pursuant to the Real Estate Subdivision Regulations of the Oakland Municipal Code, and may be processed and considered therewith. In either case, however, the reviewing officer or body shall, in considering such a variance, determine whether the conditions required in Section 9603 or Section 9604 are present.

FEE SCHEDULE

SECTION 9800 TITLE, PURPOSE, AND APPLICABILITY. The provisions of Section 9800 through Section 9824, inclusive, shall be known as the FEE SCHEDULE. The purpose of these provisions is to prescribe the fees for the filing of applications for the procedures indicated herein. This fee schedule shall apply to all such filings.

SECTION 9801 NO FEE FOR PUBLIC AGENCY. No fee shall be charged for an application filed by any city, county, district, state, federal, foreign, or international government, or agency thereof.

SECTION 9802 NO FEE FOR RENEWALS. No fee shall be charged for an application to extend a termination date or a stage development schedule prescribed as a condition of an approval which has been granted and which has not expired, provided that no substantial change in plans or other conditions of approval is proposed.

SECTION 9803 REFUND OF FEE. The Director of City Planning may refund an application fee in whole upon a determination that the application was erroneously required or filed. He may refund a fee pro rata, based on the cost of processing the application, if the application is withdrawn prior to a decision thereon. The Director's determination shall be subject to appeal pursuant to the ADMINISTRATIVE APPEAL PROCEDURE at Section 9100.

SECTION 9810 ADMINISTRATIVE APPEAL. No fee shall be charged for an administrative appeal.

SECTION 9811 CONDITIONAL USE PERMIT. (a) Major Conditional Use Permit. A fee of $50 shall be charged for an application for a conditional use permit for one of the purposes set forth in Section 9202(a).

(b) Minor Conditional Use Permit. A fee of $15 shall be charged for an application for a conditional use permit for one of the purposes referred to in Section 9202(b).

SECTION 9812 DESIGN REVIEW. No fee shall be charged for an application for design review.

SECTION 9813 PLANNED UNIT DEVELOPMENT. (a) Original Application. A fee of $100, plus $10 for each 25,000 square feet of aggregate lot area or major fraction thereof in excess of 60,000 square feet, shall be charged for an application for a planned unit development permit. For the purposes of this section, a major fraction shall be deemed to be 12,500 or more square feet.

(b) Modification of Approved Plan. A fee of one-half that prescribed in subsection (a) shall be charged for an application for major modification or amendment of an approved preliminary or final development plan.

SECTION 9814 REZONING AND LAW CHANGE. A fee of $100 shall be charged for a private party application to rezone property or to amend or delete a development control map applicable thereto. A single fee shall be charged for a joint application involving two or more properties which are abutting or are separated only by a street, alley, or path.

SECTION 9815 VARIANCE. (a) Major Variance. A fee of $50 shall be charged for an application for a variance from one of the provisions set forth in Section 9602(a).

(b) Minor Variance. A fee of $15 shall be charged for an application for a variance from one of the provisions referred to in Section 9602(b).

(c) Application for More Than One Property. A single fee shall be charged where similar variances are requested for two or more properties which have like characteristics and which are abutting or are separated only by a street, alley, or path.

(d) Variance Related to Other Type of Application. No fee shall be charged for a variance included, pursuant to Section 9609, in an application for subdivision approval or for a conditional use permit, design review, or a planned unit development permit.

ENFORCEMENT REGULATIONS

SECTION 9900 TITLE, PURPOSE, AND APPLICABILITY. The provisions of Section 9900 through Section 9924, inclusive, shall be known as the ENFORCEMENT REGULATIONS. The purpose of these regulations is to ensure compliance with the ZONING REGULATIONS. These provisions shall apply to the enforcement of the ZONING REGULATIONS, but shall not be deemed exclusive.

SECTION 9901 OFFICIAL ACTION. All officials, departments, and employees of the City of Oakland vested with the authority to issue permits, certificates, or licenses shall adhere to, and require conformance with, the ZONING REGULATIONS.
SECTION 9902 INSPECTION AND RIGHT OF ENTRY. Whenever they shall have cause to suspect a violation of any provision of the ZONING REGULATIONS, or whenever necessary to investigation of an application for revocation of any zoning approval under any of the procedures prescribed in the ZONING REGULATIONS, the officials responsible for enforcement or administration of the ZONING REGULATIONS, or their duly authorized representatives, may enter on any site or into any structure for the purpose of investigation, provided they shall do so in reasonable manner. No secured building shall be entered without the consent of the owner or occupant. No owner or occupant or agent thereof shall, after reasonable notice and opportunity to comply, refuse to permit such entry.

SECTION 9903 ABATEMENT. Any use which is established, operated, erected, moved, altered, enlarged, painted, or maintained contrary to the ZONING REGULATIONS shall be and is hereby declared to be unlawful and a public nuisance, and may be abated as such.

SECTION 9904 PENALTIES. Any person who violates or causes or permits another person to violate any provision of the ZONING REGULATIONS is guilty of a misdemeanor, and upon conviction shall be punishable by a fine of not more than $500 or by imprisonment for not more than six months, or by both such fine and imprisonment. A violator may be deemed guilty of a separate offense for each day during any portion of which a violation of the ZONING REGULATIONS is committed, continued, or permitted.
shall be provided a minimum of five (5) parking spaces, plus one (1) additional parking space for each five thousand (5,000) square feet or fraction thereof over and above twenty-five thousand (25,000) square feet with a maximum number of required parking spaces not to exceed ten (10) parking spaces regardless of the total floor area of the warehouse.

9106.72 MANUFACTURING PLANTS, MACHINE SHOPS, RESEARCH OR TESTING LABORATORIES, BOTTLING PLANTS, PUBLIC UTILITY BUILDINGS AND USES, AND PRINTING PLANTS. The minimum number of off-street parking spaces to be provided pursuant to this Part for each manufacturing plant, machine shop, research or testing laboratory, bottling plant, public utility buildings and uses, and printing plant shall be one parking space for each one and one-half (1 1/2) employees, plus one parking space for each company vehicle used in the operation of such plant, shop, or laboratory.

TOPIC 8. MINIMUM OFF-STREET PARKING REQUIREMENTS FOR MISCELLANEOUS USES.

9106.80 FUNERAL HOMES AND MORTUARIES. The minimum number of off-street parking spaces to be provided pursuant to this Part for each funeral home or mortuary shall be one parking space for each four seats in such funeral home or mortuary, plus one parking space for each employee, plus one parking space for each company vehicle used in the operation of such funeral home or mortuary.

9106.81 LIBRARIES. The minimum number of off-street parking spaces to be provided pursuant to this Part for each library shall be one parking space for each five hundred (500) square feet of floor area in such library, plus one parking space for each employee.

9106.82 POST OFFICES: The minimum number of off-street parking spaces to be provided pursuant to this Part for each post office shall be one parking space for each two hundred (200) square feet of floor area, plus one parking space per employee, plus one for each official vehicle.

9106.83 PRIVATE CLUBS, LODGES, AND COMMUNITY CENTERS—EXCEPT GOLF COURSES AND PARKS. The minimum number of off-street parking spaces to be provided pursuant to this Part for each private club, lodge, and community center, except golf courses and parks, shall be one parking space for each two hundred (200) square feet of floor area, plus one parking space for each two hundred (200) square feet of outside areas employed for purposes of assembly and meetings by the members and guests of such clubs, lodges, and community centers, plus one parking space for each five hundred (500) square feet of outside areas developed for recreational purposes, such as gardens, swimming pools, and park areas.

9106.84 ELEMENTARY SCHOOLS AND JUNIOR HIGH SCHOOLS. The minimum number of off-street parking spaces to be provided pursuant to this Part for each elementary school and junior high school shall be one parking space for each teacher and employee.

9106.85 HIGH SCHOOLS. The minimum number of off-street parking spaces to be provided pursuant to this Part for each high school shall be one parking space for each teacher or employee, plus one parking space for each seven (7) students in such high school.

9106.86 COLLEGES. The minimum number of off-street parking spaces to be provided pursuant to this Part for each college or university shall be one parking space for each employee, plus one parking space for each three (3) students in such college or university, and if such college or university has an auditorium there shall be one parking space for each three and one-half (3 1/2) fixed seats in such auditorium plus one parking space for each six (6) linear feet of fixed benches therein, or one parking space for each thirty (30) square feet of floor area in such auditorium.

9106.87 CHURCHES. The minimum number of off-street parking spaces to be provided pursuant to this Part for each church or synagogue or other place of worship shall be one parking space for each four seats in each building used separately, or together with any other building, for worship.
9106.88 **BOWLING ALLEYS.** The minimum number of off-street parking spaces to be provided pursuant to this Part for each bowling establishment shall be seven (7) parking spaces for each bowling lane in each establishment.

9106.88a **DANCE HALLS, SKATING RINKS AND EXHIBITION HALLS WITHOUT FIXED SEATS.** The minimum number of off-street parking spaces to be provided pursuant to this Part for dance halls, skating rinks, and exhibition halls without fixed seats shall be one parking space for each fifty (50) square feet of floor area.

9106.88b **AUDITORIUMS, THEATERS, SPORTS ARENAS, STADIUMS AND ASSEMBLY HALLS WITH OR WITHOUT FIXED SEATS.** The minimum number of off-street parking spaces to be provided pursuant to this Part for auditoriums, theaters, sports arenas, stadiums, and assembly halls with or without fixed seats shall be one parking space for each four (4) fixed seats on such premises plus one parking space for each seven (7) linear feet of fixed benches on said premises, or one parking space for each thirty (30) square feet of floor area, whichever requires the greater number of parking spaces.

### TOPIC 9. OFF-STREET LOADING REQUIREMENTS

9106.90 **OFF-STREET LOADING SPACES REQUIRED.** No building or part thereof having a floor area of ten thousand (10,000) square feet or more, which is to be occupied by a manufacturing plant, storage facility, warehouse facility, goods display facility, retail store, wholesale store, market, hotel, hospital, mortuary, laundry, dry cleaning establishment, or other use or uses similarly requiring the receipt or distribution by vehicles or trucks of material or merchandise, shall be constructed, erected, or moved within or onto any lot or parcel of land in any district for any use or purpose unless at the time such building or part thereof is constructed, erected, or moved within or onto such lot or parcel there is provided on the same lot or parcel of land on which such building is constructed, erected, or moved at least one off-street loading space, plus one additional such loading space for each twenty thousand (20,000) square feet of floor area. Such off-street loading spaces shall be maintained during the existence of the building or use they are required to serve.

9106.91 **SIZE OF OFF-STREET LOADING SPACE.** Each off-street loading space required by this Part shall be not less than ten (10) feet wide, thirty (30) feet long and fifteen (15) feet high, exclusive of driveways for ingress and egress and maneuvering areas.

9106.92 **DRIVEWAYS FOR INGRESS AND EGRESS AND MANEUVERING AREAS.** Each off-street loading space required by this Part shall be provided with driveways for ingress and egress and maneuvering space of the same type and meeting the same criteria required for off-street parking spaces.

9106.93 **LOCATION.** No off-street loading space required by this Part shall be closer than fifty (50) feet to any lot or parcel of land in a residential district unless such off-street loading space is wholly within a completely enclosed building or unless enclosed on all sides by a wall not less than eight (8) feet in height.

### PART 7. VARIANCES, EXCEPTIONS, ADJUSTMENTS AND OTHER SPECIAL PERMITS

9107.1 **PURPOSE.** Variances, exceptions, adjustments, and other special permits may be granted pursuant to the provisions of this Part.

9107.2 **PART 5 VARIANCES AND EXCEPTIONS.** Pursuant to and in accordance with the provisions of Sections 9107.2a through 9107.2g, the Director of Planning, and the Planning Commission on appeal from a decision of the Director of Planning, may, but shall not under any circumstances be required, to grant the following variances and exceptions, to wit:

A. Variances to the height, number of stories, set-back, coverage, density, and area requirements and regulations prescribed in Part 5 of this Chapter, hereinafter referred to as "Part 5 Variances."
B. Certain exceptions to the rear set-back and height regulations and requirements prescribed in Part 5 of this Chapter, hereinafter referred to as "Part 5 Exceptions," said exceptions being as follows, (i) exceptions permitting an incursion (otherwise prohibited by Part 5 of this Chapter) by buildings or structures of up to, but not more than, five (5) feet into the rear set-back area prescribed by said Part 5, provided however, that no exception granted hereunder shall permit the vertical projection of any building or structure to be closer than fifteen (15) feet, measured horizontally, to the rear property line, and (ii) exceptions permitting church steeples and bell towers which exceed in height the height limitations prescribed by said Part 5.

9107.2a PART 5 VARIANCES AND EXCEPTIONS; PETITIONS FOR; FORM OF SUCH PETITION, WHERE FILED, AND REQUISITES BEFORE DIRECTOR MAY ACCEPT FOR FILING. Petitions for Part 5 Variances and petitions for Part 5 Exceptions shall be filed in writing with the Director of Planning on a form furnished by the Director. The form of these petitions and the information and data required to be set forth in them shall be as prescribed by the Director. The Director shall not accept any such petition for filing unless (i) all information and data is set forth and shown as required by the form (ii) the petition is verified, and (iii) the filing fee required by Section 9107.5 has been paid.

9107.2b PART 5 VARIANCES AND EXCEPTIONS; HEARING BY DIRECTOR; NOTICE OF HEARING; EFFECT OF FAILING TO MAIL OR RECEIVE NOTICE. The Director shall investigate and conduct a public hearing on each Part 5 Variance petition and each Part 5 Exception permit accepted by him for filing. The date of such hearing shall be not less than five (5) nor more than twenty-one (21) days from and after the date such petition was accepted for filing.

Notice of the time, place and purpose of such hearing shall be given to the petitioner and to the owners, as shown on the last equalized assessment roll adopted by the County of Santa Clara prior to the date the petition was accepted for filing, of the lots or parcels of land which — either in their entirety or in part — are situate within two hundred (200) feet of any part of the lot or parcel of land which is the subject of such petition.

The form of such notice shall be as prescribed by the Director and shall be given by mailing the same postage prepaid, at least five (5) days before the date set for hearing, to the petitioner at the address designated for such purpose on the petition and to the above mentioned owners shown on said last equalized assessment roll at their addresses shown on said assessment roll. Upon the completion of the mailing of such notice the Director shall file in the proceedings an affidavit of mailing of such notice.

Notwithstanding the provisions of the preceding paragraph of this section, the failure of the Director to mail any notice or the failure of any person to receive the same shall not affect in any way whatsoever the validity of any proceedings taken under Sections 9107.2a through 9107.2g, nor of any action or decision of the Director made or taken in any such proceedings, nor prevent the Director from proceeding with any hearing at the time and place set therefor.

9107.2c PART 5 VARIANCES AND EXCEPTIONS; SUBMISSION OF MATTER AFTER HEARING BY DIRECTOR; DIRECTOR'S DECISION; ANNOUNCEMENT AND NOTICE OF DECISION; FINALITY AND EFFECTIVE DATE THEREOF; EFFECT OF APPEAL FROM. At the conclusion of the hearing, the Director may take the matter under submission for a reasonable time, but in no event to exceed a period of ten (10) days. The findings and decision of the Director on each Part 5 Variance petition and each Part 5 Exception petition heard by him shall be in writing and he shall publicly declare the same at a time and place which shall be announced by him at the time the hearing is closed and the matter taken under submission by him. On the date that his findings and decision is publicly declared by him the Director shall mail a certified copy thereof to the petitioner at the address shown for such purpose on the petition. The date of the decision shall be the date that it is publicly declared by the Director and each such decision shall become final and effective on the seventh (7th) day from and after said date unless a written notice of appeal therefrom is accepted for filing by the Director as hereinafter provided in Section 9107.2d on or before the fifth (5th) day from the date of the
decision. If such a notice of appeal is accepted for filing within said five (5) day period, the
decision of the Director shall become neither final nor effective and shall be of no force or
effect.

If no such notice of appeal is accepted for filing within the time provided and the
decision of the Director becomes final and effective, the Director shall send a certified copy
of the decision to the Building Official accompanied by a certification that the decision has
become final and effective.

9107.2d NOTICE OF APPEAL FROM DIRECTOR'S DECISION; WHO MAY APPEAL; FORM
OF SUCH NOTICE; REQUISITES BEFORE DIRECTOR MAY ACCEPT FOR FILING, AND SETTING
OF HEARING BY COMMISSION ON THOSE ACCEPTED; NOTICE OF COMMISSION HEARING;
EFFECT OF FAILURE TO MAIL OR RECEIVE NOTICE. The petitioner, or any person who is
a resident and taxpayer of the City within the meaning of Section 526a of the Code of Civil
Procedure of the State of California, may, on or before the expiration of the fifth (5th) day
from and after the date of the decision of the Director, file a written notice of appeal from
the decision of the Director on a form furnished by the Director. The information and data
required to be set forth in the form shall be as prescribed by the Commission. The director
shall not accept any such notice of appeal for filing unless (i) all information and data is set
forth and shown as required by the form, (ii) the notice is verified, and (iii) the filing fee
required by Section 9107.5 has been paid.

When a notice of appeal has been accepted by him for filing, the Director shall, subject
to the rules of the Planning Commission as to the hour and place of public hearings which
shall be conducted by it, set a date for the public hearing which shall be held thereon by
the Planning Commission. Said date of hearing shall be not less than five (5) nor more than
twenty-one (21) days from and after the date such notice was accepted for filing by the
Director.

Notice of the time, place, and purpose of such hearing shall be given within the time
and in the manner provided in Section 9107.2b for notice of the hearing before the Director
and such notice shall be given to the appellant, the petitioner, and all other persons to whom
notice of the hearing before the Director was given as provided in Section 9107.2b. The
form of the notice of hearing shall be as prescribed by the Commission. Upon the completion
of the mailing of such notice, the Director shall file in the proceedings an affidavit of such
mailing.

Notwithstanding the provisions of the preceding paragraph of this section, the failure
of the Director to mail any notice or the failure of any person to receive the same shall not
affect in any way whatsoever the validity of any proceedings taken under Section 9107.2a
through 9107.2g, nor of any action or decision of the Planning Commission made or taken
in any such proceedings, nor prevent the Planning Commission from proceeding with any
hearing at the time and place set therefor.

Subject to the rules of the Planning Commission regarding the closing date of the
agenda for its regular meetings, the Director shall place such notice of appeal on the agenda
for the next regular meeting of the Planning Commission and submit such notice to said
Planning Commission at such regular meeting, or he shall submit such notice to the Planning
Commission at a special meeting called for that purpose. At the time that he submits such
notice of appeal to the Planning Commission he shall inform them of the date set for the
hearing thereon.

9107.2e HEARING DE NOVO BY PLANNING COMMISSION ON APPEALS FROM DIREC­
TOR'S DECISION; ACTION BY COMMISSION; FINALITY AND EFFECTIVE DATE OF COMMISS-
ION DECISION; NOTICE OF COMMISSION DECISION. The Director shall file with the
Planning Commission at its hearing on appeal the petition for variance or the petition for
except (as the case may be), the notice of appeal, and all other papers, documents, and
physical things filed at the hearing before the Director. The Planning Commission shall hear
the matter de novo as if no hearing had been conducted by the Director. Within a reasonable
time after the hearing has been concluded and the matter submitted for decision the Com-
mission shall, by a written resolution, set forth its findings and decision on the matter. The
The decision of the Planning Commission shall be final, and unless otherwise provided therein, the decision shall be effective forthwith.

The Director, with respect to any variance or exception permit issued by him, and the Planning Commission, with respect to any variance or exception permit issued by the Commission, may, (i) deny the permit petitioned for, (ii) grant a permit based on the plan proposed by the petitioner, and may make such permit subject to conditions, or (iii) grant a permit based on a plan substantially different from the plan proposed by the petitioner, and may make such permit subject to conditions; provided however that such variance or such exception (as the case may be) shall not be greater than the amount of variance or exception requested in the petition nor, in the case of a variance, be a different type of variance or for a variance which covers a different part of the subject property from that designated in the petition.

The Director shall mail a certified copy of the decision of the Planning Commission to the petitioner and to the appellant at the addresses shown for such purpose on the petition and notice of appeal, respectively, (only one need be mailed if the appellant is the petitioner and the address on the notice of appeal shall control). The Director shall also send a certified copy of such decision to the Building Official.

9107.2f FINDINGS REQUIRED FOR ISSUANCE OF A PART 5 VARIANCE OR EXCEPTION.
A. Neither the Director of Planning nor the Planning Commission shall grant a Part 5 Variance unless they find that: (1) Because of special circumstances uniquely applicable to the subject property, including (but not limited to) size, shape, topography, location, or surroundings — but expressly excluding any consideration (i) of the personal circumstances of the petitioner, or (ii) of any changes in the size or shape of the subject property made or occurring while the subject property was situated in the zoning district in which it is situated at the time of the filing of the petition, regardless of whether such changes were caused by the petitioner or his predecessors in interest — the strict application of the requirements and regulations of Part 5 deprives such property of privileges enjoyed by other property in the vicinity of and in the same zoning district as the subject property, and (2) the variance, subject to such conditions as may be imposed thereon, (i) will not impair the utility or value of adjacent property or the general welfare of the neighborhood, and (ii) will not impair the integrity and character of the zoning district in which the subject property is situated.

B. Neither the Director of Planning nor the Planning Commission shall grant a Part 5 Exception unless they find that the exception, subject to such conditions as may be imposed thereon, (i) will not impair the utility or value of adjacent property or the general welfare of the neighborhood, and (ii) will not impair the integrity and character of the zoning district in which the subject property is situated.

9107.2g CONDITIONS IN PART 5 VARIANCE AND EXCEPTION PERMITS. The Director, with respect to any variance or exception permit issued by him, and the Planning Commission, with respect to any variance or exception permit issued by the Commission, may make any such permit subject to such conditions as they may deem reasonably necessary to secure the general purposes of this Chapter. Without limiting the generality of the preceding sentence, such conditions may include time limitations on the commencement of the use of the variance or exception, architectural and site improvement approval, street right-of-way dedications, street improvements, and revocation for failure to comply with conditions.

9107.3 PART 3 AND PART 6 VARIANCES. Pursuant to and in accordance with the provisions of Sections 9107.3b through 9107.3h the Planning Commission may, but shall not under any circumstances be required to grant variances to the use regulations prescribed in Part 3 of this Chapter, hereinafter referred to as “Part 3 Variances,” and variances to the off-street parking and loading requirements prescribed in Part 6 of this Chapter hereinafter referred to as “Part 6 Variances.”

9107.3a PART 3 EXCEPTIONS. Subject to provisions of this section and pursuant to and in accordance with the provisions of Sections 9107.3b through 9107.3h, the Planning Co-
mission may, but shall not under any circumstances be required, to grant exceptions to the
use regulations prescribed in Part 3 of this Chapter, hereinafter referred to as Part 3 Ex-
ceptions.

The Part 3 Exceptions authorized by this section are as follows:

A. Exceptions allowing the uses hereinafter set forth in this subdivision A to be located
in any zoning district from which they would otherwise be precluded by the provisions of
said Part 3, said uses being the following: airports; horticultural nurseries and greenhouses;
community centers; swimming, golf and tennis clubs; riding clubs and horse stables;
churches; institutions of an educational, religious, youth, welfare, or philanthropic nature;
private clubs or lodges (including those which occasionally rent their facilities to other
groups but excepting those the principal activity of which is a service or activity customarily
carried on as a business and excepting fraternity and sorority houses); non-profit hospitals
having one hundred (100) or more beds, exclusive of bassinets; cemeteries, crematories, and
columbaria; public utilities; privately owned buildings leased and used for governmental pur-
poses; community antenna television systems; public garages; and nursery schools and
children's nurseries, if such schools or nurseries are situate on property being used for school
(other than nursery school), private club or lodge, church, or community center purposes
and if the children in such schools or nurseries do not live on the premises. (Note: The
foregoing do not refer to City-owned facilities since City-owned property and facilities are
not, except as otherwise expressly provided elsewhere in this Chapter, subject to any of the
requirements or regulations of this Chapter).

B. For lots or parcels of land situate in a (PD) District and covered by a PD permit,
exceptions may be granted which will allow a use of the subject property which is not
shown in the PD permit covering the subject property providing that (i) any such exception
must conform to the (PD) zoning of the subject property and (ii) no such exception shall be
effective for a period in excess of one year. The Commission may grant, concurrently or
successively, more than one such exception for the same subject property but no use of the
subject property not shown in the PD permit shall be permitted to continue for more than
two years after it was first allowed by any exception.

C. Exceptions may be granted allowing carnivals and amusement rides in the C-2 and
C-3 zoning districts provided that (i) no such exception shall be effective for a period in
excess of ten days and (ii) not more than two such exceptions may be granted for the same
subject property in any calendar year. As used herein "calendar year" means a period
of twelve consecutive months commencing on the first day of January.
of the time, place, and purpose of such hearing shall be given to the petitioner and to the
owners, as shown on the last equalized assessment roll adopted by the County of Santa
Clara prior to the date the petition was accepted for filing, of the lots or parcels of land
which—either in their entirety or in part—are situated within two hundred (200) feet of
any part of the lot or parcel of land which is the subject of such petition. The form of such
notice shall be as prescribed by the Commission and shall be given by mailing the same,
postage prepaid, at least five (5) days before the date set for hearing, to the petitioner at
the address designated for such purpose on the petition, and to the above mentioned owners
shown on said last equalized assessment roll at their addresses shown on said assessment
roll. Upon the completion of the mailing of such notice the Director shall file in the pro­
cedings an affidavit of such mailing.

Notwithstanding the provisions of the preceding paragraph of this Section, the failure
of the Director to mail any notice or the failure of any person to receive the same shall not
affect in any way whatsoever the validity of any proceedings taken under Sections 9107.3b
through 9107.3h, or of any action or decision of the Planning Commission made or taken
in any such proceedings, nor prevent the Planning Commission from proceeding with any
hearing at the time and place set therefor.

9107.3d PART 3 AND PART 6 VARIANCES AND PART 3 EXCEPTIONS; HEARING BY
COMMISSION; ACTION BY COMMISSION; PART 3 VARIANCES AND PART 3 EXCEPTIONS SUB­
JECT TO CITY COUNCIL APPROVAL. Whenever petitions for Part 3 and Part 6 Variances
and Part 3 Exceptions have been set for hearing, the Commission shall consider the same
at a public hearing. Within a reasonable time after the hearing has been conducted and the
matter submitted for decisions, the Commission shall, by a written resolution, set forth its
findings and decision on the matter.

With respect to petitions for Part 3 Variances, the Commission may, (i) deny the variance
permit petitioned for, (ii) grant a variance permit for the use requested in the petition, and
may make such permit subject to conditions, provided that the Commission shall not grant
a variance permit for such requested use if a more restrictive use than the use requested in
the petition may reasonably be made of the subject property, or (iii) grant a variance permit
for a more restrictive use than the use requested in the petition, and may make such use
subject to conditions. As used in the preceding sentence, the term "more restrictive use"
means a use which is allowed, or permitted by conditional use permit, in a zoning district
which is less restrictive than the zoning district in which the subject property is situate but
more restrictive than the zoning district in which the use requested in the petition is allowed
or permitted by conditional use permit. For purposes of the preceding sentence the order of
restrictiveness of zoning districts is as set forth in Section 9102.1.

With respect to petitions for Part 6 Variances, the Commission may, (i) deny the variance
permit petitioned for, (ii) grant a variance permit based on the off-street parking or off-street
loading plan proposed by petitioner, and may make such permit subject to conditions, or
(iii) grant a variance permit based on an off-street parking or off-street loading plan sub­
stantially different from the plan proposed by applicant, and may make such permit subject
to conditions.

With respect to petitions for Part 3 Exceptions, the Commission may, (i) deny the ex­
ception permit petitioned for or (ii) grant an exception permit for the use requested in the
petition and may make such permit subject to conditions.

Whenever the Commission denies a petition for a Part 3 Variance, a Part 3 Exception, or
a Part 6 Variance, its decision shall be final and effective forthwith. Whenever the Commission
grants a Part 6 Variance its decision shall be final and, unless otherwise provided therein,
shall be effective forthwith. Whenever the Commission denies a petition for a Part 3 Variance,
Part 3 Exception, or Part 6 Variance, or grants a Part 6 Variance, the Director shall mail a
certified copy of such decision to the petitioner at the address shown for such purpose on the
petition. The Director shall also send a certified copy of such decision to the Building
Official.

Whenever the Commission grants a Part 3 Variance or a Part 3 Exception its decision
shall not be final but shall instead be subject to an automatic review by the City Council,
provided, however, that in reviewing such matters the City Council need not conduct a public hearing, and provided further that such variances and exceptions shall be of no force or effect pending review by the City Council of the Commission decision granting the same. The Director shall file with the City Clerk three certified copies of all Commission decisions granting Part 3 Variances or Part 3 Exceptions. Upon review by the City Council the City Council may (i) disapprove the variance or the exception (as the case may be) or (ii) approve the variance or the exception (as the case may be) which was granted by the Commission, and may make the same subject to such conditions — which may be in addition to, but not in derogation of, conditions which may have been imposed by the Commission — as the City Council may deem reasonably necessary to secure the general purposes of this Chapter. The decision of the City Council shall be final.

If the City Council disapproves a variance or exception which was granted by the Commission, then such variance or exception shall be null and void. The decision of the City Council disapproving such variance or exception shall be effective forthwith.

If the City Council approves a variance or exception which was granted by the Commission, then such variance or exception shall, in addition to the conditions which may have been imposed by the Commission, be subject to such additional conditions as may have been imposed by the City Council. The decision of the City Council approving such variance or exception shall become effective forthwith unless otherwise provided therein. Whenever the City Council approves a variance or exception, the City Clerk shall, (i) mail a certified copy of the Commission’s resolution and the Council’s resolution (or a certified copy of the minutes of the Council meeting if the action was by motion) to the petitioner at the address shown for such purpose on the petition, (ii) file a certified copy of such documents with the Building official, and (iii) file a certified copy of such documents, except the Commission’s resolution, with the Commission.

9107.3f FINDINGS REQUIRED FOR ISSUANCE OF PART 3 VARIANCES. The Planning Commission shall not grant a Part 3 Variance unless the Commission finds that: (1) Because of special circumstances uniquely applicable to the subject property, including (but not limited to) size, shape, topography, location, or surroundings — but expressly excluding any consideration (i) of the personal circumstances of the petitioner, or (ii) of any changes in the size or shape of the subject property made or occurring while the subject property was situated in the zoning district in which it is situated at the time of the filing of the petition, regardless of whether such changes were caused by petitioner or his predecessors in interest — none of the uses allowed, or permitted by conditional use permit, in the zoning district in which the subject property is situated is a reasonable use for the subject property, and (2) the variance, subject to such conditions as the Commission may impose, (i) will not impair the utility or value of adjacent property or the general welfare of the neighborhood, and (ii) will not be detrimental to the public peace, health, safety, morals, or welfare.

9107.3g FINDINGS REQUIRED FOR ISSUANCE OF PART 3 EXCEPTIONS. The Planning Commission shall not grant a Part 3 Exception unless the Commission finds that permitting the
particular use on the subject property, subject to such conditions as it may impose, is (i) essential or desirable for the public convenience or welfare, (ii) will not impair the utility or value of adjacent property or the general welfare of the neighborhood, and (iii) is not detrimental to the public peace, health, safety, morals, or welfare.

9107.3h CONDITIONS IN PART 3 AND PART 6 VARIANCES AND PART 3 EXCEPTIONS. The Planning Commission may make any Part 3 or Part 6 Variances or Part 3 Exceptions granted by it subject to such conditions as it may deem reasonably necessary to secure the general purposes of this Chapter. Without limiting the generality of the preceding sentence, such conditions may include time limitations on commencement of use of the variance or exception, architectural and site improvement approval, street right-of-way dedications, street improvements, and revocation for failure to comply with conditions.

9107.4 ADJUSTMENTS. The Planning Commission may grant the adjustments hereinafter set forth in this section whenever it finds that the granting thereof will not be detrimental to the public peace, health, safety, or welfare. The adjustments referred to in the preceding sentence are as follows: (1) Extending throughout the entire area of a lot any zoning district which covers only a portion of such lot, provided that all of the following conditions exist, (i) the boundaries of the lot have not changed since July 1, 1929, (ii) the zoning district to be extended has covered such portion of the subject lot continuously since July 1, 1929, and (iii) the zoning district to be extended covers not less than sixty percent (60%) of the entire areas of the lot; (2) to permit houses built in a subdivision, and which have not yet been occupied for residential purposes, to be used temporarily as "model homes" or sales offices in connection with the sale of houses in such subdivisions, and also to permit land to be used temporarily for off-street parking or "tot lot" purposes in connection with the use of such "model homes" and sales offices; and (3) to permit land to be used temporarily as a storage or construction yard in connection with the construction of houses or other buildings in an adjacent subdivision or lot or parcel.

The Planning Commission may make any such adjustment permitted by it subject to such conditions as it may deem reasonably necessary to secure the general purposes of this Chapter. Without limiting the generality of the preceding sentence, such conditions may include time limitations on the duration of such adjustments, and revocation for failure to comply with conditions.

9107.5 FILING FEES FOR PETITIONS FOR VARIANCES AND EXCEPTIONS AND NOTICES OF APPEAL FROM PART 5 VARIANCES AND EXCEPTIONS. No petition for any variance or exception shall be accepted unless a filing fee of Twenty-five Dollars ($25.00) is paid to the City at the time of filing; and no notice of appeal from the Director's decision on a Part 5 Variance or a Part 5 Exception shall be accepted for filing unless a filing fee of Fifteen Dollars ($15.00) is paid to the City at the time of filing. Said fees are required to partially defray City's costs and expenses in conducting the proceedings following such filings.

9107.9 PARKING AREAS OR STRUCTURES IN RESIDENCE DISTRICTS. Subject to the conditions, restrictions and limitations hereinafter mentioned, the Planning Commission, and the City Council on appeal, shall have the power to permit the construction, establishment, maintenance or operation of an automobile parking area or automobile parking structure within a lot or parcel of land, or portion thereof, situate in a residential district, adjacent to or abutting land situate in a commercial or industrial district, for the purpose only of providing off-street parking space for passenger automobiles of owners, tenants, employees, business visitors, customers and clients of professions-office, commercial or industrial establishments or businesses situate within said adjoining or abutting zoned land if said Planning Commission, or the City Council on appeal, finds that the grant of such permit in each specific instance, respectively, will not unreasonably interfere with or be unreasonably detrimental to the use and enjoyment for residential purposes of other property situate in a residential district, will not create or aggravate any traffic hazard or unreasonable traffic congestion or other problems because of inadequate street widths or improvements or otherwise, and will not otherwise be detrimental to the public peace, health, safety or welfare; provided, however, that no such permit issued by the Planning Commission shall be valid or effective unless
and until it shall have been approved by the City Council. If the Planning Commission denies an application for such a permit the applicant may appeal such denial to the City Council by filing a notice of appeal therefrom with the Planning Commission within ten days after such denial.

Each application for a permit shall be in writing; shall be filed in triplicate with the Planning Commission; shall describe the lot or parcel, or portion thereof, wherein the applicant proposes to construct, establish, maintain or operate any parking area or parking structure; shall describe the abutting or adjoining lot or parcel wherein is located the establishment or establishments or business or businesses for which such parking facilities are desired, and shall describe the nature of such establishments or businesses; shall describe all structures and improvements, and their proposed uses, for which a permit is requested; shall specify the height and number of stories of any proposed structures; and shall be accompanied by plans showing the location of said lands, the proposed location of all parking areas, spaces, structures or improvements, the dimensions of the same, the distances at which they will be set back from the front, side and rear boundary lines of the parcel of land within which they are proposed to be located, and the location of and dimensions of all proposed entrances and exits. Upon request of either the Planning Commission or the City Council, the applicant shall also furnish such other relevant information as either may desire.

Anything elsewhere to the contrary notwithstanding, the Planning Commission shall not grant any such permit unless it shall have first held a public hearing thereon. At any such hearing before the City Council, whether for approval or on appeal, the City Council shall consider the matter de novo. Notice of any such Planning Commission hearing shall be given in the same manner as is required by Section 9112.9 of this Code for Planning Commission hearings where land is proposed to be rezoned from one type of zoning district to another; and notice of any such City Council hearing shall be given in the same manner as is required by Section 9112 of this Code for Council hearings where land is proposed to be zoned from one type of zoning district to another.

Upon its granting any such permit, the Planning Commission shall cause to be filed with the City Council two copies of such permit, two copies of the application requesting such permit, and a report of said Commission setting forth its reasons for granting said permit. If the Planning Commission denies the application, it shall, upon notice of appeal being filed with it, cause to be filed with the City Council two copies of the application, the notice of appeal, and a report setting forth its reasons for denial. Whenever the City Council approves a permit issued by the Planning Commission or issues a permit on appeal, a copy of the same, together with a copy of the application, shall be filed by the City Clerk with the City Building Official. No building permit shall be issued for the construction, improvement or establishment of any parking area or parking structure within land in the residential district unless the same complies with a permit which shall have been approved by the City Council after issuance by the Planning Commission or issued by the City Council on appeal and also complies with all other applicable laws.

The issuance and approval of any permit hereunder, and each and every permit issued hereunder, shall be subject to each of the following conditions, restrictions and limitations:

(a) No land in a residential district shall be used or be permitted to be used for any of said parking purposes unless it abuts and adjoins the commercially or industrially zoned lot or parcel within which is situate the establishment or business for whose benefit such parking area or facilities are desired.

(b) No part of any interior lot or parcel in a residential district, which part is situate within twenty (20) feet of any street or streets upon which such interior lot or parcel abuts or has frontage, or which part is situate within what would be the required front-yard setback area or areas of such interior lot or parcel if a house or houses were constructed therein with front-yard frontage on each of such streets, shall be used or be permitted to be used for any of the above mentioned parking purposes nor for the purpose of providing any access or way of ingress or egress to or from any parking area or facilities for which a permit is granted hereunder; and such restricted parts of such lot or parcel
Chapter 1 Enforcement and Administration

71-00 ENFORCEMENT AND ADMINISTRATION

The Commissioner of the Department of Buildings shall administer and enforce this resolution, except as otherwise specifically provided in the New York City Charter and in this resolution.

Chapter 2 Interpretations and Variances

72-00 POWERS OF THE BOARD OF STANDARDS AND APPEALS

72-01 General Provisions

The Board of Standards and Appeals (referred to hereinafter as the Board) shall have the power, pursuant to the provisions of the New York City Charter and of this resolution, after public notice and hearing:

(a) To hear and decide appeals from and to review interpretations of this resolution;
(b) To hear, decide, and determine, in a specific case of practical difficulties or unnecessary hardship, whether to vary the application of the provisions of this resolution;
(c) To hear and decide applications for such special permits as are set forth in this resolution and are more specifically enumerated in Section 73-01 (General Provisions); and
(d) To adopt, amend, or repeal such rules or regulations as may be necessary to carry into effect the provisions of this resolution.

72-10 APPEALS FOR INTERPRETATION

72-11 General Provisions

The Board shall hear and decide appeals from or may, on its own initiative, review any rule or regulation, order, requirement, decision, or determination of the Commissioner of Buildings, of any duly authorized officer of the Department of Buildings, or of the Commissioner of any agency which, under the provisions of the New York City Charter, has jurisdiction over the use of land or over the use or bulk of buildings or other structures, subject to the requirements of this resolution.

On such an appeal or review, the Board may reverse, affirm, in whole or in part, or modify, such rule, regulation, order, requirement, decision, or determination and may make such rule, regulation, order, requirement, decision, or determination as in its opinion should have been made in the premises in strictly applying and interpreting the provisions of this resolution, and for such purposes the Board shall have the power of the officer from whose ruling the appeal or review is taken.

However, there shall be no appeal to or review by the Board from an interpretation of this resolution made by the Board of Air Pollution Control of the Department of Air Pollution Control, or any other agency for which the New York City Charter establishes a board empowered to adopt rules and regulations for such agency.

72-12 Street Layout Varying from Maps

Where the street layout actually on the ground varies from the street layout as shown on the zoning maps, the designation as shown on such maps shall be applied by the Board, after public notice and hearing, in such a way as to carry out the intent and purpose of this resolution.

72-20 VARIANCES

72-21 Findings Required for Variances

When in the course of enforcement of this resolution, any officer from whom an appeal may be taken under the provisions of Section 72-11 (General Provisions) has applied or interpreted a provision of this resolution, and there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such provision, the Board may, in accordance with the requirements set forth in this Section, vary or modify the provision so that the spirit of the law shall be observed, public safety secured, and substantial justice done.

Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this resolution in the specific case, provided that as a condition to the grant of any such variance, the Board shall make each and every one of the following findings:

(a) That there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular zoning lot; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the use or bulk provisions of the resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the zoning lot is located.
(b) That because of such physical conditions, there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of this resolution will bring a reasonable return, and that the grant of a variance is necessary to enable the owner to realize a reasonable return from such zoning lot.

(c) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the zoning lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

(d) That the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title. Where all other required findings are made, the purchase of a zoning lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

(e) That within the intent and purposes of this resolution the variance, if granted, is the minimum variance necessary to afford relief; and to this end, the Board may permit a lesser variance than that applied for.

It shall be a further requirement that the decision or determination of the Board shall set forth each finding and each finding shall be supported by substantial evidence.

Chapter 3 Special Permits by the Board of Standards and Appeals

72-00 SPECIAL PERMIT USES AND MODIFICATIONS

72-01 General Provisions

In harmony with the general purpose and intent of this resolution and in accordance with the provisions set forth in this Chapter, the Board may, in an appropriate case:

(a) Grant special permits for specified uses in specific districts (referred to hereinafter as special permit uses);

(b) Permit specified modifications of the use or bulk regulations of this resolution;

(c) Permit the renewal of revoked building permits as provided in Sections 11-31 to 11-33, inclusive, relating to Building Permits Issued before Effective Date of Resolution or Amendment;

(d) Permit the renewal of a variance, exception, or permit issued by the Board prior to the effective date of this resolution, in accordance with the provisions of Section 11-11 relating to Exceptions, Variances, or Permits Previously Authorized.

provided that, in each specific case, the requirements for findings as set forth in this Chapter (or in the Sections referred to in (c) or (d) of this Section) shall constitute a condition precedent to the grant of such special permit, modification, or renewal.

In addition to meeting the requirements, conditions, and safeguards prescribed by the Board as set forth in this Chapter, each such special permit use shall conform to and comply with all of the applicable district regulations on use, bulk, supplementary use regulations, regulations applying along district boundaries, accessory signs, accessory off-street parking and off-street loading, and all other applicable provisions of this resolution, except as otherwise specifically provided in this Chapter or as they may be modified in accordance with (b) of this Section. In the case of required accessory off-street parking, such use shall satisfy the requirements specified for such use in Sections 25-31, 36-31, or 44-21 (General Provisions) except that, where no parking requirement is specified therein, such use shall satisfy the requirements set forth in this Chapter.
A building permit must not be issued until an appeal is decided or the time for filing the appeal has expired. If a written protest is signed by the owners of 20 percent or more either of the area of the lots or lands included in the proposed change, or of those immediately adjacent within 100 feet of the area proposed for change, disregarding public ways, the change to the Zone Map required the concurring vote of at least four members of the City Commission.

(1) Written notice of appeal must be filed with the Planning Director.

(2) Public notice of an appeal must be given by legal advertisement in the manner prescribed for a change to the text of this ordinance. The Planning Director must give written notice of an appeal together with notice of the hearing date to the applicant, a representative of opponents, if any, and the appellant. The appeal must be presented to the City Commission within three months after the date of filing. Once the appeal is presented to the City Commission, a request for delay in hearing the appeal must be acted upon at a regular City Commission meeting.

(3) A filing fee of $25 must accompany each appeal application.

B. Board of Adjustment:

1. A Board of Adjustment is established and consists of seven members, three members appointed for one term expiring July 31, 1966, two members appointed for terms expiring July 31, 1967, and two members appointed for terms expiring July 31, 1968. Subsequent appointments to fill expired terms shall be for three-year terms. Members shall serve without pay. Members shall not serve more than two consecutive terms. Members shall be appointed by the City Commission. An appointment to complete an unexpired term shall be only for the remainder of the term. The Board may nominate persons to fill a vacancy, and, if it does, it must submit to the City Commission at least two names for each vacancy. The City Commission is not restricted in its choice by the list of nominees submitted by the Board.

2. Procedures:

a. Meetings and Notices. The Board must fix a reasonable and regular time and place for meetings, and adopt rules as may be necessary and proper to govern its own proceedings. The rules must be in conformance with the requirements of this ordinance. All meetings must be open to the public. The Board must keep minutes of its proceedings, including a record of the vote of each member on each question, and its minutes are public records. An application for special exception must have public notice of the meeting at which the application is to be considered by at least one publication of notice in a daily newspaper of general circulation in the City of Albuquerque at least 15 days before the date of the meeting and by mailing written notice not less than five days before the date of the meeting to the owners of all property within 100 feet of the exterior boundaries, excluding
public rights of way, of the property which is the subject of the application, using for this purpose the last known name and address of the owners shown in the records of the Bernalillo County Assessor. Special meetings may be held at other than the established regular time or place provided that public notice of any meeting is given at least 24 hours in advance, and provided further that the other requirements of meetings and notice herein are complied with when applicable.

b. Applications and Fees. An application to the Board must be made in writing to the City on prescribed forms. Each application, other than that for administrative review and interpretation, must be accompanied by an accurate plot plan, site plan, building development plan, sketch, program of development, or other related material and information as required by the City. Submission of inaccurate material or information with an application is grounds for denial. Approval of an application is not to be construed as approval of a building permit. Before an application for special exception shall be considered by the Board, an application fee must be charged as follows:

1. Conditional Use: $25
2. Variance: $25
3. Non-Conforming Use Plans for Expansion or Enlargement: $25
4. Administrative Review and Interpretation: No Fee

When an application is withdrawn after it has been advertised for public hearing by the Board of Adjustment, the application fee will not be refunded.

c. Notification and Recording. When a special exception is approved, written notification of the approval listing conditions imposed, if any, must be sent to the applicant, the Enforcement Officer, the City Clerk, and any other persons as directed by the Board. In the event special conditions are imposed in connection with approval of a special exception, the City Clerk must have notice of the special exception and any conditions accompanying it recorded in the office of the Bernalillo County Clerk before a building permit may be issued, the recorded notice being for the purpose of giving notice to a subsequent purchaser of the property that special exception has been granted and conditions have been imposed.

d. Appeals. A determination by the Board is final unless written notice of appeal to the City Commission is filed within 15 days after the determination by the Board. The day of determination by the Board is not included in the 15-day period for filing an appeal, and if the fifteenth day falls on a Saturday, Sunday, or holiday as listed in the Merit System Ordinance, the next working day shall be considered as the deadline for filing an appeal. A building permit must not be issued until an appeal is decided or the time for filing the appeal has expired. The concurring vote of at least four members of the City Commission is required to reverse a determination by the Board. The following procedure must be complied with in filing an appeal:

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(1) Notice of appeal must be filed with the Planning Director.

(2) A filing fee of $25 must accompany each appeal application.

(3) Public notice of an appeal must be given by legal advertisement in the manner prescribed for an application for special exception. The Planning Director must give written notice of the appeal, together with a notice of the hearing date to the applicant, a representative of the opponents, if any, and the appellant. The appeal must be presented to the City Commission within three months after the date of filing. Once the appeal is presented to the City Commission, a request for delay in hearing the appeal must be acted upon at a regular City Commission meeting.

3. Powers and Duties. The Board must hear and decide all applications made under this subsection and, in so doing, it must comply with the additional requirements herein:

The Board must record each decision by written resolution, each of which must contain a statement of findings of fact.

When approving an application, the Board must impose conditions as required by this ordinance, together with additional conditions necessary to safeguard the public welfare, safety, health, morals, convenience, and best interest of the adjoining property and neighborhood.

The Board may approve an application only when a majority of the Board is wholly convinced, and on the basis of full and complete hearing, finds that the intended use will not, in the circumstances of the particular case and under conditions that the Board imposes, be substantially or permanently injurious to the neighborhood and appropriate use of adjoining property, or otherwise be detrimental to the public welfare, safety, health, morals, or convenience, and finds that the use will be compatible with the purpose of this ordinance.

a. Special Exceptions:

(1) A conditional use may be approved provided the use is deemed by the Board to be desirable or essential to the public welfare, safety, health, morals, or convenience, or to be important to the development of an undeveloped area. Such conditional uses are limited to those enumerated as permissible in the various zones.

(2) Variance from the strict application of an area, height, or setback requirement of this ordinance may be approved in the case of an exceptionally irregular, narrow, shallow, or steep lot, or other exceptional physical condition, where the strict application of the requirements of this ordinance would result in practical difficulty or unnecessary hardship that would deprive the owner of the reasonable use of his land or building, but in no other case. Practical difficulty or unnecessary hardship cannot be found when financial gain or loss or monetary savings is the basis for the claim of hardship.
(3) Non-conforming use plans for expansion or enlargement of a building which is non-conforming as to use may be approved, provided that the expansion or enlargement does not exceed 25 percent of the floor area of the building as it existed at the time it became non-conforming, and the new construction authorized under the provisions of this subsection is removed or converted to a conforming building at the same time as the original building is removed or converted to a conforming building as required by this ordinance. Approval of expansion of a non-conforming building may be granted only when the Board finds that the applicant will be denied a continued reasonable use of the property if the expansion is not approved.

b. Administrative Review and Interpretation. The Board must review an administrative action of the Enforcement Officer when it is alleged that there is an error in the order, requirement, determination, or refusal made by the Enforcement Officer, and reverse, affirm, or modify the administrative action. The Board must interpret this ordinance when the Enforcement Officer is in doubt as to the exact meaning of the text. The Board must interpret the Zone Map in accordance with the standards of Section 25.F. when the Enforcement Officer is uncertain as to the exact boundary of a zone shown on the Zone Map. A request before the Board, action on which would require an amendment to the Zone Map or the text of this ordinance, must be referred to the Planning Commission for processing under the regulations of Section 25.A.

4. Expiration and Extension of Special Exception Approval and Violation of Conditions:

a. Expiration: Approval of a special exception application is void after six months from date of approval if the rights and privileges granted thereby have not been executed or utilized, or, if construction work is involved, the work has not actually been started on the grounds or premises. Approval also shall be void if the rights and privileges are discontinued for a period of six or more months. The Board may extend the expired approval upon request, and if it does, the request for extension must be treated as an original application for purposes of notification, hearing, and evaluation, and the original approval does not in any way obligate the Board to approve the extension or restrict the Board from imposing different or additional conditions.

b. Violation. Violation of a condition imposed by the Board in approving an application constitutes a violation of this ordinance and is subject to the same penalties as any other violation of this ordinance. A condition imposed by the Board becomes effective and must be strictly complied with immediately upon execution or utilization of a portion of the rights and privileges authorized by approval of an application.

C. Old Town Architectural Review Board

1. An Architectural Review Board is hereby created, consisting of seven members. Four of the initial appointive members shall be appointed for four (4) years, and three for two (2) years. Subsequently, members shall
plus spaces adequate in number—as determined by the Department of City Planning—to serve the visiting public.

(7) Penal and Correctional Institutions. One parking space shall be provided for each four employees, plus spaces adequate in number—as determined by the Department of City Planning—to serve the public.

(8) Permitted Retail Uses (including restaurants). One parking space shall be provided for each 400 square feet of floor area in excess of 4,000 square feet.

(9) Permitted Wholesale Establishments. One parking space shall be provided for each 400 square feet of floor area in excess of 4,000 square feet.

(10) Public Utility and Public Service Uses. One parking space shall be provided for each four employees, plus spaces adequate in number—as determined by the Department of City Planning—to serve the public.

1.1 Stadiums, Auditoriums, and Arenas. Parking spaces equal in number to 10 per cent of the capacity of persons shall be provided.

1.2 Theaters, Drive-in. Reservoir parking space equal in number to 10 per cent of the vehicle capacity of such theaters shall be provided.

1.3 Trade Schools. One parking space shall be provided for each four employees, and one parking space shall be provided for each six students based on the maximum number of students attending classes on the premises during any 24 hour period.

10.16-2 Off-Street Parking — M2-1 To M2-5 General Manufacturing Districts.

In the M2-1 to M2-5 Districts inclusive, parking spaces shall be provided as required for uses in the M1 Districts under the provisions of Section 10.16-1.

10.16-3 Off-Street Parking — M3-1 To M3-5 Heavy Manufacturing Districts.

In the M3-1 to M3-5 Districts inclusive, parking spaces shall be provided as required for uses in the M1 Districts under the provisions of Section 10.16-1.

ARTICLE II
ADMINISTRATION

11.1 Statement of Purpose

11.2 Bureau of Zoning

11.3 The Board of Appeals

11.4 Department of City Planning

11.5 Zoning Certificates

11.6 Occupancy Certificates

11.7 Variations

11.8 Appeals

11.9 Amendments

11.10 Special Uses

11.11 Fees

11.12 Penalties

Statement of Purpose

(1) The administration of this comprehensive amendment is hereby vested in three offices of the City of Chicago as follows:

   Bureau of Zoning

   The Board of Appeals

   Department of City Planning

(2) This Article shall first set out the authority of each of those three offices and then shall describe the processes and substantive standards with respect to the following administrative functions:

   Issuance of Zoning Certificates

   Issuance of Occupancy Certificates

   Variations

   Appeals

   Amendments

   Special Uses

   Fees

   Penalties

Bureau of Zoning

11.2-1 Creation. There is here established a Bureau in the department of buildings which shall be known as the "Bureau of Zoning", Said Bureau shall be under the direction of a Zoning Administrator who shall be appointed by the Mayor by and with the consent of the City Council. The Zoning Administrator may be removed by the Mayor for cause. Such other employees of the Office of Zoning Administrator shall be appointed as shall be authorized by the City Council in its annual appropriation ordinance.

11.2-2 Duties of the Office of Zoning Administrator.

The Zoning Administrator shall enforce this comprehensive amendment, and in addition thereto and in furtherance of said authority he shall:

(1) Issue all Zoning Certificates, and make and maintain records thereof;

(2) Issue all Certificates of Occupancy, and make and maintain records thereof;

(3) Conduct inspections of buildings, structures, and uses of land to determine compliance with the terms of this comprehensive amendment;

(4) Maintain permanent and current records of the comprehensive amendment, including, but not limited to all maps, amendments and special uses, variations, appeals and applications therefor;

(5) Provide and maintain a public information bureau relative to all matters arising out of this comprehensive amendment;

(6) Receive, file and forward to the City Clerk all applications for amendments to this Comprehensive Amendment. (Amend. 4-9-59 Coun. J. page 7547).

11.3-1 Creation and Membership. A Board of Appeals is hereby authorized to be established. The word "Board" when used in this section shall be construed to mean the Board of Appeals. The said Board shall consist of five members appointed by the Mayor of the City of Chicago by and with the consent of the City Council of the City of Chicago. The members of said Board shall serve respectively for the following terms,
or until their respective successors are appointed and qualified; one for one year, one for two years, one for three years, one for four years, and one for five years, for the first five appointed, and five years each for those following the first five appointed. One of the members of said Board shall be designated by the Mayor of the City of Chicago, with the consent of the City Council, as Chairman of said Board, and shall hold his said office as Chairman until his successor is appointed. The Mayor of the City of Chicago shall have the power to remove any member of said Board for cause and after a public hearing. Vacancies upon said Board shall be filled for the unexpired term of the member whose place has become vacant, in the manner herein provided for the appointment of such member: The salaries of members of the Board of Appeals shall be determined and fixed by the City Council in the annual appropriation ordinance.

11.3.2 Jurisdiction. The Board of Appeals is hereby vested with the following jurisdiction and authority:

(1) To hear and decide appeals from any order, requirement, decision, or determination made by the Zoning Administrator under this comprehensive amendment;

(2) To hear and pass upon applications for variations and variations in the nature of special uses from the terms provided in this comprehensive amendment in the manner and subject to the standards set out herein; and

(3) To hear and decide all matters referred to it or upon which it is required to pass under this comprehensive amendment.

11.3.3 Meetings and Rules. All meetings of the Board of Appeals shall be held at the call of the Chairman and at such times as such Board may determine. All hearings conducted by said Board shall be open to the public. Any person may appear and testify at a hearing, either in person or by duly authorized agent or attorney. The Chairman, or in his absence, the Acting Chairman, may administer oaths and compel the attendance of witnesses. The Board shall keep minutes of its proceedings showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall also keep records of its hearings and other official actions. A copy of every rule or regulation, every variation and every order, requirement, decision, or determination of the Board shall be filed immediately in the Office of the Zoning Administrator and shall be a public record. The Board shall adopt its own rules of procedure not in conflict with this comprehensive amendment or with the applicable Illinois statutes, may select or appoint such officers as it deems necessary. (Amend. 4-95-58 Coun. J. p. 7545)

11.3.4 Finality of Decisions of the Board of Appeals. All decisions and findings of the Board of Appeals, on appeal or upon application for a variation after a hearing, shall, in all instances, be final administrative determinations and shall be subject to review by court as by law may be provided.

Department of City Planning

11.4.1 Jurisdiction of the Department of City Planning with Respect to Zoning. The Commissioner of City Planning shall have the following duties under this comprehensive amendment:

(1) To receive from the office of Zoning Administrator copies of all applications for amendment, to make an investigation relative thereto and to make recommendations thereon to the Committee on Buildings and Zoning. (Amend. 4-9-53 Coun. J. page 7457).

(1a) To receive from the Buildings and Zoning Committee all applications for an amendment for a Planned Development, to make an investigation relative thereto and to make recommendations thereon to the Committee on Buildings and Zoning.

(1) Planned Developments as hereinafter defined are of such substantially different character from other amendments that qualifications and standards are hereby set out to govern the recommendations of the Commissioner of City Planning and the action of the City Council:

a. Such plan, design, or proposal for a Planned Development shall be in general conformity with the scope and the overall use and bulk provisions of the applicable zoning district regulations of this Zoning Ordinance, as amended, in which area such Planned Development is located.

b. Such plan, design or proposal for a Planned Development shall be submitted by the Commissioner of City Planning to the Chicago Plan Commission for review and recommendation to the City Council as to its conformity with the planning and zoning objectives of the City of Chicago.

c. In the case of planned developments the Commissioner of City Planning may recommend and the City Council may authorize by proper amendment that the use and bulk provisions within the area of such development are within the intent and purpose of the Zoning Ordinance, as amended, provided that the Commissioner of City Planning shall find:

1. That the plan of the area of such development is in conformity with a comprehensive plan of development of adjoining areas having similar characteristics;

2. That the uses to be permitted shall be for the purpose of developing an integrated site plan in conformity with adjoining areas;

3. That the intensity of use to be permitted by such amendment is necessary or desirable and is appropriate with respect to the primary purpose of the development and with that of surrounding land use and zoning;

4. That the uses to be permitted are not of such a nature or so located as to exercise a detrimental influence on the surrounding neighborhood.

(2) To receive from the Zoning Board of Appeals all applications for variations in the nature of a special use to make an investigation relative thereto and to make recommendations thereon and forward such recommendations to the Zoning Board of Appeals through the Zoning Administrator. (Amend. 4-9-53 Coun. J. page 7547).

(3) To initiate, direct, and review, from time to time, a study of the provisions of this comprehensive amendment, and to make reports on the recommendations of the Chicago Plan Commission on the status and effectiveness of the Chicago Zoning Ordinance to the Mayor and the City Council not less frequently than annually. Amend. 9-19-57 Coun. J. page 6000. (Amend. 4-9-53 Coun. J. page 7548).


Zoning Certificates

11.5 Except as hereinafter provided no permit pertaining to the use of land or buildings shall be issued.
any officer, department, or employee of this City
less the application for such permit has been examin- by the Office of the Zoning Administrator and has
ed to it a certificate of the Office of the Zoning
administer that the proposed building or structure
plies with all the provisions of this comprehensive
amendment. Any permit or certificate of occupancy is
ed in conflict with the provisions of this comprehen-

ative amendment shall be null and void.

11.2 Issuance of Occupancy Certificate. No occu-
pancy certificate for a building or addition thereto, con-
structed after the effective date of this comprehen-
sive amendment, shall be issued until construction has
been completed and the premises inspected and certi-
fied by the Office of the Zoning Administrator to be in
conformity with the plans and specifications upon
which the zoning certificate was based. No occupancy
certificate for a building or addition thereto, con-
structed after the effective date of this comprehensive
amendment shall be issued and no addition to a previ-
ously existing building shall be occupied until the pre-
ises have been inspected and certified by the Office of
the Zoning Administrator to be in compliance with all
the applicable performance standards of the zoning dis-

11.3 Standards for Variations. The Board of Ap-
peals shall not vary the regulations of this comprehen-
sive amendment, as authorized in Section 11.7-4 hereof
unless it shall make findings based upon the evidence
presented to it in each specific case that:

A. The property in question cannot yield a reasonable
return if permitted to be used only under the condi-
tions allowed by the regulations in the district in which
it is located;
B. The plight of the owner is due to unique circum-
stances; and

C. The variation, if granted, will not alter the essen-
tial character of the locality.

For the purpose of implementing the above rules, the
Board shall also, in making its determination whether
there are practical difficulties or particular hardships,
take into consideration the extent to which the follow-
ing facts favorable to the applicant have been establish-
red by the evidence:

1. The building or addition thereto, constructed
prior to the effective date of this comprehensive
amendment, shall be occupied, and no land vacant on the effective
date of this comprehensive amendment shall be used for
any purpose until a certificate of occupancy has been
issued by the Office of the Zoning Administrator. No
building, or addition thereto, constructed after the effective date of this comprehensive
amendment, shall be issued until construction has
been completed and the premises inspected and certi-
fied by the Office of the Zoning Administrator to be in
conformity with the plans and specifications upon
which the zoning certificate was based. No occupancy
certificate for a building or addition thereto, con-
structed after the effective date of this comprehensive
amendment shall be issued and no addition to a previ-
ously existing building shall be occupied until the pre-
ises have been inspected and certified by the Office of
the Zoning Administrator to be in compliance with all
the applicable performance standards of the zoning dis-

11.5-1 Plats. Every application for a building permit
shall be accompanied by:

1. A plat, in duplicate, of the piece of parcel of land,
lot, lots, block or blocks, or parts or portions thereof;
 drawn to scale showing the actual dimensions and certified by a Land Surveyor or Civil
Engineer licensed by the State of Illinois, as a
true copy of the face or parcel, lot, lots, block or blocks or portions thereof, according to the regis-
tered or recorded plat of such land; and

2. A plat, in duplicate, drawn to scale in such form
as may, from time to time, be prescribed by the
Zoning Administrator, showing the ground area,
height, and bulk of the building or structure, the
building lines in relation to lot lines, the use to be
made of the building or structure or land, and such
other information as may be required by the Zon-
ing Administrator for the proper enforcement of
this comprehensive amendment.

One copy of each of the two plats shall be at-
tached to the application for a building permit
when it is submitted to the Office of the Zoning
Administrator for a zoning certificate and shall be
retained by the Zoning Administrator as a public record.

3. The fee for said application shall be ten dollars
($10.00) payable to the City Collector, with the
exception that no fee shall be charged for any
residential building containing four dwelling units
or less. (Amend. C. J. 12-4-63, p. 1327):
11.7-4 Authorized Variations. Variations from the
regulations of this comprehensive amendment shall be
granted by the Board of Appeals only in accordance with
the standards set out in this Section 11.7-3 to reduce or minimize the
injurious effect of such variation upon other property in
the neighborhood, and better to carry out the general inten-
tent of this comprehensive amendment.

(1) To permit any yard less than the yard required by
the applicable regulations;
(2) To permit the use of a lot for a use otherwise
prohibited solely because of the insufficient area
of the lot, but in no event shall the area of the lot
be less than 90 per cent of the required lot area;
(3) To permit the same off-street parking facility to
qualify as required facilities for two or more uses,
provided the substantial use of such facility by
each user does not take place at approximately
the same hours of the same days of the week;
(4) To reduce the applicable off-street parking or
loading required by not more than one parking
space or loading berth or 20 per cent of the appa-
llicable regulations, whichever number is greater,
extcept as further provided in paragraph (6) here-
inafter;
(5) In an R6, R7, or R8 District, to reduce the off-
street parking requirements by not more than five
parking spaces or 20 per cent, whichever is greater,
in the case of a dwelling which existed on the
effective date of this comprehensive amendment and
which subsequently is converted into a two-
family or multiple-family dwelling;
(6) To increase by not more than 25 per cent the maxi-
mum distance that required parking spaces are
permitted to be located from the use served;
(7) To allow any permitted non-residential use in a
Residence District to exceed the floor area ratio
imposed by the applicable regulations;
(8) To increase by not more than 20 per cent the gross
area of any sign; and
(9) To allow parking lots in Residence Districts to
be open or illuminated or both between the hours
of 10 P.M. and 7 A.M. when necessary for the pub-
sal safety or welfare.
(10) To increase by not more than 10 per cent the maxi-
mum gross floor area of any business, commer-
cial or manufacturing establishment imposed by
the applicable regulations. (Amend. 4-9-58 Cour.
J. page 7548).
(11) To increase the area occupied by a detached acces-
sory building or buildings in a required rear yard
by not more than ten per cent. (Added. Coun. J.
7-3-64, p. 2590.)

The Board of Appeals may impose such conditions
and restrictions upon the premises burdened by a varia-
tion as may be necessary to comply with the standards
set out in this Section 11.7-3 to reduce or minimize the
injurious effect of such variation upon other property in
the neighborhood, and better to carry out the general in-
tent of this comprehensive amendment.

11.8-1 Scope of Appeal. An appeal may be taken to
the Board of Appeals by any person, firm or corpora-
tion, or by any officer, department, board or bureau
aggrieved by a decision of the Office of the Zoning Ad-
ministrator. The application for appeal shall be filled
with the Zoning Board of Appeals and shall be taken
with such time as shall be prescribed by the Board of
Appeals by general rule. A Notice of Appeal specifying
the grounds thereof shall be filed with the Office of
Zoning Administrator. (Amend. 4-9-58 Coun. J. page
7547).

11.8-3 Findings on Appeals. An appeal shall stay all
proceedings in furtherance of the action appealed from
unless the Zoning Administrator certifies to the Board
of Appeals after the notice of appeal has been filled with
him that by reason of facts stated in the certificate a
stay would, in his opinion, cause imminent peril to life or
property, in which case the proceedings shall not be
stayied otherwise than by a restraining order, which may
be granted by the Board of Appeals or by a court of
record on application, on notice to the Zoning Admin-
istrator and on due cause shown.

The Board shall select a reasonable time and place for
the hearing of the appeal and give due notice thereof
to the parties and shall render a written decision on
the appeal without unreasonable delay.

The Board may affirm or may, upon the concurring
vote of four members, reverse, wholly or in part, or
modify the order, requirement, decision, or determina-
tion, as in its opinion ought to be done, and to that end
shall have all the powers of the officer from whom the
appeal is taken.

The Zoning Administrator shall maintain complete
records of all actions of the Board relative to appeals
and shall keep the Committee on Buildings and Zoning
informed on a current basis of the disposition of each

Amendments

11.9-1 Authority. The regulations imposed and the
districts created under the authority of this compre-
sensive amendment may be amended from time to time by
ordinance, but no such amendments shall be made with-
out a public hearing before the Committee on Buildings
and Zoning of the City Council.

11.9-2 Initiation of Amendment. Amendments may be
proposed by the City Council, by the Commissioner of
City Planning or by any resident of or owner of prop-
erty in the City of Chicago.

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Application. An application for an amendment to any regulation of this comprehensive amendment shall be filed with the Zoning Administrator. Accept those filed by members of the City Council, which may be filed directly with the City Clerk. The Zoning Administrator shall transmit such application without delay to the City Clerk. The City Clerk shall issue all such applications with the City Council at its next regular meeting. The application shall be in such form and accompanied by such information as shall be required from time to time by the Zoning Administrator. An application for the designation of a Planned Development shall be considered as an amendment, subject to the provisions of Section 11.4-1 (a). (Amend. 4-9-58 Coun. J. page 7547; 7-23-61 Coun. J. page 5334.)

Processing of Applications. Before the holding of public hearings on any amendment introduced into the Council, it shall be forwarded by the Committee on Planning and Zoning to the Zoning Administrator with request for recommendations relative thereto by both the Commissioner of City Planning and the Zoning Administrator.

Upon receipt of such proposed amendment, the Zoning Administrator shall transmit a copy to the Commissioner of City Planning who shall make his recommendations relative thereto and forward same through the Zoning Administrator to the Committee on Planning and Zoning. The Zoning Administrator shall transmit the recommendations of the Commissioner of City Planning to the Committee on Planning and Zoning shall forward therewith either an indication of its concurrence with such recommendations or, in the event of disagreement with same, his own separate recommendations.

Hearing. The Committee on Planning and Zoning of the City Council shall hold a hearing on such application for an amendment at such time and place as shall be determined by said Committee. The hearing shall be conducted and a record of the proceedings shall be preserved in such manner and according to such procedures as the Committee on Planning and Zoning shall, by rule, prescribe from time to time.

Notice of Hearing. Notice of the time and place of such hearing shall be given by the City Clerk at least 30 nor less than 15 days before the hearing. By publishing a notice thereof at least once in a newspaper of general circulation published within the city of Chicago. Said notice shall include such description of the property affected by the proposed amendment as the Committee on Planning and Zoning may by rule prescribe from time to time. The published notice may be supplemented by such additional form notice as the Committee on Planning and Zoning may prescribe.

Action by City Council. An amendment shall not be passed except by a favorable vote of two-thirds of all the Aldermen in the event that a written protest against the proposed amendment is filed with the City Clerk and is signed and acknowledged by the owners of 50 per cent of the frontage immediately adjoining or across an alley therefrom, or by the owners of 20 per cent of the frontage directly opposite the frontage proposed to be altered.

If an application for a proposed amendment is not acted upon finally by the City Council within six (6) months of the day upon which said application is filed by the City Clerk with the City Council it may be considered by the applicant to have been denied. (Amend. Coun. J. 4-9-53, p. 7518; 6-15-62, p. 7333.)

Minimum Size of Parcel. A lot, lots or parcel of land shall not qualify for a zoning amendment unless it has 100 feet of frontage, or has 10,000 square feet of area or is adjoining a lot, lots or parcel of land which is in the same zoning district as the proposed zoning amendment. (Amend. 4-9-58 Coun. J. page 7548.)

Variations in the Nature of Special Uses (Herein Called Special Uses)

Purpose. The development and execution of a comprehensive zoning ordinance is based upon the division of the City into districts within which districts the use of land and buildings and the bulk and location of buildings and structures in relation to the land are substantially uniform. It is recognized, however, that there are variations in the nature of special uses which, because of their unique characteristics, cannot be properly classified in any particular district or districts, without consideration in each case, of the impact of those uses upon neighboring land and of the public need for the particular use at the particular location. Such variations in the nature of special uses fall into two categories:

(1) Uses either municipally operated, or operated by publicly regulated utilities or uses traditionally affected with a public interest; and

(2) Uses entirely private in character but of such an unusual nature that their operation may give rise to unique problems with respect to their impact upon neighboring property or public facilities.

Authorization. Variations in the nature of special uses may be authorized by the Zoning Board of Appeals provided that no application for variation in the nature of special use shall be acted upon by the Zoning Board of Appeals until after (1) a public hearing is noticed and held; and (2) a written report is prepared and filed by the Board of Zoning Appeals, which report shall become a part of the record.

Application for variation in the nature of a Special Use. An application for a variation in the nature of a special use shall be filed and processed in the manner prescribed for applications for other variations and shall be in such form and accompanied by such information as shall be established from time to time by the Zoning Board of Appeals.

Standards. No special use shall be granted by the Zoning Board of Appeals unless the special use:

(1) Is necessary for the public convenience at that location;

b. Is so designed, located and proposed to be operated that the public health, safety and welfare will be protected; and

(2) Will not cause substantial injury to the value of other property in the neighborhood in which it is to be located; and

(3) Is within the provisions of "Special Uses" as set forth in rectangular boxes appearing in Articles

4, 5, 9, and 10; and

(4) Such special use shall conform to the applicable regulations of the district in which it is to be located.

Conditions. The Commissioner of City Planning may recommend and the Board of Zoning Appeals may provide such conditions or restrictions upon the construction, location and operation of a special use, including but not limited to provisions for off-street parking and loading, as shall be deemed necessary to secure the general objectives of this comprehensive amendment and to reduce injury to the value of property in the neighborhood.

Fees

11.11 Any application for an amendment or special use filed by, or on behalf of, the owner or owners of the property affected shall be accompanied by a fee of one hundred dollars, which shall be paid to the City Collector. There shall be no such fee, however, in the case of applications filed by members of the City Council, the Mayor, Departments of the City of Chicago; or by a duly constituted public body such as, but not limited to, United States Government, State of Illinois, Metropolitan Sanitary District of Greater Chicago, Board of Education of Chicago, Chicago Housing Authority, Chicago Park District and Chicago Public Library.

The provisions in this Section however do not apply to any application for an amendment for a Planned Development which subject is covered by Section 11.11-1 (Amend. Coun. J. 4-27-60, p. 2504, 7-28-61, p. 5335; 6-15-62, p. 7324.)

Penalties

11.12 A person who violates, disobeys, omits, neglects, or refuses to comply with or resists the enforcement of any of the provisions of this comprehensive amendment shall be fined not less than 50 dollars nor more than 200 dollars. Each day such a violation or failure to comply is permitted to exist after notification thereof shall constitute a separate offense.

PART B

ARTICLE 12

ZONING MAPS

12.1 Zoning Maps, Incorporation of
12.2 Location of District Boundaries
12.3 Square Mile Index Map
12.4 Street Guide

Zoning Maps, Incorporation of

12.1 The location and boundaries of the districts established by this comprehensive amendment are shown upon the following zoning maps which are hereby incorporated into this comprehensive amendment. The said zoning maps, together with everything shown thereon and all amendments thereto, shall be as much a part of this comprehensive amendment as if fully set forth and described herein.

Location of District Boundaries

12.2 (1) Where zoning district boundary lines are indicated as following streets or alleys or extensions thereof, such boundary lines shall be construed to be the center lines of said streets or alleys or extensions thereof.

(2) Where zoning district boundary lines are indicated as adjoining railroads, such boundary lines shall be construed to be the boundary lines of the railroad rights-of-way, unless otherwise dimensioned.

(3) Where zoning district boundary lines are indicated as adjoining expressways such boundary lines shall be construed to be the boundary lines of the expressway rights-of-way, unless otherwise dimensioned.

(4) Dimensioned zoning district boundary lines shown on the zoning maps are intended usually to coincide with lot lines, Where a dimensioned boundary line coincides approximately but not exactly with a lot line which existed on the effective date of incorporation of such boundary line into the zoning map(s), the said boundary line shall be construed to be the said lot line at that location.

(5) Streets or alleys which are shown on the zoning maps and which heretofore have been vacated, or which may be vacated hereafter, shall be in the same zoning district as the lots, pieces, or parcels abutting both sides of the street or alley involved. If the lots, pieces or parcels abutting each side of the street or alley were located in different zoning districts before the said street or alley was vacated, the center line of such vacated street or alley shall be the boundary line of the respective zoning districts.

Section II. This Ordinance shall take effect upon passage and due publication.
LIST OF REFERENCES


City of Dallas, Texas. Comprehensive Zoning Ordinance and Map Delineating the Various Use Districts. Ordinance No. 12663, City of Dallas, Texas, 1965.


Department of City Planning. Zoning Regulations of the City of San Jose, California. City of San Jose, Calif. 1970.


___________. *Rules and Regulations of Board of Adjustment City of Tucson, Arizona, 1971.*
