PITFALLS OF Zoning

A GUIDE FOR ATTORNEYS

HOME TITLE GUARANTY COMPANY
New York

Here is your copy of "Pitfalls of Zoning: A Guide for Attorneys". We trust you will find it informative and helpful.

PRESIDENT

HOME TITLE GUARANTY COMPANY

180 FULTON STREET, NEW YORK 7, NEW YORK

BEEKMAN 3-1234

HAROLD W. BEERY
President

April 8, 1959

Mrs. Margaret B. Sterritt, Librarian
Housing & Home Finance Agency Library
1626 K Street, North West (25)
Washington, D. C.

Dear Mrs. Sterritt:

We are enclosing a copy of a monograph entitled, "Pitfalls of Zoning: A Guide For Attorneys" which has been prepared by the legal staff of our Company. We seek to answer three principal questions:

1. How does zoning affect title to real property?

2. What problems does this create for lawyers?

3. How can these problems be managed?

Because present-day zoning laws, regulations and practice are too variable and unpredictable, we do not at this time write a zoning insurance policy. We have felt, however, a responsibility to study zoning and make the benefit of such study available to members of the bar. It is our hope that adequate remedial legislation as suggested in the last section of the publication may remove most, if not all, of the problems presently standing in the way of writing a policy of zoning insurance.

Although the monograph is primarily concerned with zoning in the State of New York, court decisions in other states which we have reviewed, lead us to believe that most of the problems we have emphasized are to a large extent also found to exist throughout the nation.

If you wish to have additional copies of this publication we shall be happy to send them to you at a charge of actual cost to us of 25¢ per copy.

Sincerely yours,

Harold Beery

PITFALLS OF

Zoning

A GUIDE FOR ATTORNEYS

HOME TITLE GUARANTY COMPANY
180 FULTON STREET, NEW YORK 7, N. Y.

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FOREWORD

As municipalities, their executives and residents see in zoning an effective means to provide for the orderly use and change in use of real property, new and more complex zoning laws and ordinances are being written. An increasing number of zoning cases seem to be turning up in the courts. The theory and use of zoning are becoming more important subjects for lawyers every day.

Even though zoning violations can render a title unmarketable, it is not possible today to write an insurance policy covering such violations with any reasonable degree of assurance. This is because present-day zoning laws, regulations and practice are too variable and unpredictable. We do not expect at this time to write a zoning insurance policy, but, at Home Title Guaranty Company, we still feel a responsibility to study zoning and make the benefit of such study available to our attorney customers.

This monograph seeks to answer three principal questions:

1. How does zoning affect title to real property?
2. What problems does this create for lawyers?
3. How can these problems be managed?

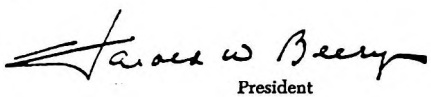
The attorneys who prepared the material in this publication sought to provide answers based on current knowledge and the best current practice. Emphasis is not only on the effect of zoning violations but also on what procedures an attorney should follow in establishing the zoning status of property and in fully protecting his client. For information regarding the authority under which zoning agencies are created, the organizational set-up of these bodies, their areas of responsibility, and their powers and duties, we refer you to "Local Planning and Zoning," a publication of the State of New York, Department of Commerce, 112 State Street, Albany 7, New York.

In the last chapter, entitled "Conclusions and Recommendations," we try to suggest how the whole field of zoning could be better managed legally and administratively. It is not enough, we think, simply to show how complex and variable the field is; we are obligated to show how it can be simplified and rationalized. The lawyer, the legislator, the public administrator, who would like to see zoning made more precise, may find in the list of weaknesses we have presented the key to the improvements which must be made in the underlying laws. This last chapter is essentially our opinion of what is needed to justify a title insurance company in writing a policy of zoning insurance.

Most of this monograph is the product of research by members of our legal staff and reflects their legal experience. They benefited greatly from the use of an original memorandum of law prepared by Mr. Ralph W. Crolly, partner of the Brooklyn and New York law firm of Cullen & Dykman. In addition, more than fifty outstanding members of the legal profession with large experience in real property matters were kind enough to read material in advance of publication and make specific suggestions. Mr. Latham C. Squire, Zoning Consultant and Executive Director of the Citizens' Zoning Committee, Inc., was our engineering adviser.

We are concerned primarily with zoning in the State of New York, although citations of decisions in other states are used at times to support certain points made herein.

We have published this monograph as a service to lawyers and their clients and in an effort to help clear up some of the misunderstandings about zoning. We also hope that we are pointing the way toward laws and regulations covering zoning so codified and clear that the subject can be handled with confidence. If their fellow attorneys feel that a practical contribution has been made, the lawyers who worked on this publication will know that they have accomplished their purpose.



President

Section I

GENERAL PURPOSE AND LEGAL AUTHORITY FOR ZONING

General Purpose

The general purpose of zoning is to control the orderly future growth of an area in accordance with a comprehensive plan. What zoning generally attempts to accomplish is to see that the physical growth of a community does not develop in a manner to endanger the health, safety and general welfare of the inhabitants of a community.

Delegation of Police Power by State

The creation and enforcement of zoning stems from the inherent police power which is vested in the state. This police power can be delegated by the state to local communities only by a proper enabling statute or constitutional authorization. The police power having been delegated, it can then be exercised by the local community only through the promulgation of a comprehensive community plan and zoning ordinance adopted pursuant to such statute or constitutional authorization. In New York State the enabling statutes are various sections of the General City, Town and Village Laws of the State which provide that any city, town or village may adopt zoning laws and regulations.

New York City Zoning Ordinances

In New York City, zoning is governed by the City Charter. New York City was an early leader in zoning in the United States by its adoption of comprehensive zoning regulations in 1916. One of the first decisions in this country upholding the validity of zoning legislation was handed down in 1920 (Lincoln Trust Company v. The Williams Building Corporation, 229 N. Y. 313) where the court said:

> "The conduct of an individual and the use of his property may be regulated."

The court also said that the zoning resolution was not an encumbrance, since it was a proper exercise of the police power.

Promotion of General Welfare and Comprehensive Plan Essential

With respect to such ordinances and regulations the courts have consistently upheld the general principle that they can be sustained only if they promote the public health, safety and general welfare of the community, and are enacted in accordance with a well-considered and comprehensive plan. In a like manner, zoning regulations have been held invalid where the courts have decided them to be arbitrary, unreasonable or confiscatory.

> "It is indeed trite to observe that zoning ordinances must be designed to promote the public health, safety and general welfare; and made with reasonable consideration to the character of the district, its peculiar suitability for particular uses, and the direction of building development.

These elements must be applied by the municipal authorities in accord with a well-considered and comprehensive plan." Greenberg v. City of New Rochelle, 206 Misc. 28, Affirmed 284 App. Div. 891, appeal dismissed 308 N. Y. 736.

"Zoning ordinances must be reasonable and conducive to the public welfare. While they may be held so to be under one set of circumstances, the result may well be different under another." City of New York v. Jack Parker Associates, Inc., et al., 5 Misc. 2d 633.

Validity of Zoning Ordinances Subject to Attack

The decisions, including the ones cited above, make it apparent that what constitutes the "general welfare" is elastic and in many cases, particularly in borderline cases, may be determined only by a court decision. The term "general welfare" is a gradually expanding concept and has been the basis for upgrading of property in order not only to maintain values, but to eliminate anticipated problems of overcrowded schools and increasing costs of providing public facilities and protections beyond the ability of the community to support them. This progressively expanding attitude increases the probable incidence of attacks upon the validity of zoning ordinances aimed to accomplish these purposes.

Grounds for Attacking Ordinance as Invalid

Although the determinations of the local legislative body with respect to the enactment of zoning ordinances and amendments are ordinarily conclusive and not subject to judicial review, the validity of an ordinance may be attacked, and may be attacked successfully, if it can be established to be arbitrary, unreasonable or confiscatory, or if it constitutes an invasion of constitutional rights. The person attacking the validity of such an ordinance assumes and must sustain the burden of proof.

Action of Local Legislative Body not Subject to Judicial Review

"The council (Common Council of the City of Yonkers) is a local legislative body, clothed with the general, delegated power to enact amendments to the Zone Ordinance. Under such a situation its motives, promptings, and procedures in making the enactment are not subject to review by the court." Homefield Association of Yonkers, N. Y., Inc., et al. v. Curtiss E. Frank, as Mayor of the City of Yonkers, et al., 273 App. Div. 788, affirmed 298 N. Y. 524.

Use of Declaratory Judgment or Mandamus Proceeding

"It seems that, as to invalidity of the ordinance, the petitioner's remedy is an action for declaratory judgment or a direct attack on a mandamus proceeding." Frank E. Lyle v. Joseph Avis, et al., 1 Misc. 2d 880.

Person Attacking Validity of Ordinance Assumes Burden of Proof

"Accordingly, the power of a village to amend its basic zoning ordinance in such a way as reasonably to promote the general welfare cannot be questioned. Just as clearly, decision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary, and the burden of establishing such arbitrariness is imposed upon him who asserts it. In that connection, we recently said (Shepard v. Village of Skaneateles, 300 N. Y. 115, 118): Upon parties who attack an ordinance * * * rests the burden of showing that the regulation assailed is not justified under the police power of the state by any reasonable interpretation of the facts. 'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control'. (Village of Euclid v. Ambler Realty Co., 272 U. S. 365 388; see, also, Town of Islip v. Summers Coal & Lbr. Co., 257 N. Y. 167, 169, 170; Matter of Wulfsohn v. Burden, 241 N. Y. 288, 296-297.)" Greenberg v. City of New Rochelle, 206 Misc. 28, affirmed 284 App. Div. 891, appeal dismissed 308 N. Y. 736.

"In Greenberg v. City of New Rochelle (206 Misc. 28, 32, 33, affd. 284 App. Div. 891) the question of spot zoning was considered. Mr. Justice Coyne, rendering the opinion for the lower court in a clear and comprehensive opinion, held in part as follows:

> 'Under this pronouncement of the Court of Appeals, clearly the scope of any inquiry by this court into the validity of the legislative enactment is limited and circumscribed. The burden rests upon the one assailing the ordinance to establish that the judgment of the legislative body was arbitrary and unreasonable. This cardinal principle is now firmly entrenched in the law'." Fieldston Garden Apartments, Inc. v. City of New York et al., 7 Misc. 2d 147, affirmed 3 App. Div. 2d 903.

No Clear Cut Definition For Improper Zoning

From the cases, it appears that there is no clearly defined line which separates arbitrary and capricious zoning from proper zoning. There is no definition which, within its own confines, could be a clear indication of the absence or presence of improper zoning and any determination must inevitably be dependent upon the particular facts of any particular case. This dependence upon the factual background has prevented the enunciation of clear cut precedents upon which one might rely with certainty.

Section II

GENERAL CHARACTER OF ZONING ORDINANCES

A. Provisions of Zoning Ordinances

Establishment of Districts

In order to protect property improvements and their occupants from fire and other hazards; to provide adequate light and air; to guard against unwise concentration of population; to conserve and enhance the value of property; and to promote the use of land for the most desirable purposes to which a specific area lends itself;—the city, town or village to be zoned is divided into a number of kinds of zoning districts—all in accordance with a comprehensive community plan.

Types of Districts

In large size communities, these districts usually include a number of residential, business, commercial and industrial districts with two or more types of districts under each of the four general classifications. Each type of district has its own established restrictions with respect to use, height and area and density of population.

Control of Height and Area

Control of height and area is accomplished in many ways, including specifying:

1. The number of stories permitted, or height in feet, or both.
2. The front, side and rear yard set-backs of buildings.
3. The percentage of a lot that may be covered by the buildings and structures.
4. Minimum size of dwellings.
5. Relationship of height to width of streets and unbuilt on portion of plot with provisions for set-backs on buildings, and other more complicated regulations for office buildings and multiple dwellings.

Control of Population Density

Control of population density may be achieved by specifying:

1. Maximum number of families per acre.
2. Minimum lot area per family to be housed.
3. Number of square feet of open space on the lot required for each family to be housed.
4. Number of families permitted to occupy a given area.

Control of Use

Control of use may be accomplished by specifying the particular type of activity which may be carried on in the building on the property such as:

1. Light manufacturing or heavy manufacturing.
2. Unrestricted use of the building or property.

3. The minimum square footage of residential space in a residence which also may be used in part as a professional office.
4. Such other use or uses of the property or improvements thereon as may be designated by the zoning regulations.

B. How Changes in Zoning are Made

Hazard With Respect to Zoning Changes

It may be interesting to note briefly how changes are made in zoning ordinances in order to emphasize one of the principal hazards with which property owners or prospective purchasers are faced when possible changes in zoning are attempted that may prove detrimental to their interests. The records of the local governing body may show that on a particular date a certain zoning status exists. However, proceedings for a change in such zoning already may have been commenced. There is no obligation on the part of the public authority to give notice of such a proposed change, unless the proceedings have progressed to the point of publication of a notice for a hearing on the prospective change. A purchaser, therefore, may buy property in reliance on the zoning status at the time of acquisition of the title and find, to his dismay, that a short time after the closing the zoning has been changed to prohibit the type of improvement or use contemplated by him. Some proposed changes may be under consideration for long periods of time before they are processed to the point of a public hearing. This uncertainty in the permanence of an existing zoning status points up the proposition that knowing what a particular zoning status is at a particular time may not answer the requirements of the purchaser of property. He may contemplate a particular use or a particular type of construction which may be prohibited when an unknown pending change is enacted.

Authority for Changes

Changes in zoning ordinances may be made only by the legislative body of the community, such as the Board of Estimate in New York City or the local governing boards in cities, towns and villages. Such changes are usually the result of problems created by changing conditions in a community. Areas originally zoned for one-family houses may later become better adapted for multi-family dwellings. Rural districts may change to suburban residential sections. Shifts in population may create increased demands for commercial and business facilities.

Zoning Changes in New York City

The procedure for effecting changes in zoning in New York City is substantially as follows:

1. Applications for a change in zoning must be filed with the City Planning Commission.
2. The Commission, itself, may initiate a change.

3. In either case, a public hearing must be held by the Commission.
4. Notice of the hearing must be published in the City Record and must appear on the Calendar of the Planning Commission.
5. If, after the hearing, the Commission approves a proposed change, it must submit its recommendation for such change to the Board of Estimate within 15 days after the date of its own approval of the change.
6. Thereafter, the Board of Estimate must schedule its own public hearing and must publish notice thereof in the City Record at least 10 days in advance of the hearing.
7. The Board may either approve or disapprove the recommendation of the Planning Commission.
8. If the Board does not act within 30 days after receiving the recommendation of the Commission, the change becomes effective automatically. This is an approval by inaction.

Zoning Changes in Suburban Areas

The procedures for effecting zoning changes in other cities and suburban areas are somewhat similar to the procedure in New York City. Under the State enabling statutes, authority is vested in city councils and in town and village boards with authority similar to that assumed by the joint action of the New York City Planning Commission and Board of Estimate. There are a few suburban areas where official maps, resolutions and other records with respect to zoning information are not authoritative or readily available. In such localities it may be difficult to ascertain the exact status of zoning with any degree of certainty.

C. Spot Zoning

Dangers of Spot Zoning

A change in zoning to accommodate one or two specific pieces of property is known as "spot zoning." The practice of spot zoning, if indulged in extensively, can, of course, ultimately destroy the effectiveness of a general plan or scheme designed to control the zoning of an entire area. When the exception becomes the rule then the rule becomes wholly ineffective and the basic purpose of zoning is thereby destroyed. Furthermore, spot zoning always runs a greater risk of being challenged in the courts by property owners adversely affected, on the ground that it is not part of a comprehensive plan and is not in the general welfare of the community. A good definition of what constitutes spot zoning is contained in the opinion in the case of Scarsdale Supply Co. v. Village of Scarsdale, decided by Mr. Justice Fanelli, in the Supreme Court, Westchester County, Law Journal, January 7, 1959, in which the court states:

> "'Spot zoning' is the very antithesis of planned zoning since it is the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and

to the detriment of other owners. If, on the other hand, an ordinance is enacted with a comprehensive zoning plan, it is not 'spot zoning' even though it singles out and affects one small plot or creates areas or districts devoted to a different use (Rodgers v. Village of Tarrytown, supra). The true test is whether the change is part of a well-considered and comprehensive plan (Shepard v. Village of Skaneateles, supra; Greenberg v. City of New Rochelle, 206 Misc. 28, 129 N. Y. S. 2d 691), since 'what is best for the body politic in the long run must prevail over the interests of particular individuals' (Rodgers v. Village of Tarrytown, supra), and only as a last resort will courts strike down legislative enactments on the ground of unconstitutionality."

D. How Special Permits and Variances are Obtained

Definition

Zoning ordinances may provide for the issuance of special exception permits and variances for the construction and use of certain types of buildings or for the use of unimproved land differing from the zoning requirements established for a particular district. Special exception permits may be issued only where the zoning ordinance itself specifies special exceptions to the requirements of the ordinance and the type of building sought to be built or use of the land is specifically permitted by the special exceptions expressly specified therein. A special exception permit may not be issued for a variance not provided for in the list of special exceptions. A variance, however, may be permitted to avoid a literal compliance with the zoning ordinance.

Authority of Board of Appeals

The granting of special exception permits and variances is a function of the local Board of Appeals. It provides the Board with a reasonable amount of flexibility in administering the zoning ordinance, although the Board has no power to legislate. Decisions of the Board are subject to appeal and review by the New York State Supreme Court if a proceeding for that purpose is instituted within 30 days of the adoption and filing of the resolution granting the permit or variance.

When Variances Are Granted

Variances, as distinguished from special exception permits, are ordinarily granted by the Board of Appeals only when undue hardships, which have not been created by the owner, exist or where a unique situation with respect to a particular parcel can be demonstrated. An illustration of an undue hardship might be an odd-shaped lot or a lot which had a sufficient area to comply with the zoning which was in effect when it was purchased by the applicant for the variance which, through upgrading, does not have sufficient area at the time building is contemplated. An example of a unique situation

would be a case where a vacant parcel, because of a change in zoning, is surrounded by legal nonconforming uses so that the vacant parcel could not reasonably be put to the use for which it is zoned. It is obvious that the refusal of the variance in cases of this kind would, in effect, destroy the ability of the owners to obtain either a reasonable use of the property or a fair return therefrom.

"Local Planning and Zoning" previously referred to sets forth three questions which should be answered in the affirmative before a variance is granted by a Board of Appeals:

1. Would the strict application of the ordinance produce undue hardship?
2. Is the hardship created limited to the parcel in question in that it is not shared by other properties in the vicinity or in the use district?
3. Will the character of the district be unchanged by the granting of the variance?

Obtaining a Variance in New York City

In New York City the procedure for obtaining a special exception permit or a variance is substantially as follows:

1. The application for a special exception permit or a variance must be filed with the Board of Standards and Appeals.
2. Before filing an application for a variance, plans for the proposed structure and its use, or application for the change in the use of vacant land or the existing buildings, must have first been filed with and rejected by the Department of Housing and Buildings.
3. Notice of the proposed special exception permit or variance and the holding of a public hearing, must be given to all owners in the affected area. Notice of the hearing is also published in the Weekly Bulletin of the Board.
4. The Board may take action on the case at the meeting at which the hearing is held or lay the matter over until a subsequent meeting.
5. When action is finally taken, a resolution is adopted by the Board, copies of which are (1) filed in the Board's own records, (2) filed in the Department of Housing and Buildings, and (3) published in the Weekly Bulletin of the Board.
6. The resolution will contain all the conditions and limitations under which the special exception permit or variance has been granted.
7. Proceedings to appeal and review may be brought in the Supreme Court within thirty days after the filing of the decision in the office of the Board, or its publication in the Bulletin of the Board.

Exceptions to Usual Procedures for Obtaining Variances

While applications for variances from the requirements of the zoning resolution of the City of New York are usually brought before the Board of Standards and Appeals, the New York City zoning resolution makes certain exceptions where the variances are granted by the Board of Estimate after application to and approval by the City Planning Commission. Such exceptions cover variances permitting the use of property for (a) parking garages with a capacity of 150 cars or more; (b) open air drive-in theatres; (c) horse racing tracks; (d) bus stations; (e) airports, and (f) large scale developments having an area of 200,000 square feet or more and at least a full block in size. After the application to the City Planning Commission is approved, then the same procedure as that involved in the proposed zoning change must be followed. The requirement for City Planning Commission approval also exists where a large amount of traffic or a considerable number of city departments would be involved in any zoning change.

Variances in Suburban Areas

The procedures for obtaining special permits and variances in areas outside the City of New York are substantially the same, with the application going to and approval coming from the local Board of Appeals.

Section III

THE EFFECT OF ZONING VIOLATIONS UPON THE MARKETABILITY OF TITLE

General Effects of Violations

A zoning ordinance, in and of itself, is not an encumbrance on real property and, therefore, does not render a title unmarketable. However, a violation of a zoning ordinance may subject the owner of the property not only to drastic fines and penalties but also to possible discontinuance of the use where it is unlawful, and, in some cases, to either removal or relocation of a building. This is true whether such violation is caused by the present owner or was caused by a former owner.

Difference Between Effect of Zoning Ordinance and a Violation Thereof

There is a vast difference between taking title subject to zoning ordinances and taking title subject to a violation of zoning ordinances. In the first case, title cannot be rejected because every contract is deemed to be subject to zoning ordinances whether the contract so states or not, unless there is specific language defining some other agreement between the parties. In the latter case, the violation may render the title unmarketable unless the buyer is obligated to take title subject to the violation. The results of a violation of zoning ordinances may, in many cases, be more drastic than a violation of a deed restriction. A deed restriction might never be enforced by persons having the right to do so or a release thereof may be obtained, but a zoning violation can not be corrected unless a variance can be obtained. The condition is not improved simply because no steps may be taken immediately to enforce compliance with the zoning. Unless the contract of sale provides specifically that the property under contract is being conveyed subject to any violations of the applicable zoning ordinance, the title may be rejected if a violation of the zoning ordinance is actually proven to exist.

An interesting case decided by Mr. Justice Johnson, Supreme Court, Nassau County (Levin v. Kissena Manor Corporation, Law Journal, February 26, 1959, page 16), involved a change in zoning with respect to area requirements between the date of the contract and date of closing. In this case the area requirements were greatly enlarged, thus reducing the number of available building sites. The court refused the purchaser's demand for rescission on the grounds that the contract of sale, which was signed on October 20, 1955, was subject to "zoning regulations and ordinances and amendments thereto of the city, town or village in which the premises lie . . ." The title was closed on January 18, 1957 and the zoning restrictions were amended prior to that time. The court held that the contract could not contain a misrepresentation when drawn because the zoning had been changed thereafter and there was no duty on the part of the seller to reveal the change in zoning prior to the closing.

Problem of Mortgage Lender

The concern about zoning violations is not limited to a purchaser. A mortgage lender has the same problem because he may eventually become the owner of the property through foreclosure. Even though there is no default in the mortgage he must face the fact that the security upon which the mortgage loan is based is inevitably substantially reduced in value if it violates the zoning because its marketability is limited and the price for which it might otherwise reasonably be sold will be greatly reduced, if it can be sold at all.

Purchase of Vacant Land

In the case of vacant unused property the purchaser need not, of course, be concerned with existing violations as to height and use but, if improvement of the property is contemplated, or use of the land for parking cars or for other purposes is intended, then he must give due consideration to all of the limitations which the applicable zoning requirements impose on his ability to use or improve the property as he desires. He must be certain that there is sufficient area to permit construction of a building of the size which he contemplates. He must also be aware of the height restrictions and the uses to which the building he contemplates erecting may be put. If the lot does not permit fulfillment of his contemplated use, then due consideration must be given to the likelihood of the success of an application for a variance. It is, of course, essential that all of these matters be considered prior to the execution of the contract so that, at the very least, he may be protected by appropriate language which will permit him to withdraw from the purchase without loss in the event that the zoning requirements are either too stringent or a variance cannot be obtained.

A suggested course of procedure is to have the contract of sale contain a representation by the seller that the property may be used for a specifically identified purpose, which representation should survive the delivery of the deed. In the case of the sale of vacant land additional protection can be obtained if the purchaser secures a representation of the zoning requirements at the time of the contract with the additional proviso that the zoning will not be changed between the date of the contract and the date of closing. In some cases a purchaser may even require assurance that the existing zoning will not be changed for a sufficient time after the closing to permit the purchaser to commence construction which would give him a vested right and so protect him against future changes. These, of course, are all matters of negotiation and agreement between sellers and purchasers.

Knowledge of Zoning Status Essential

It is obvious from the foregoing that one who embarks upon the purchase of property without a complete knowledge of the applicable zoning ordinances and their effect on the property, is sailing in uncharted waters and must anticipate some difficulties in setting his course to the destination he desired to reach when he started on his venture.

Section IV

AREAS IN WHICH ZONING VIOLATIONS MAY DEVELOP RESULTING IN UNMARKETABILITY OF TITLE OR FINANCIAL LOSS

Zoning Problems Causing Violations

Examples of zoning problems causing violations which are most frequent and troublesome and which, even if legalized by variances, may substantially diminish the value of property, fall principally into the following six categories:

1. Noncompliance with restrictions governing height, area and bulk.
2. Changes in use, buildings or structures.
3. Building permits and certificates of occupancy that may be subject to nullification or revocation.
4. Time and other limitations on variances and special exception permits.
5. Legal nonconforming uses subject to discontinuance or amortization.
6. Rezoning involving substantial recent downgrading or upgrading of an area.

Avoiding Pitfalls

A good many of these problems and the pitfalls which they create may be avoided if due consideration is given to the applicable zoning status of the property at the time a purchase or mortgage transaction is to be consummated.

A. Noncompliance with Restrictions Governing Height, Area and Bulk

Examples of Area Violations

Some examples of the effects of an inadequate regard to zoning with respect to area, frontage and yard requirements are best illustrated by the following:

Minimum Lot Size and Frontage Violated

A piece of property improved with a dwelling is situated in a district zoned for residential purposes by a municipal zoning ordinance which requires a minimum lot size of 12,000 square feet and a frontage of 100 feet for each lot. The property in question was 100 feet wide and 125 feet deep and contained 12,500 square feet, more than enough under the terms of the ordinance. The owner conveyed to an adjoining owner a strip on one side of his property 10 feet wide and 125 feet deep, containing 1,250 square feet. This left the owner with a frontage of only 90 feet and a lot size of 11,250 square feet, or 250 feet less than re-

quired by the zoning ordinance. Thus he was in violation of the ordinance both as to the minimum size of his lot and minimum street frontage.

Violation Despite Prior Construction

An owner built a house in a residential district. The house did not stand in the center of the 100 foot by 100 foot lot, but well over to one side. After the house had been built, a zoning ordinance was enacted requiring that lots have an area of 6,000 square feet and each a minimum frontage of 60 feet. The owner sold a portion of his property, 50 feet by 100 feet, to an adjoining owner. He thus reduced his square footage to 5,000 and his frontage to 50 feet, leaving his house on a lot that did not comply with the prescribed lot size.

Violation of Frontage Requirement

A farmer owned 30 acres of land in a rural village, on which stood his home and several other buildings. The minimum acreage requirement is 2 acres and the minimum street frontage 150 feet. The farmer sold off 10 acres of his land including the entire highway frontage, but reserved a 15 foot right of way for ingress and egress over the part sold so that he could get to and from his residence and the other buildings on the remaining acreage. The selling off of the entire frontage caused a violation of the frontage requirement in the zoning ordinance and destroyed the use and value of the 20 acres he had kept.

Violation of Percentage of Land to be Occupied

In a district that did not permit a building to occupy more than 25 per cent of a lot, a resident owned 6,000 square feet of land. His house occupied an area of 1,400 square feet, well within the 25 per cent provision. Since the ordinance required lots of only 5,000 square feet, each with a 50 foot frontage, the owner sold off 1,000 square feet, leaving himself with a legal size lot and a legal frontage. His residence, however, thus occupied more than 25 per cent of the lot and the owner was in violation of the ordinance.

Effect of Purchase on Adjoining Land

In the foregoing examples the owners of the property created the violations by voluntary sales and a consideration of the zoning would reveal the existence of these violations without any difficulty. However, let us consider the position of the purchaser of any one of these parcels. It may be that his acquisition, when added to other property which he already owned, would appear to give him a parcel large enough to comply with the zoning requirements. It is quite likely, however, that his application for a building permit on his assembled parcel may be denied because his compliance with the zoning requirements resulted from the creation of a violation of the zoning

requirements by the adjoining owner who sold the portion of land in question. A purchaser must, therefore, guard against the possibility that he has purchased a vacant parcel of land which may have been used wholly or in part as a portion of a yard or other open space required by the zoning ordinances for adjoining property. An example of such a situation is as follows:

Vacant Land Used for Requirements of Adjoining Parcel

> A seller owned two parcels, A and B, which formed an "L." He had erected a duplex building on Parcel A, leaving enough room for a legally required 25 foot yard. He then contracted to sell a purchaser Parcel B and 20 feet of the yard required for Parcel A. The purchaser rejected the title on the ground that the restriction against building on any portion of the 20 feet acquired by him made the title unmarketable.

Granting or Leasing of Air Rights

Another serious problem may be created when an owner of a piece of property wishes to construct a building with a bulk in excess of that permitted by the zoning ordinances by acquiring an easement of the space above a certain height on adjoining property and incorporating such space, in the computation of his area for the purpose of expanding the bulk limitations. A recent case involving this problem was decided by Mr. Justice Klein, in Special Term of the Supreme Court, New York County, and the decision appears in the New York Law Journal of December 5, 1958, Matter of Brause (Murdock). In this case a builder sought to construct on a plot of two lots, which he owned, a building with a tower in excess of 25 per cent of the area of the plot, which percentage is the limit permitted for a tower by the zoning regulations. He leased the air space of adjoining property and drew building plans providing for a tower having an area in excess of 25 per cent of the plot which he owned, but which would be less in area than 25 per cent of the combined area of the owned land plus the leased air space. He applied for a building permit on that basis and such a permit was issued. A nearby owner who felt that he was affected by this proposed building applied to the Board of Standards and Appeals to have the building permit revoked on the grounds that it was in violation of the zoning ordinance. The Board of Standards and Appeals refused to revoke the permit and a proceeding to review the decision of the Board was brought pursuant to Article 78 of the Civil Practice Act. The court reversed the determination of the Board of Standards and Appeals on the ground that the air rights over the adjoining parcel may not be added to the ground area to increase the total area. The equities in the case, if any, were not considered by the court, since this was a matter to review an interpretation of the zoning ordinance upon which plans were accepted and a permit to build granted. The court further held that an easement of air space could not be added to a fee simple to arrive at the area of a plot, the term plot being defined in the zoning

resolution as a parcel or plot of ground. While the court did not order the building permit to be revoked, it did remand the matter to the Board of Standards and Appeals for any further procedure not inconsistent with the decision.

B. Changes in Use, Buildings and Structures

Changes Subsequent to Issuance of Certificate of Occupancy

Changes in the use, buildings and structures of a property subsequent to the issuance of a certificate of occupancy, may create violations of zoning ordinances causing unmarketability of title. This includes the enlargement or relocation of buildings or structures. It is easy to understand that only an investigation of the existing use, buildings and structures in relation to the applicable zoning ordinance can determine if any violations have been created since the issuance of a certificate of occupancy.

Contemplated Changes

It requires no illustration to demonstrate that any contemplated change in the use, buildings and structures or any enlargement or additions to them, will require the issuance of a new permit and certificate of occupancy to afford protection to a purchaser. In such a case, the applicable zoning ordinance must be investigated for assurance that such new permit and certificate of occupancy will be obtainable.

C. Building Permits and Certificates of Occupancy That May Be Subject to Nullification or Revocation

Certificate of Occupancy or Building Permit Not Sufficient Except in Certain Cases

Section 301 of the Multiple Dwelling Law and Section 302 of the Multiple Residence Law appear to extend immunity from attack to a certificate of occupancy issued for a multiple dwelling. Subdivision 5 of each of these sections is identical and they provide that a certificate, a record in the department, or a statement signed by the head of the department that a certificate has been issued, may be relied upon by every person who, in good faith, purchases a multiple dwelling or lends money secured by a mortgage on a multiple dwelling. It is important to emphasize, however, that reliance must be placed thereon by a person in good faith. In the City of New York Section 646 of the City Charter provides that a certificate of occupancy shall be binding and conclusive upon all agencies and officers of the City unless and until it is set aside or vacated by the Board of Standards and Appeals or a court of competent jurisdiction. This provision of the Charter protects against a collateral attack and the validity of this provision has been raised and has been sustained by the courts. However, the courts have also held that the power of the Board of Standards and Appeals to revoke a certificate of occupancy for a multi-family dwelling is limited in accordance with the provisions of Section 301 and Section 302 of the Multiple Dwelling Law and the Multiple Residence Law, respectively. With the excep-

tions of these statutory protections a certificate of occupancy or a building permit is, generally, not in itself, sufficient proof to assure compliance with the zoning ordinance. It is effective only as to conditions existing on the date of its issuance and if obtained by fraud, or issued by mistake or without authority, is not binding upon the municipality and is subject to revocation. Aside from these immunities attaching to certificates of occupancy for multiple dwellings it is important to bear in mind that certificates of occupancy and building permits are subject to attack and do not necessarily afford the protection or validity which they presumptively may appear to have, as will appear more clearly from the following.

Certificate of Occupancy Issued by Mistake

Laches or estoppel cannot be invoked against a municipality as a defense against a revocation of a building permit or certificate of occupancy issued through fraud, mistake, or without authority. This is so even though considerable expense may have been incurred in reliance upon the validity of the building permit if it was issued in violation of zoning regulations. "No building permit by an administrative official could condone, or afford immunity for, a violation of law." (Marcus v. Village of Mamaroneck, 283 N. Y. 325.) A different rule, however, may be invoked where a permit was validly issued under the zoning ordinances existing at the time of its issuance but became illegal subsequently by reason of an alteration or repeal of the zoning ordinance. In those cases, where substantial expense has been incurred by the permittee prior to the subsequent invalidating ordinance, such subsequent ordinance may not deprive the permittee of his property rights, and, to do so, would probably be held to be an invasion of his constitutional rights. It is important to note that in these cases the permits were valid when issued and are rendered invalid only by subsequent legislation after expense has been incurred in reliance on the validity of the permit at the time of its issuance. The basic rule, however, is that no building permit by an administrative official can condone, or afford immunity for, a violation of law and that an illegally granted permit is not a basis for an estoppel. (Wyler v. Eckert, 73 N. Y. S. 2d 789.)

Certificate of Occupancy Revoked after 20 Years

The fact that the illegal occupancy has continued for a long period of time will not create any equities in favor of an owner where the certificate was invalidly issued and even if no change has been made in the building since the time of its initial construction. A certificate of occupancy for a public garage which had been in operation continuously for about twenty years was revoked by the Board of Standards and Appeals because it has been issued in violation of the zoning regulations of the City of New York, which prohibited the maintenance of a garage in the same block front where there was an entrance or an exit to a public school. (S. B. Garage Corp. v. Murdock, 185 Misc. 55.)

Procedure for Revocation of Certificate of Occupancy in New York City

It would appear that in the City of New York where a certificate of occupancy has been issued through fraud or by mistake, or without authority, and the situation is later discovered by the Department of Housing and Buildings, the procedure to revoke the certificate would be as follows:—The Department, or the City, could on notice to the owner of the property, apply to the Board of Standards and Appeals for a revocation of such certificate, or the City could institute an action or proceeding in the Supreme Court for that purpose. In any such case, it is probable that the burden of showing that the certificate was issued through fraud, mistake or without authority would be on the municipality.

Section 646 Not Applicable Outside New York City

There is no statute operative in the State of New York which is similar in nature to Section 646 of the New York City Charter which affords the same kind of protection as that section does to certificates of occupancy issued in the City of New York.

Power of Revocation in Cases Not Under Section 646

Therefore, a building permit issued anywhere in the State, including New York City, or a certificate of occupancy issued anywhere in the State, except in New York City, if it has been obtained by fraud, or issued illegally or under a mistake of fact, may be subject to revocation. While a certificate of occupancy issued in New York City may also be subject to revocation if issued improperly, the ability to revoke is subject to the limitations contained in Section 646 of the Charter. Accordingly, a permit or certificate so obtained, generally confers no vested right or privilege on the person to whom it has been issued, or his successor in title, and may be revoked notwithstanding that they may have acted in reliance of its validity. In short, a building permit or certificate of occupancy improperly issued affords no immunity. An exception may exist only in a case where a permit or certificate valid when issued has been acted upon at some substantial expense and the illegality comes about through a later change in the zoning ordinance.

Revocation in "Borderline" Cases

A building permit or certificate of occupancy may also be revoked if it has been issued pursuant to a ruling of the Department of Housing and Buildings, or Building Inspector, or other appropriate authority of a municipality in a so-called "borderline" case. The authority to vacate such a permit or certificate rests with a Board of Appeals or a court of competent jurisdiction.

Board of Appeals Ruling Advisable on "Borderline" Cases

There may be a question of the interpretation of a zoning ordinance with respect to the use, or proposed use, of a property in relation to the requirements of the ordinance, or with respect to the compliance of an existing or proposed building with the height, bulk or yard restrictions contained in the ordinance. If the question is resolved by the appropriate municipal authority in favor of the owner or purchaser of the property, such ruling is not necessarily

conclusive. In any such case, it would be safer to have the proper municipal authority deny the permit or certificate and then have the owner or purchaser take an appeal from such ruling to the appropriate Board of Appeals. If the denial of the issuing authority is reversed by the Board of Appeals, the resulting affirmative ruling will be conclusive unless reviewed by the court within the time specified by law.

Permit or Certificate of Occupancy Not Conclusive

It is apparent from all these situations that a permit or certificate of occupancy cannot in itself be relied upon as evidence of compliance of a property, its use and improvements, with the applicable zoning ordinance. A further investigation must be made to see whether the permit or the certificate of occupancy was issued in full compliance with all the conditions and circumstances necessary for the valid issuance of such permit or certificate.

D. Limitations on Variances and Special Exception Permits

Nonconformance May Be Permissible

If an investigation of zoning status discloses that a building, structure or use does not conform with the applicable zoning ordinance, it does not necessarily mean that a violation exists. Either a special permit or variance may have been obtained as described in Section II of this report, or a legal nonconformance may have been established.

Conditions of Exceptions and Variances

If a building permit or certificate of occupancy has been issued as a result of obtaining a special exception or variance, it is essential to know:

1. The time limitations and other conditions of the exception or variance as contained in the resolution granting it, and
2. Whether or not an appeal is pending by either the municipality itself or affected property owners, and if not, whether the time for taking such an appeal has expired.

Violation May Result in Termination

After ascertaining such information, it is, of course, necessary to determine whether or not there exists a violation of the conditions and safeguards contained in the resolution of the Board of Appeals granting the special exception permit or variance. If such a violation does exist, it may result in the vacating and terminating of the permit or variance.

Power to Vacate

Although there is no question as to the power of a Board of Appeals to vacate a special exception permit or variance, it appears that it can only do so on notice to the then owner of the property, and probably after public notice and a hearing. It is therefore essential that in a case of this kind, the purchaser of the property or pros-

pective mortgagee satisfy himself that there are no existing violations of the conditions and safeguards at the time of closing the transaction.

It has been established that when a Board of Appeals has power to grant a variance or special exception, it has the power in a proper case to revoke it. (Marianna Sales Co. v. Anderson, Supreme Court, Kings County, New York Law Journal, August 9, 1930.)

A Board of Appeals may impose conditions when granting a variance or special exception. If a permit is granted by the Board upon a condition imposed, which condition is thereafter violated, any aggrieved person may apply to the administrative officer to revoke the permit, and if denied may appeal to the Board of Appeals to reopen the hearing and revoke the permit granted. (Kelly v. Board of Appeals of New Haven, 126 Conn. 648, 13 A 2d 675.)

Lapse of Variances

Many zoning ordinances provide that both use and area variances, and special exceptions, are valid for only certain periods of time, and if not availed of within that time, will lapse. An illustration of such time limitation is found in Section 22-A of the Zoning Resolution of the City of New York which provides as follows: "§22-A. Lapse of Variance. After the Board of Standards and Appeals has varied the provisions of this resolution, or after the court has reversed or modified the action of the Board pursuant to § 668 e-1.0 of the administrative code, the variance so granted shall lapse after the expiration of one year, if no substantial construction has taken place in accordance with the plans for which such variance was granted, and the provisions of this resolution shall thereafter govern." The word "variance" has been interpreted to include a special exception. Many ordinances limit such time to six months.

Nullification by Change in Zoning

Regardless of the provisions of the zoning ordinance itself, if a variance or special exception has not been availed of by commencement of construction of the improvements within the time limited, it also can be nullified by a change in the zoning.

Nullification Must Be Guarded Against

It is therefore evident that all nonconformance permitted by reason of variances and special exceptions require close examination of possible causes for lapse or nullification.

E. Legal Nonconforming Buildings, Structures or Uses Subject to Discontinuance

Legal Nonconforming Uses Defined

When a district is rezoned, certain buildings or structures and/or their uses as of the time of the rezoning may not conform with the newly established zoning requirements. Under these circumstances they may be continued as legal nonconforming buildings, structures or uses, subject, however, to certain limitations.

Effect of Enlargements, Extensions and Changes

One such limitation is the fundamental one that a legal nonconforming building, structure or use may not be enlarged or extended or changed, unless the zoning ordinance so provides, or unless a variance or special exception permit is properly granted by the Board of Appeals. In the absence of such a variance or permit, the enlargement, extension or change will create a violation of the ordinance.

It was held that a grocery store which had been operating as a legal nonconforming use, could not be enlarged even in the rear of the property adjoining a vacant lot. (Rehfield v. City of San Francisco, 218 Cal. 83; 21 P. 2d 419.)

Substitution of an old nonconforming building by a new nonconforming building for the same use, but larger in size, was not permitted. (Thayer v. Board of Appeals of City of Hartford, 114 Conn. 15; 157A. 273.)

Voluntary Abandonment as Cause for Nullification

A permitted nonconforming use of property may be nullified as a result of a period of voluntary abandonment. It is necessary, however, that there exist an intent to abandon or relinquish the property. The mere discontinuance of the use, without such intention, is normally not sufficient to cause nullification unless the zoning ordinance contains a provision to that effect. While intention to abandon, in the absence of some overt act on the part of the owner of the property is usually difficult to prove, nevertheless it would be risky for a purchaser to attempt to continue a nonconforming use without adequate proof that there had been no past abandonment of the use or a binding judicial determination to that effect. A change of a nonconforming use to a conforming one, or to one of a higher or more restricted classification, would obviously constitute an abandonment of a prior nonconforming use. The following are some examples of abandonment:

> A property was used as an automobile race track from 1927 until 1936. From then until 1941 it was not used and the grandstand became worn and dilapidated and was partially destroyed by fire. In the year 1941 one or two automobile races were run and thereafter nothing further was done with the property until 1946. It was held by the court that the right to continue the nonconforming use had been lost by reason of abandonment. "An abandonment within the meaning of such rule connotes a voluntary affirmative completed act. It means something more than a mere suspension, a temporary nonoccupancy of a building or a temporary cessation of business. An abandonment is the voluntary intentional relinquishment of a known right. There must be a concurring intention to abandon and an actual relinquishment of the right." The court held that these elements were present in this case and held that the

nonconforming use was abandoned and lost. (Longo v. Eilers, 196 Misc. 909.)

A retail druggist closed a nonconforming store in a residential district for the duration of the war. His right to resume operations as a nonconforming use was decreed to be lost because the business had been discontinued for a sufficient period of time to constitute abandonment. (State ex rel. Harz v. City of New Orleans 44 So. 2d. 889.)

In Curtiss-Wright Corporation v. Village of Garden City (296 N. Y. 839), the Court of Appeals held that the plaintiff had abandoned a nonconforming pre-existing legal use of the property for manufacturing purposes by discontinuing the manufacture of airplanes and airplane engines from 1930 to 1940. The plaintiff's property had been upgraded to residential purposes but it had obtained a three year temporary permit sanctioning the use of the premises as an experimental laboratory. Since no manufacturing had been conducted on the premises since 1931, and until 1940 no part of the premises was used for industrial purposes, it was held that the premises had been abandoned for that use.

Nullification by Cessation Without Abandonment

Many zoning ordinances provide that a mere discontinuance or cessation of a nonconforming use for any reason for a specified period of time, terminates such use. In cases of this kind, the intent of an owner of property to abandon the nonconforming use is not an element.

A provision in the zoning ordinances of the Village of Old Westbury provided that a nonconforming use could not be resumed if it had been discontinued for a period of one year or more. A gasoline service station operating as a nonconforming use was discontinued for more than twelve months. Even though the discontinuance was solely due to war-time restrictions and there was no intent to abandon on the part of the owner, the court ruled that the one-year provision was valid and prohibited the resumption of the non-conforming use. (Franmore v. LeBoeuf, 104 N. Y. Supp 2d. 347)

Provisions for Amortizing and Outlawing Nonconforming Uses

In some localities the zoning ordinances provide for the "amortizing" or "outlawing" of nonconforming uses and structures after a specified period of time. The amortizing method involves an estimate of the normal useful remaining life of a nonconforming building and prohibits the owner from maintaining it after the expiration of that time. This method is designed to afford an owner a fair and reasonable time in which to amortize and liquidate his investment and to prepare for the elimination of such use.

Constitutionality Discussed

The courts have upheld the constitutionality of such provisions on the principle that if the police power can be invoked to prohibit new nonconforming uses of buildings in the interests of the health, safety and general welfare of the community, it may also be invoked to terminate existing nonconforming uses which have the same detrimental effects. All zoning laws are, to some extent, retroactive in their effect because they impose limitations on the use of property which did not exist prior to the enactment of the zoning ordinances or prior to the amendments to existing zoning ordinances. Such retroactive effect, even though it may not immediately impose limitations on existing uses, may, nevertheless, depreciate the value of property. In cases where such depreciation in value was so substantial and material as to be in effect confiscatory, a consideration of the equities involved may well lead to the conclusion that where such resulting depreciation is extreme, that the police power of the state should not be the implement used to accomplish the desired result. Under such circumstances it may be more equitable to the affected owners to invoke the right of eminent domain so that such property will have to be condemned and an award paid therefor commensurate with its value.

Public Good v. Individual Harm

It is extremely difficult to draw the line objectively at the point where the public good can outweigh the individual harm caused by the imposition of restrictive zoning ordinances. The courts have wrestled with this problem and have attempted to arrive at some equitable determination. There are, therefore, cases where the amortization periods for nonconforming uses are very short, but in such cases they are coupled with the material value of the improvements on the property. A zoning ordinance of the City of Buffalo which required the termination of a legal nonconforming use within three years of the effective date of the ordinance was held to be constitutional because the ordinance applied to properties improved with buildings or structures with an assessed value of not more than $500.00, and to any junk yard, auto wrecking or dismantling establishment without specification of any value of the buildings thereon. The validity of this ordinance was sustained in Harbison v. City of Buffalo, (4 N. Y. 2d 553). Some pertinent portions of the opinion are the following:

> "... where the benefit to the public has been deemed of greater moment than the detriment to the property owner, we have sustained the prohibition of continuation of prior nonconforming uses.... We have also upheld the restriction of projected uses of the property where, at the time of passage of the ordinance, there had been no substantial investment in the nonconforming use ... In these cases, there is no doubt that the property owners incurred a loss in the value of their property and otherwise as a result of the fact

that they were unable to carry out their prospective uses; but we held that such a deprivation was not violative of the owners' constitutional rights. In People v. Miller (304 N. Y. 105), we explained these cases by stating that they involved situations in which the property owners would sustain only a 'relatively slight and insubstantial' loss."

"As these cases indicate, our approach to the problem of permissible restrictions on nonconforming uses has recognized that, while the benefit accruing to the public in terms of more complete and effective zoning does not justify the immediate destruction of substantial businesses or structures developed or built prior to the ordinance (People v. Miller, supra, p. 108), the policy of zoning embraces the concept of the ultimate elimination of non-conforming uses, and thus the courts favor reasonable restriction of them. But, where the zoning ordinance could have required the cessation of a sand and gravel business on one year's notice, we have held it unconstitutional (Town of Somers v. Camarco, 308 N. Y. 537, supra)."

Discontinuance after Ten Years Held Valid

The zoning ordinance of the City of Tallahassee, Florida, was amended requiring the discontinuance of certain nonconforming uses within a specified area of the State Capitol after ten years. Such non-conforming uses included a gasoline filling station of the Standard Oil Company, which was across the street from the State Capitol building. The amendment to the ordinance, however, did not become effective until one year after the property was acquired and used by the oil company, which thus had a legal nonconforming use. After the ten-year period expired, the oil company declined to discontinue its use and instituted an action in the United States District Court to have the amendment to the ordinance declared invalid. The District Court held the ordinance valid and enforceable and its decision was upheld by the Circuit Court of Appeals. The United States Supreme Court denied certiorari. The court held that the enforcement of the ordinance did not entail any unjust discrimination or deprive the owners, who were conducting such nonconconforming uses (there were others beside the oil company), of the use of their properties without due process merely because their sites were acquired and improved at considerable expense before the zoning ordinance was enacted. (Standard Oil Company v. City of Tallahassee, 183 Fed. 2d. 410; certiorari denied 340 U.S. 892.)

Discontinuance After One Year Held Valid

An ordinance of the City of New Orleans was enacted prohibiting the establishment of all businesses of any kind in a certain defined residential area and providing that all businesses then in operation within the area must be liquidated and discontinued within one year from the date of the passage of the ordinance. There were two

businesses in the district operated by certain owners, in one case a grocery store and in another a drug store, which had been in existence before the adoption of the ordinance. The Court of Appeals of Louisiana sustained the validity of the ordinance. (State ex. rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314.)

Provisions of Ordinance Must be Ascertained

At the present time there are no provisions in the zoning ordinances of New York City for amortizing or discontinuing legal nonconforming uses. It is interesting to note that the recent proposal for a zoning resolution for the City of New York submitted to the City Planning Commission by Voorhees, Walker, Smith & Smith, in August of 1958, contains recommendations for a plan of amortization of various types of nonconforming uses presently existing. It is, however, certain that many localities outside the City of New York have zoning ordinances which do contain limitations upon the continued use of legal nonconforming property. It is, therefore, extremely important to bear that possibility in mind when the purchasing or mortgaging of property is being contemplated.

Nullification by Destruction of Buildings

Many zoning ordinances contain provisions prohibiting the reconstruction of a nonconforming building where it is involuntarily damaged or destroyed by fire to an extent exceeding a certain percentage of its value. Where that point is exceeded, such ordinances may require that any reconstruction be limited to a conforming structure. When these incidents occur a factual question is often presented as to whether the extent of the damage or destruction permits the repair of the nonconforming use or whether the reconstruction must be in a manner to conform to the then effective zoning ordinances. Bearing in mind the legal principle that the municipality is not estopped by a permit which is improperly issued, it is important to resolve in advance as a matter of fact whether a permit which is issued for the reconstruction of nonconforming use will be safe and free from attack.

In the matter of Koeber v. Bedell, et al. (254 App. Div. 584, affirmed 280 N. Y. 692), the court upheld the constitutionality of a provision of the zoning ordinance of the Town of Hempstead which provided that where a nonconforming building had been damaged by fire to the extent of more than 75 per cent of its value, it could not be repaired or rebuilt except for a conforming use. In this case the court found that as a matter of fact the damage to the petitioner's building had exceeded 75 per cent of its value and refused to upset the determination of the Board of Zoning Appeals.

Validity of Nonconformance Must be Determined

It is apparent from the foregoing that where one is dealing with a nonconforming building, the investigation of the zoning status of the property must include an investigation of whether or not any reconstruction has taken place in the past as the result of destruction

or damage to the building which might have been made pursuant to a permit granted for such repair or reconstruction in possible violation of the zoning restrictions.

F. Rezoning Involving Recent Downgrading or Upgrading of an Area

Dangers of Downgrading and Upgrading

Recent zoning, particularly where it involves substantial downgrading or upgrading, is vulnerable to attack from surrounding owners who are unfavorably affected by the changes. Such attacks, if successful, may result in substantial loss to a purchaser or mortgagee who has relied upon the change in zoning as a factor in the evaluation of the property for the use which the rezoning permits.

Problem of Downgrading

The likelihood of attack is greater where a parcel of property has been rezoned downward, thereby becoming less restrictive in its use. The form of such attack may be in the form of a complaint that the rezoning is not part of a comprehensive plan but is "spot zoning" designed solely for the benefit of the property which is rezoned. In these cases a factual question is presented and while one person's opinion of the facts may be as good as anyone else's, the final determination can only be made binding by a decree of a court of competent jurisdiction. While there seems to be no Statute of Limitations against such attack the doctrine of laches may be invoked as a defense and would probably be sustained where more than a reasonable time had elapsed since the change in zoning and, in the meantime, an owner of the affected property had made some substantial investment and progress in the erection or completion of a building on the premises in conformity with the rezoning.

Problem of Upgrading

A similar situation may be involved where an area has been upgraded, for example, where a previous one acre requirement for a one family dwelling has been changed to a two acre requirement. This question is very serious where a developer has filed a subdivision map at a time when the one acre area was in effect and the subdivision map was approved by the proper municipal authorities and filed. Where such a one acre tract has been sold to an individual purchaser prior to the upgrading, there is little doubt that such individual purchaser has a right to construct a legal nonconforming building. However, where the developer has retained ownership and has not yet commenced construction, there is grave doubt that he has any right to build except in conformity with the upgraded requirements.

Developer's Position

In some cases the new zoning ordinances may provide that where such a map has already been filed and approved the developer may build in accordance with the zoning requirements as they existed

prior to the change. In the absence of such a provision in the ordinance it would appear that the developer would be protected only if he had proceeded with and had progressed to a substantial extent with the erection of some residences, in which event he would probably be permitted to complete the improvement of the subdivision in accordance with the previous zoning requirements and not with the new upgraded requirements.

Clearing of Site not Sufficient

Under a New York City zoning resolution relating to the effect of zoning change after construction had been commenced and which provided that, if the permitted use is changed after operations have been lawfully started on erecting a structure, work might proceed under certain stated conditions, it was held that the mere clearing of the site prior to the issuance of the building permit did not constitute a commencement of operations within the contemplation and intent of the zoning resolution. (Rosenzweig v. Crinnion, 1954, 139 N. Y. S. 2nd. 172, appeal dismissed 286 App. Div. 1066, 148 N. Y. S. 2nd. 912.)

Attacks on Downgrading

The following two cases are illustrations of attacks on changes in zoning involving downgrading and upgrading of property.

In the case of Freeman v. City of Yonkers (205 Misc. 947), the zoning classification of a single lot was changed from residential to commercial use. The application for rezoning had previously been disapproved by the Planning Board on the ground that the change would be spot zoning. The Common Council of the city, after a public hearing, granted the change in zoning. An attack on the rezoning by residential owners in the vicinity of the property was successful and the zoning ordinance was held to be invalid and improper spot zoning.

Attacks on Upgrading

In the case of Shepard v. Village of Skaneateles, (300 N. Y. 115) what would appear to be upgrading spot zoning, was held to be valid and proper in the public interest. This case affected a single piece of property which was, at the time of the original zoning, located in a business district. In 1930 the plaintiff applied for a permit to erect a gas station but his application was denied because the parcel was surrounded by a residential area. This parcel was then rezoned for residential purposes and the validity of such rezoning was attacked by the owner as spot zoning. The following extracts from the opinion of Mr. Justice Fuld are extremely illuminating with respect to the equitable doctrines applied to a situation of this type:

"Zoning laws, enacted as they are to promote the health, safety and welfare of the community as a whole (see Vil-

lage Law, §175), necessarily entail hardships and difficulties for some individual owners. No zoning plan can possibly provide for the general good and at the same time so accommodate the private interest that everyone is satisfied. While precise delimitation is impossible, cardinal is the principle that what is best for the body politic in the long run must prevail over the interests of particular individuals. (See Baddour v. City of Long Beach, 279 N. Y. 167, 174-175; Matter of Fox Meadow Estates, Inc. v. Culley, 233 App. Div. 250, affd. 261 N. Y. 506; Matter of Wulfsohn v. Burden, supra, 241 N. Y. 288, 302; Village of Euclid v. Ambler Realty Co., supra, 272 U. S. 365, 388-389.) There must, however, be a proper balance between the welfare of the public and the rights of the private owner . . . A possible depreciation in value is not of too great significance, for the pecuniary profits of the individual are secondary to the public welfare. (See Matter of Wulfsohn v. Burden, supra, 241 N. Y. 288, 302.) Either plaintiffs' property or the land near it would suffer depending on the board's action, and the board could properly find that the loss sustained by plaintiffs would be offset by the gain to the community in general."

Summary

The following list may be used as a check against the many pitfalls referred to in this section of the report arising from zoning:

1. Violations of area, frontage and yard restrictions.
2. Use of vacant land for zoning requirements of an adjoining parcel.
3. Granting or leasing of air rights.
4. Changes in zoning subsequent to issuance of certificate of occupancy.
5. Changes in buildings, structures and uses subsequent to the issuance of a certificate of occupancy.
6. Effect on compliance of contemplated changes in the use, buildings or structures, and any enlargements or additions to them.
7. Possible nullification of a building permit or certificate of occupancy as a result of:
   (1) Issuance through fraud, or by mistake, or without authority, or
   (2) Interpretations of ordinance in "borderline" cases which may subsequently be overruled.

8. Possible nullification or lapse of variances and special exception permits because of:
   (1) Limitations in the resolutions granting them.
   (2) Pending appeals or non-expiration of appeal period.
   (3) Provisions of the zoning ordinances.
   (4) Changes in zoning before a variance or permit has been availed of.

9. Possible nullification or discontinuance of legal nonconforming buildings, structures and uses as a result of:
   (1) Enlargements, extensions and changes.
   (2) Voluntary abandonment.
   (3) Cessation without abandonment.
   (4) Provisions in ordinance for amortizing or outlawing nonconforming uses.
   (5) Destruction of buildings.

10. Recent rezoning involving:
   (1) Downgrading.
   (2) Upgrading.

Section V

HOW THE ZONING STATUS OF PROPERTY MAY BE ASCERTAINED

Thorough Investigation of Zoning Status Essential

It cannot be over-emphasized that a thorough investigation of the zoning status of property must be made before assurance can be had that there are no violations which might create unmarketability of title, cause depreciation in the value of property or prevent a contemplated improvement or use. The extreme care usually required to be expended in such investigation may be relaxed to a reasonable extent in the simple situation of a one-family home in an established residential district where a more casual examination may be sufficient to indicate a compliance with area and yard restrictions. In more complex situations, such as those involving commercial or manufacturing properties where height, bulk, area and use compliance is essential to the legality of the project, it may be advisable to draw upon the knowledge of a competent engineer or architect experienced in zoning matters who is familiar with the local zoning ordinances and who is acquainted with the officials in charge of their administration. The advice of such an expert may be valuable not only because of his inherent knowledge and experience with the technical requirements of the ordinances, but may also have additional value because of his knowledge as to the likelihood of obtaining variances, where necessary, based upon his own past experience with the local Board of Appeals.

Situations Subject to Litigation

Where a borderline case is involved and other complicated situations such as some of those referred to in Section IV of this report exist, serious legal problems, with their accompanying possibility of litigation, must be faced. In view of the highly specialized nature of the legal practice involved with zoning, it is pointed out that there are experts in that field whose services may be extremely valuable because of their intimate knowledge with the manner in which courts deal with these problems.

Procedure for Investigating Zoning Status

The following procedure is recommended as a guide to attorneys in making an investigation of the zoning status of property in New York City. Because of a lack of uniformity outside the City it can only be indicated as to what procedures may be followed elsewhere.

A. Determination of Zoning Regulations Affecting the Property in Accordance with the Current Zoning Resolution

1. Apply for the Official Zoning Map at the Zoning Desk of the City Planning Commission Office or similar office in other cities (or in the suburbs, apply to the Town or Village Clerk, or Secretary of the Zoning Board).

2. Determine from the Map the use, height and area districts in which the property is located. This Map is kept up-to-date by the posting of all changes in district classifications resulting from amendments to the Zoning Resolution, as soon as they have been approved by the Board of Estimate (or official governing body in other cities, towns or villages).

3. Requisition and examine the current Zoning Resolution to determine the character of the zoning applicable to the district in which the property is located. The official copy of the Zoning Resolution on file is posted to include all amendments approved by the Board of Estimate to date (or by the official governing body in other cities, towns or villages).

4. Examine the Zoning Map for notice of pending amendments to the Resolution to determine whether or not any affect the subject property. If any pending amendments are indexed as affecting the district in which the property is located, such amendments must be requisitioned and examined.

5. Obtain and examine a certified survey of the subject property to determine if the buildings and/or land comply with the requirements of the particular zoning districts.

6. Ascertain that the present and/or contemplated use of the property complies with the requirements of the applicable use district.

7. If they all comply, there will be only three further checks necessary in the Department of Buildings:
   (1) Confirmation of compliance by examination of the Certificate of Occupancy and accompanying papers.
   (2) Check of adjoining parcels to determine if any part of the subject plot has already been used to meet requirements for buildings on such adjoining parcels.
   (3) Check for possible violations.

8. If the building and/or land and their use do not comply with the requirements of the particular zoning districts, it will be necessary to:
   (1) Check the files of the Department of Buildings and City Planning Commission (or similar body in other cities, towns and villages) to determine if a legal nonconforming structure and/or use exists, and if not,
   (2) Check the records of the Board of Standards and Appeals (or in other communities, the Board with power to grant variances) to determine if a variance has been granted. (See outline of procedure following.)

B. Determination of the Status of the Buildings with Respect to Zoning as Disclosed by the Records of the Department of Buildings

1. Application is made for the complete file covering all plans, surveys, permits, Certificates of Occupancy, copies of resolutions covering variances granted by the Board of Standards and Appeals, etc., relating to the subject property. From this file can be determined:
   (1) Date and use for which the Certificate of Occupancy was issued.
   (2) Compliance with height and area requirements as disclosed by surveys, plans and architect's drawings approved at time of construction of buildings, and compliance with use restrictions.

2. Requisitioning and examination of files on adjoining properties will disclose whether or not the subject premises has been used for required areas of buildings on such adjoining properties.

3. If the original investigation at the City Planning Commission (or other corresponding body) disclosed compliance with the zoning requirements, the investigations outlined under B. 1. and B. 2. (immediately preceding) will usually confirm same. If, however, they should disclose any discrepancies, compliance, of course, cannot be determined with certainty until such discrepancies are reconciled.

4. If the original investigation at the City Planning Commission disclosed nonconforming use or structures, the investigation under B. 1. will provide the date the existing use and structures were authorized by the Certificate of Occupancy. The Official Zoning Map and the Zoning Resolution, as of such date and filed in the Office of the City Planning Commission (or other corresponding body), must then be examined. If such examination discloses that the existing use and/or structures were permitted as of the date of the issuance of the Certificate of Occupancy, the use and/or building may be certified as a legal non-conforming use or structure, subject, however, to proof that there has been no voluntary abandonment and when provided for in the ordinance, no cessation without abandonment, nor the expiration of amortizing or outlawing periods.

5. If the nonconforming use or structure is permitted by reason of a special exception permit or variance, a copy of the resolution of the Board of Standards and Appeals (or other Board of Appeals) authorizing such permit or variance, will be filed in the Building Department file of the subject premises. It will

then be necessary to check in the Office of the Board of Standards and Appeals (or other corresponding body) for verification of the variance and to ascertain:

(1) Whether or not any suits opposing the special exception permit or variance have been commenced within the 30-day grace period provided under the statute, and if so, their current status including a possible pending appeal to a higher court, or

(2) If not, whether the period for appeal has expired, and

(3) The date of termination and other conditions of the permit or variance.

C. Determination of the Status of a Variance as Disclosed by the Records of the Board of Standards and Appeals (or, in the Suburbs, the Board with Power to Grant Variances)

1. If a special exception permit or variance has been granted, the complete file covering the proceeding can be requisitioned at the Office of the Board of Standards and Appeals (or corresponding body). This file will also include a copy of the Board's resolution.

2. If there is any pending suit with respect to the permit or variance, the record will so indicate and the details may be obtained from the Office of the Corporation Counsel (or other city, town or village counsel).

Section VI

CONCLUSIONS AND RECOMMENDATIONS

Purpose of this Report Re-emphasized

The preceding sections of this report have attempted to point up the numerous hazards and problems created by zoning. It is hoped that they indicate the many avenues of inquiry which must be explored by attorneys who wish adequately to protect their clients in their realty investments.

Weaknesses in Zoning Laws

Many of these hazards and problems are created as a result of the lack of express limitations in the enabling statutes contained in the General City, Town and Village Laws which are the source of authority for the enactment of zoning ordinances by local governing bodies. Even a greater number of problems are created by the respective zoning ordinances themselves because of the lack of uniformity in the ordinances of different communities. These may be caused by differing local needs, differing ideas and concepts of future development, or because of local pressures or individual attitudes of the members composing a particular local body having authority to enact zoning ordinances.

Responsibility for Correction of Present Inadequacies in Zoning Laws

It would appear logical to believe that if the enabling statutes of the state were amended to include certain fundamental provisions which might require, among other things, certain uniformities, procedures, notices or limitations on changes, many problems now depending on court interpretations could be eliminated. This subject might well be a matter for an exhaustive study by the Law Revision Commission.

Principal Weaknesses

Some of the principal matters which appear from our study to deserve consideration for remedial changes are the following:

1. There is no time limit for an attack on the validity of a zoning ordinance or change therein on the grounds that it is arbitrary, unreasonable or invasive of constitutional rights; there are no provisions for personal notice to owners in an affected area of public hearings on proposed changes in zoning. This is despite the existence of provisions for limitations and notice in connection with variances granted or to be considered by local boards.
2. There is not sufficient requirement for uniformity and authenticity in official zoning maps. Up-to-date official copies of zoning resolutions and other official records are not always readily available to the public for positive determination of the zoning status of a piece of property. In many suburban areas available information appears to be unreliable.
3. There is a lack of notice that zoning changes are under consideration which have not progressed to the point of public

hearings. Such situations create unnecessary uncertainty in the purchase or mortgaging of real estate. Consideration should be given to a requirement for the filing and indexing of a notice similar to a lis pendens giving constructive notice of the consideration of all changes in zoning.

4. Areas acquired by lease or easement should be adequately defined to provide a certain ability to compute area with respect to height and bulk restrictions.
5. Purchasers for value should be protected in the validity of a permit or certificate issued upon which they rely, even though it was issued improperly, provided such purchasers are not guilty of connivance or evasion. This may be coupled with a time limitation for revocation.
6. The enabling statutes should provide some degree of uniformity for the termination or amortization of legal nonconforming uses.
7. Protection should be afforded purchasers for value against nullification of a nonconforming use by reason of abandonment, where intent to abandon is an element.
8. There is a need for uniformity and greater certainty with respect to vested rights where a change in zoning is made after plans for construction have been filed or approved or development maps have been properly filed.
9. There should be a time limit for attacks on alleged "spot zoning."

Conclusion

Legislation designed to eliminate these problems would not appear to interfere with orderly and beneficial growth and development of communal areas. The courts have placed great emphasis on the importance of the public welfare even when balanced against an individual loss. It is confidently anticipated that legislation correcting these situations would not interfere seriously, if at all, with the common good.

It is apparent that a determination of compliance with zoning is a matter of exhaustive search coupled with a requirement for some skill in analyzing plans and relating buildings, their history of construction, changes and repairs with the changes in the zoning from the time of construction to the present. Even after all of this information is obtained and examined, questions of interpretation, opinion, risk judgment and the possibility of litigation are involved. The operations of title companies up to the present time have not contemplated the furnishing of any zoning information or guaranteeing the accuracy thereof even on a basis of limited liability. Even if such services were made available, under presently existing conditions it could only be done at considerable expense and with great risk.

We hope that enactment of amendments to existing laws may, in the future, permit us to afford zoning service with reasonable certainty and expense. It is even possible to contemplate that adequate legislation may remove most, if not all, of the problems.

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