3-1-1988

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UNNECESSARY HARDSHIP: THE FINANCIAL STANDARD FOR ZONING VARIANCES IN NEW YORK CITY

William Valletta*

INTRODUCTION

The concept of unnecessary hardship was included as a standard for the variance of zoning regulations in the 1916 Building Zone Resolution of New York City.¹ This first zoning regulation became

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¹ New York City Building Zone Resolution of 1916, § 20 (renumbered as § 21 in 1925). The section provided:

Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution the Board of (Standards and) Appeals shall have power in a specific case to vary any such provision, in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secured and substantial justice done. . . . Before taking any action authorized in this section the Board of Appeals shall give public notice and hearing.

The 1916 Building Zone Resolution was adopted pursuant to enabling authority contained in Section 242-9 of the 1916 Charter of the City of New York which gave the power to create zoning to the Board of Estimate, the collective executive body composed of the Mayor, the
the model for state enabling acts and municipal zoning ordinances throughout the country, and today, the hardship variance is authorized in most jurisdictions that have adopted zoning. The standard has been interpreted in hundreds of judicial opinions and thousands of grants and denials by zoning boards of appeal. But despite this long experience, the concept remains elusive. The courts continue to disagree on the type of financial evidence that must be presented and on the extent and nature of the analysis that must be conducted by the boards of appeal.

In recent years, the New York City Board of Standards and Appeals (the BSA) has attempted to follow a consistent approach in requiring financial evidence to demonstrate unnecessary hardship in all variance cases. The experience of the BSA is significant, be-

Comptroller, the City Council President and the five Borough Presidents.


4. See. A. Rathkopf, supra note 2, § 38.03 and § 38.05; see also Note, Area Variance Law in New York: A Uniform Approach, 7 Cardozo L. Rev. 251 (1985).

5. The New York City Board of Standards and Appeals (hereinafter BSA) is the nation's only full-time board of appeals. It has six members, appointed by the Mayor with City Council approval, who sit for staggered terms of six years; N.Y. City Charter of 1975 § 661(a). The professional background of the members is mandated with two architects, two engineers (one structural and one mechanical) and one city planner. N.Y. City Charter of 1975 §661(b). The Board exercises combined responsibilities, administering zoning variances and special permits (about 150 cases per year), building code variances (about 400 per year),
cause, in attempting to give clear meaning to the standard, the record of the Board’s actions has raised new questions about the assumptions and purposes of the variance process.6

This article will explore the issue of unnecessary hardship as the financial standard for the grant of a variance. It will analyze the body of judicial opinion from the courts of New York State and discuss how New York City has used the courts’ guidance to formulate its approach. This paper will detail the method of analysis of the BSA and finally, will offer a critique of the unnecessary hardship standard.

**HISTORY OF THE CONCEPT**

The New York City Charter of 1916 created the Board of Standards and Appeals as the agency which would hear appeals from the application of the city’s newly created Building Zone Resolution.7 It also provided authority for the Board to grant variances pursuant to a finding of “unnecessary hardship or practical difficulties” that was set forth in the Zoning Resolution.8 This finding was not clearly de-
fined, as it was intended that a case by case approach supply the full and accurate definition.9

From the beginning there were several unanswered questions.10 Were there to be separate standards of “unnecessary hardship” and “practical difficulties,” or was a single standard intended?11 Did the term “unnecessary” have specific meaning, thereby implying a level of “necessary” hardship that could not be remedied?12 Was the vari-

tions, zoning variances and code variances are subject to separate authorities in the city. See McGarry v. Walsh, 213 A.D. 289, 210 N.Y.S. 286 (1925). And, unlike other New York municipalities which derive their zoning variance power directly from the enabling statutes, the variance in New York City is defined by the Board of Estimate which is free to change the standards if it wishes. People ex rel. Boyd v. Walsh, 217 A.D. 461, 216 N.Y.S. 242, aff'd, 244 N.Y. 512, 155 N.E. 877. (1926).


10. Early literature discussed the nature of the power to vary. Swan, How Zoning Works in New York, 7 Nat'l Mun. Rev. 244 (1918); Bassett, Zoning, 9 Nat'l Mun. Rev. 315 (1922); Sumner, The Board of Adjustment as a Corrective in Zoning Practice, 13 Nat'l Mun. Rev. 203 (1924); Baker, The Zoning Board of Appeals, 10 Minn. L. Rev. 277 (1926); Note, Zoning Administration in New York City, 2 St. John's L. Rev. 105 (1928); Note, Zoning Power to Vary the Application of Zoning Ordinances, 16 Cornell L.Q. 579 (1931).

11. It appears that the drafters contemplated separate standards. The term “unnecessary hardship” was a new phrase, but the term “practical difficulties” had been used before. In the 1885 Charter, the phrase practical difficulties described the power of the borough Building Superintendents and the Boards of Examiners to vary code provisions in a case in which an old building was being altered and the type of previous construction did not allow incorporation of the new methods prescribed by the code. 1882 N.Y. Laws ch. 456 31; see People ex rel. Tucker v. D’Onech, 44 Hun. 33, 7 St. Rept. 460 (1887). By 1909, the limitation of the practical difficulty standard to the alteration of old buildings had been removed; thus, practical difficulties would have been understood to relate to any engineering or architectural design difficulties presented by unusual sites or building programs. N.Y. City Charter of 1909, § 411. Unnecessary hardship most likely was related to a market value concept of zoning. (See infra note 14.)

Despite this apparent distinction at the beginning, in practice, the standards were not kept separate. Professor Anderson has stated that the courts “either treated the two standards as one, assumed that the two terms were synonymous, or discussed the variance power in terms of unnecessary hardship without reference to practical difficulties.” R. Anderson, New York Zoning Law and Practice, § 18.07 (2nd ed. 1973). Professor Rathkopf states that the concepts tend to “overlap;” A. Rathkopf, The Law of Zoning and Planning § 37.02 (4th ed. 1975).

12. Professor Rathkopf in The Law of Zoning and Planning offers a plausible explanation for the use of the term “unnecessary.” He assumes that the original drafters recognized that they were imposing a “necessary” hardship on owners generally in each zoning district by the restrictions on the use and level of development that the regulations required. Each individual owner would, therefore, be expected to suffer some diminution in the value of his/her property in order to achieve the overall public benefit of district uniformity. The variance would be available only to those owners whose hardship was “unnecessary,” that is, resulting from problems not generally shared in the district and imposing a level of loss beyond that generally expected. A. Rathkopf, The Law of Zoning and Planning § 38.02 (4th ed. 1975); see Eaton v. Sweeney, 257 N.Y. 176, 177 N.E. 412 (1931).
naire to have a limited meaning, related to the constitutional issue of the "taking" of property? Or was it a more broad concept that could encompass many problems of planning, development and real estate investment?

The report of the drafting committee for the 1916 Building Zone Resolution made clear that a concern for the "capital value" of real property was uppermost in the drafters' minds. Thus, it would be reasonable to assume that the unnecessary hardship standard was intended to address the impact on individual property values of the general regulations, and offer a method of adjustment for any property that would suffer an unreasonable diminution of its investment potential. One early commentator did offer this "taking issue" rationale for the variance process. However, the early work of the BSA and the writings of other commentators did not clearly explain their intent. Much of the literature spoke broadly of the variance as the "safety valve" that would spare the regulations from court challenge as an unconstitutional exercise of the police power. Other opinions characterized the variance as a method of "flexibility" in a


14. The drafters of the Building Zone Resolution stated that zoning was necessary to preserve the total "capital value" of real property in the city. The location of an incompatible use or an oversized building in a neighborhood tended to depress the value of neighboring properties. As a widespread phenomenon, incompatible uses and bulk deprived the city of investment stability. See "Tentative Report of the Commission on Building Districts and Restrictions", PROCEEDINGS OF THE N.Y. CITY BOARD OF ESTIMATE AND APPORTIONMENT 1366 (1916); see also Whitten, The Building Zone Plan of New York City, 6 NAT'L MUN. REV. 325 (1917).

15. See A. Rathkopf, supra note 12.


17. A review of the earliest variance cases does not give a clear picture. This is partly because the Building Zone Resolution included a rudimentary special exception procedure under § 7, which allowed several non-permitted uses to be located in various districts by BSA action. These were primarily garages and service stations. During 1917 and 1918, the Board received hundreds of such "variance" applications, which were not differentiated from the few § 20 applications. See People ex rel. Smith v. Walsh, 211 A.D. 205, 207 N.Y.S. 324 (1924) aff'd, 240 N.Y. 606, 148 N.E. 724 (1925) in which the "hardship or practical difficulty" variance procedure was not carefully established with a clear set of guidelines for the presentation or analysis of evidence.

18. Bassett E., quoted in Baker, supra note 10 at 282; see Van Auken v. Kimmey, 141 Misc. 105, 252 N.Y.S. 329 (1930); People ex rel St. Basil's Church v. Kerner, 125 Misc. 526, 211 N.Y.S. 470 (1925). One other commentator suggests that this concept of the "safety valve" relates the variance not to the "taking" issue, but to a concern that the zoning scheme as a whole would be held unconstitutional on broader due process grounds; see Swan, The Law of Zoning, 10 NAT'L MUN. REV. 519 (1921).
zoning scheme that could not otherwise anticipate the myriad of potential development problems of individual lots as opposed to districts generally.29

The courts in the 1920's and 1930's adopted an approach that embodied the "taking issue." The very first hardship variance was contested through the New York courts, resulting in a decision by the Court of Appeals that held the diminution of market value and lack of potential return as proper basis for the unnecessary hardship finding.20 Numerous subsequent cases elaborated this financial evidence approach,21 and finally, in 1939, the Court of Appeals fixed the finding in a three-step test for the variance analysis in the case of Otto v. Steinhilber.22 The court wrote that to grant a variance, the Board of Appeals must make the following findings:

a. that the property in question cannot earn a reasonable return from conforming use or development;
b. that this hardship is the result of unique factors inherent in the real property;
c. that the use to be allowed by the variance will not impair the essential character of the neighborhood.28

20. The very first variance granted under § 20 of the Building Zone Resolution was the Application of Madison Avenue between 35th and 36th Streets, Manhattan, BSA Cal. No. 2305-17-BZ, BSA BULLETIN 545 (May 1, 1918); litigated as People ex rel. Sheldon v. Board of Appeals, 234 N.Y. 484, 138 N.E. 416 (1923). The BSA allowed the expansion of a commercial use onto several lots in a residential district fronting Madison Avenue. Its resolution stated that there was "unnecessary hardship", but did not recite the facts upon which this conclusion was based. The court, however, held that the finding was properly based on evidence that the value of the lots, although improved with brownstone residences, had depreciated 50 percent as the result of the restriction to residential use. The court stated that the expanding commercial use on the avenue had made the residences unsuitable for their original single-family use and that they had been converted to lodging houses, but even in this transient use, they could not earn a sufficient return to remain viable.
21. The variance was intended to be an exceptional remedy available only when "unusual conditions" and "excessive hardships" were present. People ex rel. Brennan v. Walsh, 195 N.Y.S. 264 (1922). The fact that the property is more valuable for the proposed use is not a sufficient reason for the grant of a variance. People ex rel. Swedish Hospital v. Leo, 120 Misc. 355, 198 N.Y.S. 397 (1923), aff'd, 215 A.D. 696, 212 N.Y.S. 897 (1925). The findings of loss of value or of profitable use must be due to conditions of the property itself and not to general economic conditions suffered by properties generally. Young Women's Hebrew Assoc. v. BSA, 266 N.Y. 270, 194 N.E. 751, appeal dismissed, 296 U.S. 537 (1935); People ex rel. Arverne Bay Constr. Co. v. Murdock, 247 A.D. 889, 286 N.Y.S. 785, aff'd, 271 N.Y. 631, 3 N.E.2d 457 (1936); Levy v. BSA, 267 N.Y. 347, 196 N.E. 284 (1935).
23. 282 N.Y. at 76, 24 N.E. 2d at 853.
The (a) finding was a clear statement of the issue of the potential "taking" of property (or the due process infirmity) that would occur if the zoning regulation were to preclude any reasonably profitable use of the parcel.\textsuperscript{24} Initially boards of appeals were directed to financial evidence to determine if, indeed, a hardship existed.

Although the Otto findings were subsequently repeated in dozens of opinions by lower courts and the Court of Appeals,\textsuperscript{25} the case did not immutably fix the standard for all variances. Over time, the alternative "flexible" approach emerged. Outside of the City of New York, boards and courts perceived that there were many variances involving minor additions to homes and businesses that had little impact on their neighborhoods, but that could not be justified under the Otto findings.\textsuperscript{26} They looked to the standard of "practical difficulties" as providing authority for variances of yards, open space and other "area" regulations without financial findings. In the 1956 opinion of the Second Department Appellate Division in Village of Bronxville v. Francis, this separate "practical difficulty" standard was first stated, but the elements of its analysis were not made clear.\textsuperscript{27} Subsequent courts attempted to clarify the standard, but since the cases have presented many diverse fact patterns, ranging from tiny additions to large developments, a single "practical diffic-

\textsuperscript{24} The three findings reflect on interplay among three constitutional themes which had arisen in the earlier case law. Finding (a) relates to the "taking" or due process issue as had been expressed in Nectow v. Cambridge, 277 U.S. 183 (1928) and Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938). \textit{See also} Calcagno v. Town Board of Webster, 265 A.D. 687, 41 N.Y.S.2d 140, \textit{aff'd}, 291 N.Y. 701, N.E.2d 592 (1943).

The (b) finding relates to the due process used for a comprehensive plan which supplies the essential nexus between the harm perceived by the legislative (unplanned and unregulated growth) and the system of regulation (the zoning scheme) chosen in Village of Euclid v. Ambler Realty, 272 U.S. 365 (1936). \textit{See A. RATHKOPF, supra note 9, §§ 12.01 12.03. Without a finding of uniqueness, the quasi-judicial board of appeals would be making a legislative judgment that general conditions in the area cannot support the development anticipated by the zoning scheme.

The (c) finding relates to equal protection, insuring that if a variance is found to be necessary, the use or bulk permitted does not cause detriment to the value of enjoyment of neighboring properties nor undermine the comprehensive plan for the area. \textit{Young Women's Hebrew Assoc.; Levy Arverne Bay Constr.; see also, Clark v. Board of Zoning Appeals 301 N.Y. 86, 92 N.E.2d 903, cert. denied, 340 U.S. 933 (1950); A. RATHKOPF, supra note 2, § 37.02.}


\textsuperscript{26} Professor Anderson traces the development of a separate body of "area variance" law. \textit{R. ANDERSON, supra note 13, § 23.33.}

ulty" standard has not been established.28

In New York City, the evolution of the case law from Otto through Bronxville had little impact. The Board of Standards and Appeals historically did not follow the general case law because its 1916 Building Zone Resolution gave it broad powers to grant remedies without making the "unnecessary hardship or practical difficulty" findings.29 After 1945, the BSA was permitted to allow any use to locate in any district on a "temporary" basis without any specific findings.30 The Board, however, interpreted temporary to mean twenty or thirty years, with unlimited opportunity to renew, and use variances subject to the Otto findings almost never arose.31 The only variances sought under the "unnecessary hardship or practical difficulty" findings were variances of yards, bulk and open space, analogous to the Bronxville fact pattern.

To remedy this situation, in 1961, the drafters of a new Zoning Resolution for the City of New York decided to spell out with great

28. In Wachsberger v. Michaelis, 19 Misc. 2d. 909, 191 N.Y.S. 2d 621 (1959), aff'd, 18 A.D.2d 921, 238 N.Y.S.2d 309 (1963), the standard was held not to require financial evidence. In Fulling v. Palumbo, 21 N.Y.2d 30, 233 N.E.2d 272, 286 N.Y.S.2d 249 (1967), which involved a small yard variance for a single family house, the court held that the test would be a balance between the owner's showing of "significant economic injury and the municipality's showing of significant public need for the regulation." In Cowan v. Kern, 41 N.Y.2d 591, 363 N.E.2d 305, 394 N.Y.S.2d 579 (1977), the Court of Appeals held that the mere showing that land was worth $1,000 without the variance and $7,500 with it was not sufficient.

One local court has attempted to organize this confused body of case law. See Point Lookout Civic Ass'n v. Zoning Bd. of Appeals, 112 Misc. 2d 263, 446 N.Y.S.2d 856 (1981). See also R. Anderson, § 23.33; Note, supra note 4 at 251; and Comment, supra note 3 at 781.

29. The Building Zone Resolution included a series of "use exceptions" in § 7 that were used as the basis for most BSA actions from 1917 to 1961. While these were originally rudimentary special permits allowing specific uses such as garages and telephone exchanges, and minor expansions of use and buildings over district boundaries, the Board of Estimate made numerous amendments expanding their scope and substance. The courts at first were somewhat confused by the relation of the § 7 variances to the § 21 hardship and practical difficulty variances. See People ex rel. Facey v. Leo, 230 N.Y. 602, 130 N.E. 910 (1921); McGarry v. Walsh, 213 A.D. 289, 210 N.Y.S. 286 (1925); People ex rel. Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 155 N.E. 575 (1927). They were eventually willing to recognize § 7 as a separate authority which could be given without the § 21 findings. See People ex rel. Smith v. Walsh, 211 A.D. 205, 207 N.Y.S. 324, aff'd, 240 N.Y. 606, 148 N.E. 724 (1925).

30. In 1945, the Board of Estimate amended § 7(e) of the Building Zone Resolution authorizing the BSA to allow any use to locate in any district, subject to "appropriate" conditions and a term of years. PROCEEDINGS OF THE BOARD OF ESTIMATE 2970 (1945).

31. In a typical year, 1952, the Board granted 64 "variances" for uses including gasoline stations, manufacturing buildings and shopping centers in residence districts under § 7(e). In that same year 28 bulk variances and 3 use variances were granted under § 21. 1952 DOCKET BOOK OF BSA.
They adopted § 72-21, which sets forth five findings as the basis for the grant of any variance, use and area alike. In their preliminary report, they included a strong statement of policy: first, that all variances would be subject to the new section; and second, that there would be no distinction between the standards of unnecessary hardship or practical difficulty.

In the densely developed neighborhoods of New York City, the drafters explained, even minor variances of yards or open space could have significant impact.

Thus, New York City by local law established the strict “taking” approach to the definition of “unnecessary hardship,” and it erased any distinction between the kinds of evidence that must be provided.

32. The comprehensive revision of the Zoning Resolution was adopted by the N.Y. City Board of Estimate on Dec. 15, 1960 and became effective on Jan. 1, 1961. 13 PROCEEDINGS OF THE BOARD OF ESTIMATE, 15575 (Dec. 15, 1960). It was based upon the recommendations of consultant planners Voorhees, Walker, Smith and Smith, who produced the preliminary report and draft, published as Zoning New York, August, 1958, authorized by the N.Y. City Board of Estimate. PROCEEDINGS OF THE BOARD OF ESTIMATE 9971 (1956). See also Harris, Ballard and Allen, Plan for Rezoning the City of New York, authorized by the N.Y. City Board of Estimate. 8 PROCEEDINGS OF THE BOARD OF ESTIMATE 9659 (1950).

33. The Voorhees, Walker, Smith and Smith report cited criticism of the Board of Standards and Appeals for its failure to apply clear standards to the consideration of variances. See the dissent of Justice Van Voorhees in Kohnberg v. Murdock, 6 N.Y.2d 937, 939, 161 N.E.2d 217, 218, 190 N.Y.S.2d 1005, 1007 (1959). See also, Note supra note 3 at 120; and Note supra note 28 at 251. Among other changes, the 1961 Zoning Resolution repealed the “use exceptions” previously allowed under § 7. It also made the power to grant special permits a shared authority, with the BSA given jurisdiction over smaller use and bulk modifications (Art. 7.3) and the City Planning Commission given jurisdiction over larger scale special permits (Art. 7.4).

34. It is further proposed that the Board apply the same standards to appeals for variances of both the use and bulk provisions. Unwarranted breaches in the density, Floor Area Ratio, Open Space Ratio or other proposed bulk regulations would have a serious impact on the character of a neighborhood and would destroy the integrity of the proposed regulation.

Under a recent trend in New York State court decisions, ‘area’ variances (synonymous with ‘bulk’ as used in the proposed resolution) have been sustained on the grounds of practical difficulties alone, and the traditional findings developed around the meaning of unnecessary hardship in the case of use variances have been disregarded. Matter of Bronxville v. Francis. The criteria for determining the existence of practical difficulties and endowing the Board with unlimited discretion to grant area variances are restricted in the proposed resolution.

Voorhees, Walker, Smith and Smith, Zoning New York. supra note 32. The city has always had a high rate of rental occupancy for uses of all types. Thus, bulk adjustments, particularly increases of floor area, translate directly into dollars and cents return. See Galin v. Board of Estimate, 72 A.D.2d 114, 423 N.Y.S.2d 932, aff'd, 52 N.Y.2d 869, 418 N.E.2d 673, 437 N.Y.S.2d 80 (1981).

35. See N.Y. City Zoning Resolution § 72-21(b) discussed below.
presented under the "unnecessary hardship" and the "practical difficulties" standards. Since its adoption in 1961, the BSA has gradually refined the evidentiary requirements and its method of analysis, looking both to its statute and to the opinions of the courts that have addressed the financial findings. It is helpful, therefore, to review both § 72-21 and the general case law before studying the specifics of the BSA approach.

**The New York City Zoning Resolution § 72-21**

Section 72-21 requires 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 therefore necessary to enable the owner to realize a reasonable return from such zoning lot. This finding shall not be required for the granting of a variance to a non-profit organization.

c. That the variance, if granted, will not alter the essential character of the neighborhood 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. When all other required findings are made, the purchase of a zoning lot subject to the restrictions sought to be varied shall not itself constitute self-created hardship.

36. N.Y. City Zoning Resolution § 72-21 begins with this prefatory language. Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions 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: . . .
e. That within the intent and purposes of the 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.\textsuperscript{87}

In addition to these findings, § 72-21 contains procedural requirements: that the Board embody its findings in a resolution in every case, and that in any resolution denying a variance, the Board specify which findings have not been satisfied.\textsuperscript{88}

In the five findings, the financial evidence is intended to play a broader role than is apparent in the \textit{Otto} formulation. The derivation of the lack of reasonable return is more closely linked to the threshold finding of “unique physical conditions . . . peculiar to and inherent in the . . . lot,”\textsuperscript{39} and it is further linked to the finding of minimum variance.\textsuperscript{40} Thus, the financial evidence is intended to serve not just as the indicator that a “taking” may occur without the variance; it must also provide a precise measure of the level of hardship or practical difficulties, and thereby determine the minimum level of

\begin{footnotesize}
\begin{enumerate}
\item N.Y. City Zoning Resolution § 72-21.
\item The language of N.Y. City Zoning Resolution § 72-21 includes the statement: 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 set forth 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 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.
\item N.Y. City Zoning Resolution § 72-21 reverses the order of these two findings. The \textit{Otto} opinion places the “reasonable return” finding first, to establish at the outset that the subject lot is one on which a “taking” might occur. Section 72-21 states the uniqueness finding first, requiring as a threshold finding that there are problems on the lot which are not generally shared, and further requiring that the lack of reasonable return be shown to clearly flow from the problems. Thus, the link between the unique problems and the lack of reasonable return is more strongly stated in the New York City regulation. This distinction is more significant in light of later cases under the \textit{Otto} rule in which the importance of the uniqueness factor may have been diminished. 22 N.Y.2d 417, 425, 239 N.E.2d 713, 717, 293 N.Y.S.2d 75, 81 (1968). See R. Anderson, \textit{New York Zoning Law and Practice} § 23.25 (2d ed.); see also, Comment: \textit{Variances in New York: A Trend toward Flexibility}, 20 \textit{Syracuse L. Rev.} 628 (1969). The BSA has stated clearly that under its Zoning Resolution, uniqueness remains a necessary finding in all cases. See \textit{9 White Street Assoc. v. BSA}, 122 A.D.2d 742, 506 N.Y.S.2d 53 (1986).
\item N.Y. City Zoning Resolution Section 72-21 (e), the “minimum variance” finding, has been construed by the BSA as a financial finding in which a feasibility workout of the proposed use or development is analyzed to insure that the variance does not result in a windfall to the owner or developer. \textit{See Galin v. Board of Estimate}, 72 A.D.2d at 117; \textit{supra}, note 34; see also \textit{Bellamy v. Board of Appeals}, 32 Misc. 2d 520, 223 N.Y.S.2d 1017 (1962).
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relief that may be allowed.

THE FINDING OF NO REASONABLE RETURN

Subsection (b) of § 72-21 requires the BSA to make financial findings in every variance case. Its language embodies three major themes. First, that the evidence must show how conforming use or complying development is not feasible. Second, that the lack of feasible use or development potential is related to the unique factors demonstrated under finding (a). Third, that the costs or lack of value caused by the unique factors inhibit the earning of a "reasonable" return. Each of these themes reflects the concern of a number of court opinions. Since the case law is more detailed, however, it is more convenient to categorize the law in five groups, with the first three corresponding to the first theme of "infeasibility." The analysis of the case law will focus on live issues: (1) dollars and cents evidence; (2) efforts to rent or sell; (3) alternative uses; (4) hardship to the property not to people; and (5) the reasonable return standard.

DOLLARS AND CENTS EVIDENCE

The New York courts have held consistently that hardship must be demonstrated by dollars and cents evidence, that is, by clear numbers with a reasonable basis and a reliable source. The opinion of the applicant or owner that the property cannot earn a reasonable return is insufficient. Similarly, the opinion of a broker or appraiser is insufficient without a layout of the numbers upon which it is based.

In every case it is the burden of the applicant to supply the numbers from a disinterested expert or experts. He or she cannot leave it up to the Board's own knowledge to supply this evidence.


44. A. RATHKOPF, § 37.06; see Galin v. Board of Estimate, 72 A.D.2d 114, supra note
What must the numbers show? In *Crossroads Recreation v. Broz*, the New York Court of Appeals recited a list of items that are relevant to the hardship analysis. Sustaining a denial of a variance for a property already in multiple use as a gas station and a bowling alley, the court stated:

There is no proof in the record to show (1) the amount of the purchase price paid by Crossroads for the entire parcel of property; (2) the present value of the entire parcel of property or any part thereof; (3) the expenses and carrying charges in connection with the maintenance of the entire parcel of property or any part thereof; (4) the amount of taxes on the entire parcel or any part thereof; (5) the amount of any mortgages, liens or other encumbrances, if any, on the entire parcel or any part thereof; (6) the amount of annual income realized by the gas station; (7) the amount of annual income realized by the bowling alley business; (8) the amount of rent paid to Crossroads by its earlier tenant, the operator of the bowling alley business; and (9) an estimate as to what a reasonable return on the entire property or part thereof should be based on the initial investment of Crossroads or the present value of the property.

Despite some inconsistency with other holdings, this statement of the required evidence gives a fair picture of the analysis. What is required is a workout which demonstrates the fair market value of the property, the cost of its development and maintenance for a use that is conforming to the zoning regulations, and the return that such an investment (in purchase, development and maintenance) would yield in present market conditions.

34. See Hickor v. Griffin, 298 N.Y. 365, 83 N.E.2d 836 (1949). This rule is inconsistent with the early case of People ex rel. Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 150 N.E. 575 (1927).


In *Crossroads* the property was improved with a gas station and a bowling alley, both legal non-conforming uses. The owner requested a variance to enlarge and modernize the gas station, arguing that it was necessary to compete with a gas station across the street which the board of appeals had previously permitted to modernize. The only evidence presented was that the rent for the existing station was $150 per month and that if the variance were granted, the lessee would spend $40,000 to $50,000 on improvements and pay $200 per month. *Id.*

46. 4 N.Y.2d at 44, 172 N.Y.S.2d at 132.

47. The court's requirement of proof of the annual income of the two businesses on the property is inconsistent with the case law, discussed below, which holds that the relevant evidence is return on the property itself, irrespective of any business that happens to occupy the land.

The purpose of such a workout is to reveal how the hardship conditions of the property affect the ability of an investor to earn a return from its development and use. The hardship might be felt either as an extraordinary cost affecting the development or maintenance of the property, or as a liability affecting its attractiveness on the market. Thus, whether the impact is on the cost side or the return side, it should emerge as an unusually high or low figure in the context of the overall performance of the property.

The dollars and cents evidence, therefore, serves two purposes. First, it offers proof of and quantifies the hardship conditions. Second, it demonstrates how, in the context of the total costs and expectations of return, the hardship impacts the final, bottom-line return that would be sought by an investor in the parcel.

The layout of figures required by the court in the Crossroads

49. The way in which the financial evidence properly relates to the unique hardship findings is illustrated by the following excerpt from an unreported 1976 opinion of Justice Giaccio of the Queens County Supreme Court in Toufexis v. Klein (1976):

The architect's statement and data received by the Board . . . indicates that the subject property is an unimproved, irregular lot with an excessive depth in relation to width, that there is a total depth of adequate, soil-bearing materials 16 feet below curb, whereas normal footing elevation is five feet below curb, and that there is evidence that a brook once traversed the rear outline of the site. It is noted that these conditions create an awkward construction site and a special foundation cost in excess of $100,000. Thus there exists in the record a basis for the Board's finding that the unique physical condition of the property would result in practical difficulty and unnecessary hardship.

The financial statements received by the Board . . . indicate that the minimum monthly rental required to offset expenses and achieve a 10 percent return on investment and still be competitive with other residential developments in the area is $112.36 per room. If such an amount were charged in a building that complied with the zoning resolution, the total yearly income would be insufficient to offset the yearly expenses and would result in a loss. On the basis of these financial estimates in the record, the Board found that there was no reasonable possibility that the development of the subject property in strict compliance with the zoning resolution would realize the owners a fair return on their investment.

50. A typical case before the BSA involves a property improved with a vacant loft-style industrial building constructed late in the 19th century. With appropriate investment in modernization, many such buildings have been restored to conforming uses in industrial and commercial districts. Several cases have been brought to the Board in which the buildings are unusually small, narrow or oddly shaped, or constructed with inadequate floor load capacity or narrow spaces between supporting beams. Even with appropriate investment, these buildings command a poor rental rate because the potential industrial or commercial users would foresee the inefficiencies of the spaces. See Application of 95 Van Dam Street, Manhattan, BSA Cal. No. 1151-81-BZ, 69 BSA BULLETIN 414 (Mar. 20, 1984); see also Application of 9 and 11 Doughty Street, Brooklyn, BSA Cal. No. 1067-81-BZ, 67 BSA BULLETIN 1399, (Nov. 16, 1982).
case reflect the factual background of that case. It would be expected that these would vary somewhat with different situations: whether the property is vacant or in use at the time of the application for the variance; if in use, whether that use is conforming with the zoning or not; whether it was recently purchased, not yet purchased, or purchased years before; and whether the types of development at issue (both conforming and proposed by the variance) are those which are commonly owner-occupied, or rented or sold. Each of these variables would affect how the figures would be presented. For example, if the property has been used for conforming uses, the actual numbers of its performance would be required. If it were vacant or used illegally or as legally nonconforming, hypothetical numbers (based on reasonable "comparables") would be presented. However, in every case the workout should achieve the same purpose—to demonstrate the full picture of how the property would perform if held strictly to the uses and bulk required by the zoning regulation.

The Court of Appeals in Crossroads did not go forward to characterize the analysis that the board of appeals was expected to use in evaluating the numbers supplied. The Board of Standards and Appeals approaches the question by requiring in most cases that the applicant supply "comparables," reports of recent construction, sales, or rentals of similar properties in the neighborhood. These figures give the Board the ability to evaluate the performance of the individual property in comparison with its neighbors, both as a way of testing whether there are extraordinary costs or liabilities arising from the unique factors of the lot, and as a way of gauging what reasonable expectations of return would be in the area. This approach is

51. In Crossroads, the property was already occupied by two on-going businesses, and the variance request was to reconstruct and enlarge one of them, upon an argument that, otherwise, the business could not remain competitive and the land would be abandoned. Thus, the court's requirement of present market value, present expenses and carrying charges, and annual income of the two businesses was directed toward the establishment of the real situation of the uses, and toward the proof of whether the applicant's arguments were true. 4 N.Y.2d 39, 149 N.E.2d 65, 172 N.Y.S.2d, 129 (1958).
52. Id.
53. See Application of 163-03 89th Ave., Queens, BSA Cal. No. 278-81-BZ, 67 BSA BULLETIN 102 (Jan. 19, 1982); appeal filed as Matter of Lincoln Courts Apartments, No. 2373/82 (Queens County Supreme Court, opinion of Justice Dunkin, Aug. 9, 1983); see infra note 79.
54. The use of comparables to determine costs or value is an accepted method in the real estate industry and is commonly used in condemnation proceedings. See In re County of Suffolk, 109 A.D.2d 155, 491 N.Y.S.2d 371 (1985).
detailed below.

**Efforts to Rent or Sell**

In cases where the subject property is vacant or is not being used in conformance with the zoning regulation, there is no record of how the property could perform when limited to legal uses and bulk. A hypothetical workout can be supplied based on area comparables. In addition, the Board may require that a record of efforts to rent or sell for conforming use be demonstrated.55

This rule (that efforts to rent or sell be provided) is one on which the courts have divided. Some courts have held that the failure to present such evidence justifies the denial of a variance.56 Others have held that the evidence is not essential, and that an owner cannot be forced to sell his/her property as the alternative to seeking a variance.57

The rule that an owner not be required to sell his/her property in order to avoid a variance is proper in theory, because, if the property is truly burdened by hardship conditions, the sale will merely pass along the problem of its development to the next owner.58 On the other hand, if the property when put on the market is shown to command a sale or rental price that yields a healthy profit to its owner, this may be evidence that his/her arguments of its hardship

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55. In Forrest v. Evershed, 7 N.Y.2d 256, 164 N.E.2d 814, 196 N.Y.S.2d 958 (1959), the only proof offered that the property could not yield a reasonable return was testimony by the owner that he had tried to sell the property for 40 years. This, the Court of Appeals held, was insufficient. The court stated that evidence was required to show a "diligent and bona fide" effort, including whether the property was advertised for sale, whether signs had been placed on the property, how it was listed with brokers, and the nature of the terms and conditions under which it was offered.


57. Berson v. Board of Zoning and Appeals, 28 A.D.2d 848, 281 N.Y.S.2d 569 (1967); Plattner v. Sacca, 49 A.D.2d 602, 370 N.Y.S.2d 188, appeal dismissed, 37 N.Y.2d 806, 338 N.E.2d 326, 375 N.Y.S.2d 569 (1975). The Monroe County Supreme Court has held that evidence of efforts to rent or sell are not necessarily required where other evidence of the inability to develop or reuse the property based on costs and comparables is complete. See Bellamy v. Board of Appeals, 32 Misc. 2d 520, 223 N.Y.S.2d 1017 (1962).

58. The N.Y. City Zoning Resolution § 72-21(d) states that the finding of self-created hardship does not apply merely because someone has purchased a property with knowledge of the zoning and intent to seek a variance. It, therefore, indicates an intent to ignore the sale and focus on the nature and extent of the problems burdening the lot.
conditions are untrue or exaggerated.\(^59\)

It appears possible to reconcile the holdings of the courts if the evidence of efforts to rent or sell is understood not as direct proof that the present owner cannot profit, but as the method of corroborating the numbers in a hypothetical workout which shows that the property, when developed with conforming use, cannot command a reasonable return. Such evidence would be pertinent in a case in which the property is already improved with a building that once housed conforming uses but is now vacant.\(^60\) Proof that, if the property were marketed for conforming uses, potential renters or buyers would not be attracted, or would offer unreasonably low prices would have to be shown.

Such evidence properly takes the form of copies of advertisements run in newspapers or publications in which properties of similar types are offered, evidence of listing with brokers, evidence of “for sale” signs placed on the property, and evidence that potential buyers or renters visited the property but failed to offer reasonable prices.\(^61\) When industrial properties are at issue in New York City, applicants for variances have been directed to the city office of economic development to explore their marketing process before a variance is considered.\(^62\)

**ALTERNATIVE USES**

The courts have stated that, in order to grant a use variance, the board of appeals must have before it evidence that each and every use permitted in the district is unfeasible for the particular property.\(^63\) This does not require consideration in every case of po-


\(^60\). Application of 143 South Street, Brooklyn, BSA Cal. No. 942-83-BZ, 69 BSA BULLETIN 577 (May 10, 1984); Application of 255-275 Park Ave., Brooklyn, BSA Cal. No. 482-82-BZ, 68 BSA BULLETIN, 749 (May 17, 1983); Application of 260 West Broadway, Manhattan, BSA Cal. No. 990-77-BZ, 63 BSA BULLETIN, 1214, appeal filed as, 260 West Broadway Ass’n v. Board of Estimate, No. 19325/78 (New York County Supreme Court), aff’d, 72 A.D.2d 505, 421 N.Y.S.2d 184 (1979), appeal denied, 49 N.Y.2d 702, 403 N.E.2d 188, 426 N.Y.S.2d 1027 (1980).


\(^62\). See Application of 255-275 Park Ave., Brooklyn, BSA Cal. No. 482-82-BZ, note 60, and Application of 9 and 11 Doughty Street, Brooklyn, BSA Cal. No. 1067-81-BZ, 67 BSA BULLETIN 1399 (Nov. 16, 1982).

tential special permit uses, public or quasi-public uses, or highly specialized uses. It does require that the board consider logical, representative uses of the types permitted in the zone. Thus, if a residential zone also allows certain community facility uses, such as a group medical facility, the applicant would have to show that neither a typical residential use, nor a doctor's office building would be feasible, before a variance for commercial use would be granted.

The New York City Zoning Resolution carries the analysis of alternatives further, by requiring the same analysis for area variances and by requiring a finding that any variance granted be the "minimum necessary to afford relief." Thus, the analysis of alternatives done by the Board of Standards and Appeals relates to the hierarchy of "Use Groups" by which the zoning districts are organized. All permitted uses are organized in Use Groups beginning with residential Use Groups 1 and 2, retail and commercial Use Groups 5 through 15, and industrial Use Groups 16, 17 and 18. In each district several Use Groups may be permitted, and the applicant's proposal may request a Use Group that is significantly higher on the


64. Muller v. Williams, 88 A.D.2d 725, 451 N.Y.S.2d 278 (1982). The BSA takes a different view in certain cases where a special permit is available which provides substantially the same relief as requested under the variance; see Application of 426 West Broadway, Manhattan, BSA Cal. No. 718-82-BZ, 68 BSA Bulletin 893, aff'd, Peter Nelson Assoc. v. BSA, No. 17362/83 (New York County Supreme Court, Nov. 18, 1983); Application of 1200/8 Third Ave., Manhattan, BSA Cal. No. 923-82-BZ, 70 BSA Bulletin 1007, refiled as City Planning Comm., Board of Estimate, Cal. No. 840206 ZSM, Mar. 11, 1984.


67. If the property is currently occupied by a legal non-conforming use, the feasibility of continuance of the use at its present level is also required. R. Anderson at § 23.12; See Application of 212-01 Hillside Ave., Queens Village, Queens, BSA Cal. No. 616-85-BZ, in which a variance was granted to reconstruct an existing gas station originally established in 1919. 71 BSA Bulletin 732 (May 27, 1986).


69. One commentator has suggested that this requirement of providing evidence of no alternatives is the key difference between the financial hardship finding for a use variance, and the test of "significant economic injury" for an area variance, where the court looks at only the value of the land when put to the specific permitted use which the owner has elected. Comment, Supra note 3 at 780. This rationale would not apply in New York City; § 72-21(e) of the Zoning Resolution makes no distinction in its requirement that the five findings be made in all variance cases.

70. N.Y. City Zoning Resolution § 72-21(e).
list. The Board may require that several typical uses permitted in the district be explored, along with several non-permitted uses that may be lower on the hierarchy than the use proposed. In addition, the Board may request that one or more different building designs be shown, if it appears that the hardship might be better satisfied by a smaller bulk variance than by the use of larger bulk variance requested.

**HARDSHIP TO THE PROPERTY**

The dollars and cents evidence must relate to the circumstances of the property, not to the financial situation of any person or business that owns or occupies the site. This separation of the property and its hardship factors from the needs and desires of particular investors is frequently misunderstood, because only a small proportion of variance requests are made by speculative developers whose purpose is to achieve profit from any use or design of the site. Most variances are requested to accommodate a specific use for a specific family or business. While the courts and the New York City Zon-
The requirement of a separation between the real estate related costs and return, and costs and return of a business or other occupant is essential to demonstrate that the hardship on which the variance is predicated truly arises out of factors inherent in the lot. A particular user may argue that he or she is not gaining a reasonable return, but it may be depressed economic conditions generally or in the particular industry, or bad management and a pattern of disinvestment in the property that is responsible. Therefore, the prop-

of Estimate, Aug. 20, 1982, sustained as Helms v. Board of Estimate, No. 13016/81 (Queens County Supreme Court, Feb. 2, 1982) (Graci, J.) see also the related case Application of 208-32 Northern Boulevard, Queens, BSA Cal. No. 223-82-BZ, granting enlargement of auto sales and repair building. 68 BSA BULLETIN 42 (amended for second story, 70 BSA BULLETIN 762 (June 13, 1985)); jurisdiction declined, Board of Estimate, Cal. No. 249, July 30, 1983. Other typical cases include owners seeking to create additional dwelling units in existing houses; see Application of 69-13 172d Street, Queens, BSA Cal. No. 183-83-BZ, (granting second unit), overturned, Board of Estimate, Sept. 15, 1983; and owners seeking to create business offices in existing houses, Application of 220 East 48th Street, Manhattan, BSA Cal. No. 493-83-BZ, granting film editing studio in one-family “brownstone.” 70 BSA BULLETIN 30 (Jan. 8, 1985), overturned, Board of Estimate, Mar. 14, 1985.

75. N.Y. City Zoning Resolution § 72-21(d) provides: "When 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."


78. Application 251-21 Jamaica Ave., Queens. Supra note 76.

79. In Application of 163-03 89th Ave., Queens, BSA Cal. No. 278-81-B2, the owner purchased a multiple dwelling in deteriorated condition. He made no effort to restore it for permitted residential use, but immediately converted it, contrary to the zoning, to a transient hotel use. In the application for a variance to legalize the use, the evidence showed that several neighboring building, including an identical companion structure, were being rehabilitated with government loans and were operating profitably. Further evidence showed that the owner had made no effort to seek reliable tenants and no effort to request rental rate increases under the Rent Stabilization procedures. The BSA denied the variance. 67 BSA BULLETIN 102 (Jan. 19, 1982). The local court upheld. Lincoln Courts v. Deutsch (Queens County Supreme Court, Aug. 20, 1982) (Dunkin J.) See also, Application of 627 Greenwich Street, Manhattan, BSA Cal. No. 182-81-BA, 87 BSA BULLETIN 213 (Feb. 9, 1982). In Application of 2377 Grand Ave., Bronx, BSA Cal. No. 391-82-BZ, the Board of Estimate overturned a variance granted
property must be analyzed separate from the situation of the owner or user.

The solution to the problem of separation lies in the formulation of a financial workout using the record of comparable properties. If a residential property is owner-occupied, an attributed rental value can be assigned to the space which he or she occupies. If the lot is specially developed for a particular business or user, then that portion of the costs of operation which arise from the need to maintain the realty and improvements must be separated from general business costs. This real-property-burden must be compared to the level of such burden that similar businesses occupying properties without hardship factors must bear. In New York such comparisons are usually easy to make since the city has a high proportion of rental properties for most types of business.

**Reasonable Return**

While the phrase has been repeated consistently by the courts, the standard of "reasonable return" has not been further defined. Most frequently, the courts have stated that the determination of what is reasonable is left to the expertise and judgment of the board. Several courts have said that the showing of a few years of loss or low profit does not, in and of itself, demonstrate the inability to maintain a grocery store (bodega) in an apartment house held by the city in tax foreclosure; the lack of reasonable return was based partly on evidence that several apartments were burned out and that the money for repairs had been stolen. 68 BSA BULLETIN 211 (Feb. 1, 1983), overturned, Board of Estimate, Mar. 18, 1983; upheld as Cuevas v. Board of Estimate, No. 15628/83 (Bronx County Supreme Court, Feb. 15, 1984) (Kent. J.).

80. In *Shiner*, the Court held that it was improper for the BSA to grant a variance to allow commercial use of an existing one family house in a residence district, where the owner gave proof of a $12,897.00 cost to repair the property, but gave no proof of the rental rate the repaired premises would command. "The feasibility studies did not analyze the return petitioner would realize if she made the necessary improvements and thereafter rented the premises at a higher rate than she could command prior to making repairs . . . petitioner attributes the alleged hardship to her own lack of money to repair the premises." *Shiner v. Board of Estimate*, 95 A.D.2d 831, 463 N.Y.S.2d 872 (1983). Failure to include an attributed rent to a portion of a multi-family house occupied by the owner was grounds for the overturning of a variance by the Board of Estimate. Application of 20 Schermerhorn Street, Brooklyn, BSA Cal. No. 764-80-BZ, 66 BSA BULLETIN 803 (June 23, 1981), overturned, Board of Estimate Cal. No. 215, Sept. 10, 1981, *aff’d*, Kallas v. Board of Estimate, 90 A.D.2d 774, 455 N.Y.S.2d 288 (1982), *aff’d*, 58 N.Y.2d 1030, 448 N.E.2d 1354, 462 N.Y.S.2d 443 (1983).

81. In *Application of 212-01/09 Hillside Ave., Queens*, BSA Cal. No. 616-85-BZ, a variance to allow modernization of a non-conforming gas station was based upon the net lease value for the property as existing. 71 BSA BULLETIN 732 (May 27, 1986).

to earn a reasonable return. Others have said that the mere showing that the property would be worth more with the variance is not sufficient. Still other courts have related the reasonable return analysis to that which would be necessary to prove confiscation in a "taking" case. This approach looks to the calculation of a value for the property without the variance to determine whether it is substantially without value.

The standard seems to require a comparative analysis, relating the bottom-line figure presented in the feasibility workout of the property to some figure that would represent the expectation of return of an average investor in the type of property or in the neighborhood at issue. This figure might be a prevailing mortgage rate, the return for alternative investments (treasury bills or bank certificates), or the figure could be derived from estimates of what compa-


86. The BSA does not reveal the grounds for its judgment. In T and D Realty v. Deutsch, Justice Saxe held that the Board was correct in rejecting a variance when the applicant's bottom-line workout showed a cash-on-cash return of 4.5 percent for conforming development and a 7.9 percent return for its proposal with a variance. The court stated that the Board had found "... anticipated return for each to be understated, based upon current interest rates and tax benefits... . The court finds that in the area of estimated income and the broad subject of tax benefits, respondent (BSA) acted within its discretion, using its expertise in evaluating customary cash flow and a realistic return." T and D Realty v. Deutsch, No. 91287/82 (New York County Supreme Court, Aug. 3, 1983) (Saxe J.); see also, 215 East 72d Street v. Klein, 58 A.D.2d 75, 376 N.Y.S.2d 223 (1977) in which a 4.6 percent return on an investment of $7 million was held to justify a variance, aff'd, as Lawrence v. Klein, 58 A.D.2d 751, 396 N.Y.S.2d 223 (1978), aff'd, 42 N.Y.2d 1013, 398 N.Y.S.2d 1035, cert. denied, 436 U.S. 905, (1978).

87. In Foster v. Saylor, 85 A.D.2d 876, 447 N.Y.S.2d 75 (1981) the school district demonstrated through evidence of efforts to rent its surplus school building, that it could not gain a sufficient return to cover debt service. The court stated: "A yearly rent thousands of dollars less than annual debt service is not a reasonable return."
rable properties in the area yield.\textsuperscript{88} Although the results from these suggested approaches might be different, any one would be appropriate because the bottom-line judgment is not decisive on whether the variance is justified. Rather, it is only an indicator of how, in context, the hardship factors affect the total performance of the property.\textsuperscript{89} The key to the analysis is not the bottom-line number, but those specific figures within the workout that qualify the impact and level of the hardship.

**The Typical Workout**

The typical workout provided to the BSA must incorporate assumptions and conventions designed to compare the subject property to other properties and to discount differences which arise because of the financial, business or tax situation of the individual owner or occupant. The detail of the workout varies with the size and complexity of the proposed use or development and the nature of the issues being presented.\textsuperscript{80} The workout is supplemented with documentation supporting its figures from sources independent of the owner of principals in the development.\textsuperscript{81} The scope and sophistication of this supporting evidence also varies with the size and complexity of the proposed variance.\textsuperscript{90}

\textsuperscript{88} Application of 17 Slaight Street, Staten Island, BSA Cal. No. 212-82-BZ, 68 BSA BULLETIN 699 (May 10, 1983), overturned, Board of Estimate, Cal. No. 360, June 30, 1983. The Board of Estimate stated that the finding of lack of reasonable return was not supported by substantial evidence because there was "no independent financial data of documentation to establish the rate of return which could be obtained from such conforming uses."

\textsuperscript{89} The Court of Appeals has stated: "In determining the question of reasonableness all the existing circumstances relative to the area involved, the object to be obtained and the necessity or lack thereof, should be considered." Gilmer v. Fritz, 28 A.D.2d 804, 281 N.Y.S.2d 154 (1967); Daurenheim v. Town Board, 33 N.Y.2d 468, 310 N.E.2d 516, 354 N.Y.S.2d 909 (1974); see also In re Allied Saint George Co., N.Y. L.J., March 5, 1975 at 18, col. 5.

\textsuperscript{90} An eight inch yard variance was upheld, based on minimal findings in Belluscio v. Klein, 65 A.D.2d 702, 409 N.Y.S.2d 751 (1978).

\textsuperscript{91} See Congregation Beth El v. Crowley, 30 Misc. 2d 90, 217 N.Y.S.2d 93 (1960); and R. ANDERSON, supra note 12 at § 23.13. Where a workout submitted to the BSA was undated, unaudited and accompanied by a letter from the accountant who prepared it disavowing any claim for the accuracy of the figures supplied by the owner, the Queens County Supreme Court held that the test of substantial evidence was not met. Bellerose Lanes v. Board of Estimate, No. 5220/83 (Queens County Supreme Court, Sept. 15, 1983) (Giacco, J.), aff'd, 109 A.D.2d 836, 486 N.Y.S.2d 361 (1985). See also Jam Rick Homes, Inc. v. Board of Appeals, 57 Misc. 2d 820, 293 N.Y.S.2d 680 (1968).

\textsuperscript{92} In a case involving a one or two family house, requesting a small variance of yard widths and lot area, values supplied by the project architect or building contractor will suffice, see Application of 315 Shirley Ave., Staten Island, BSA Cal. No. 136-85-BZ, 70 BSA BULLETIN 1220 (Oct. 15, 1985). In a recent case involving a request for over 100,000 square feet of floor area beyond that permitted on a midtown Manhattan lot, the hardship shown was the
Each item in the workout must be explained in such detail as is appropriate. Comparables are provided for major elements, such as market value, cost of construction, operating costs, projected rents or sale prices. The BSA would require the submission of comparables for any figure that appears to be out of line with its sense of prevailing market conditions.

In every project, the expectation of reasonable return is to be based upon a reasonable level of equity investment in the land and existing improvements, the costs of development or redevelopment for a conforming use and complying building, normal levels of financing, operating and carrying costs, and the expectation of a market level of gross and net return. Thus, the workout is organized to set forth all these figures in a clear and coherent fashion.

**PURCHASE PRICE**

The workout must show the Board what an average investor in property of the type presented would spend to acquire and develop it for conforming use and complying construction. The workout, therefore begins with a purchase price or fair market figure. If the property has been purchased recently in an arm's length transaction, the actual purchase price may be accepted by the Board as an accurate measure of its value. If there has been no recent purchase, there are two methods of showing its value. First, the actual price at the time of past purchase may be presented with the carrying cost over difficulty of foundation design for a permitted 38 story apartment building. The costs estimates for the foundations were accompanied by elaborate engineering reports prepared by a consulting firm with particular expertise in problem foundation work. The BSA denied the variance on minimum variance grounds, upon a finding that the extraordinary cost of foundations would be amortized by rentable square footage substantially less than the 100,000 requested. Application of 1091/1109 Third Avenue, Manhattan, BSA Cal. No. 512-82-BZ, BSA BULLETIN 967 (August 7, 1984); see infra note 117.

93. Application of 163-03 Avenue, Queens BSA Cal. No. 278-81-B2.


95. In Application of 115/21 East 12th Street, Manhattan, BSA Cal. No. 708-84-BZ, the recent purchase price for a vacant formerly used commercial building was accepted as a reasonable basis for the equity calculation, in granting bulk variances to allow conversion to residential use. 70 BSA BULLETIN 820 (June 25, 1985), jurisdiction declined, Board of Estimate Cal. No. 454, August 15, 1985.
time. Second, an appraisal of the current fair market value by a disinterested professional may be submitted. The courts have suggested and the BSA will often require the presentation of both figures, as well as the presentation of some comparables by which to corroborate the appraised current value.

Analysis of these market value figures raises several problems that have not been fully resolved. When an actual sale price or contract price is given, the Board must consider whether the owner has been willing to pay an inflated price based on the expectation of the variance. The Court of Appeals has warned against such a miscalculation in the case of Douglaston Civic Association v. Galvin:

We would merely add that in affirming the decision below we do intend to infer our approval of the Appellate Division's statement that the Board acted correctly in "apparently concluding that a projected return of income, for a parcel for which a variance is sought, may be based on present value, rather than its original cost." While present value most often will be a relevant basis from which the rate of return is to be calculated, it is important that the "present value" used be the value of the parcel as presently zoned, and not the value that the parcel would have if the variance were granted.


98. In Crossroads, the Court of Appeals said that the "basis or yardstick" for measuring reasonable return may be either the "initial investment of Crossroads or the present value of the property, 4 N.Y.2d 39, 149 N.E.2d 65, 172 N.Y.S.2d 129. See Douglaston Civic Ass'n v. Galvin, 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974). In Application of 80-21/37 138th Street, Queens, BSA Cal. No. 831-85-BZ, the applicant held an option to purchase property zoned for four single-family houses contingent on a variance being granted for a 48 unit multiple dwelling. The BSA did not accept the purchase price quoted in the option as a measure of fair market value, and required an independent appraisal based on neighborhood comparables. The BSA also found this second figure too high and further discounted it, based on the Board's own sense of the value of single-family lots. A minimum variance was granted for 29 units, but was overturned by the Board of Estimate which found no substantiation in the record for the fair market value chosen by the BSA.


This suggests that the proper approach is to compare the owner's actual purchase price with a present value market price derived from comparables or from evidence of other efforts to rent or sell. A further complication has been added by the Court of Appeals, which went on to say:

We would note further that the original costs becomes relevant where, despite the prohibition upon converting the land to another use, the land has nevertheless appreciated significantly to the extent that the owner may have suffered little or no hardship. Jayne Estates' v. Raynor 22 N.Y.2d 417, 239 N.E.2d 713, 293 N.Y.S.2d 75 (1968).

The court, thus, seems to be coming back to the dilemma of whether to require the sale of the property to relieve the individual owner's hardship. This, as we have said, does not appear to be a proper solution since, if the property is burdened with true problems hindering its development, a sale would merely pass along the problems to the new owner. The dilemma appears to arise from too narrow a focus on the numbers alone. It should be in the context of the case as a whole, with its detailed documentation of the unique problems of the site, that the level of appropriate purchase price is recognized.

101. In Cowan V. Kern, the applicant had requested an area variance to develop a substandard residential lot. He presented an appraisal showing a value of $1,000 without the variance, and $7,500 with the variance, but presented no evidence of the actual purchase price for which the lot was acquired at a tax auction. The Court of Appeals, applying a "significant economic injury" standard for area variances, ruled that the evidence of actual purchase price was essential. Without that figure to compare to the appraised figure of $1,000, the court said: "there is no predicate which would support a finding of economic hardship. . . ." Cowan v. Kern, 41 N.Y.2d 591, 597, 363 N.E.2d 305, 309, 394 N.Y.S.2d 579, 588 (1977).


103. The failure is to focus on the uniqueness finding where problems burdening the lot are demonstrated. Jayne Estates v. Raynor is significant, since it was in that case that Judge Keating stated that evidence of uniqueness might be unnecessary where a lack of reasonable return had first been shown. 22 N.Y.2d 417, 239 N.E.2d 713, 293 N.Y.S.2d 75 (1968). Professor Anderson has speculated that this language indicates that uniqueness is no longer necessary as the basis of a variance of use. R. ANDERSON, supra note 11, at § 23.25. In New York City, however, the abandonment of uniqueness is not authorized, given the explicit language of § 72-21.

104. The key relationship between the dollars and cents evidence and the evidence of unique problems was recognized by the First Department Appellate Division in 9 White Street Corp. Assoc. v. BSA 122 A.D.2d 742, 506 N.Y.S. 2d 53 (1986); for the initial disposition see Application 9 White Street Corp., Manhattan BSA Cal. No. 921-83-BZ, 69 BSA BULLETIN 632 (May 8, 1984). The First Department overturned a decision of the New York County Supreme Court which reversed the denial of a variance for the construction of an additional residential floor on a formerly industrial building. The judge below found that the owners of
Presumably, the value of one lot would not be static in a dynamic real estate market; its value would tend to rise and fall in direct relation to values generally in the area. If the lot is truly burdened by hardship factors, its gain in a rising market would appear to be significantly less than the gains of other properties. Looked at from another angle, if the property does show a healthy gain in value in a rising market, that evidence should call into question the verity of the applicant’s argument that it is burdened by unique problems.

**Costs of Development**

The purpose of the workout is to demonstrate how the property would perform if developed and used in conformity and compliance with the zoning regulations. Therefore, the workout must demonstrate what it would cost to erect new buildings or demolish or remodel old buildings in order to achieve that situation. The figures must include both “hard” and “soft” costs of development. These present few problems of analysis, except for questions of the assumptions or “conventions” by which they are calculated.

Hard costs include the bricks and mortar costs of construction, which may be expressed in costs per square foot, or may be expressed in more detail. Greater detail is necessary in cases in which the unique problems alleged are said to cause extraordinary costs—such as expensive pilings and foundation work on a site with swampy conditions. In such a case, of course, the foundation numbers must be broken out and explained in detail, along with the engineer’s or architect’s report that states the nature of the problem and the solutions needed to overcome it.
Dispute over soft costs usually centers upon the level of these costs as a percentage of the total development cost. Since the real estate industry has conventional percentages for various types of projects, these norms are usually acceptable to the Board. If, however, the stated soft costs deviate from the norm, the Board will require that they be documented. Expert opinion on such matters as probable time period of construction and rent-up or sell-out and the probable levels of interest rates over that time would be required.

GROSS INCOME

The figures presented on projected income from conforming use or complying development may be directed towards two different types of analysis. The first assumes that the property, once developed, will command the same level of rents or sale price as comparable properties. It attempts to show that these rents or prices will not be adequate compensation because the development costs have been extraordinary. The request for relief in such a case is framed in terms of the methods for generating more income, by greater floor area, enhanced design or a more lucrative use.

In the second approach, the hardship factors are shown to emerge on the income side. While no extraordinary development costs occur, the unique problems of the site are shown to make the resulting building undesirable, so that its rents or sales price will fall.
significantly below what the market is offering elsewhere.\textsuperscript{110}

The income numbers raise similar issues as have been seen. If the property has already been in conforming use and the argument is that its actual income has been insufficient, the Board must determine whether this is, indeed, the result of the unique hardship conditions, or whether poor management or depressed conditions generally have been its cause.\textsuperscript{111} Once again, the requirement of comparables can aid the analysis. Similarly, if the numbers are projections because the property has not been in conforming use, the reliability of the projections must be tested by the comparables given.

\textbf{Operating Expenses}

Projected operating expenses must be presented in all cases in which the eventual return will be shown as a rental rate.\textsuperscript{112} These must be presented in sufficient detail to indicate any effect that the alleged hardship or practical difficulty will have on continuing operation. The total figure of operating expenses is subtracted from gross income to calculate periodic net return.\textsuperscript{113}

Operating expenses include real estate taxes, and should reflect tax abatement or other subsidy programs that are normally available for the type of project being shown.\textsuperscript{114} If the figures do not include the usual types of subsidies, an explanation of why the project is ineligible will be required.

\textsuperscript{110} In \textit{Application of 235 Forest Avenue, Staten Island, BSA Cal. No. 105-81-BZ}, there was no cost impediment to building a conforming residential building, but because the lot was sliced by a railroad embankment, the normal sized house would have no yards, making it undesirable in the suburban-style neighborhood. 67 BSA \textsc{Bulletin} 1034, \textit{aff'd}, Board of Estimate Cal. No. 68, Oct. 14, 1982.

\textsuperscript{111} See notes 17-80.

\textsuperscript{112} They are not needed if the property is of such a type as is normally sold, unless the argument presented is that the unique problems of the site will cause extraordinary operating expenses over the life of the project, and thus will affect its sale price.

\textsuperscript{113} Operating expenses may include all normal periodic expenses for the type of property at issue. In one case in which a use variance for a veterinarian's office in a one family house was requested, the Board disallowed the cost of aluminum siding as an operating expense; the cost, instead, was considered a capital improvement to be added to equity. The case was denied for a lack of showing of uniqueness as well as financial hardship. Application of 1784 West Sixth Street, Brooklyn, BSA Cal. No. 372-82-BZ, 68 BSA \textsc{Bulletin} 210 (Feb. 1, 1983), \textit{appeal filed}, Board of Estimate Cal. No. 173, Mar. 3, 1983, \textit{withdrawn}, April 28, 1983.

\textsuperscript{114} Lincoln Courts v. Deutsch, No. 2373/82 (Queens County Supreme Court, Aug. 20, 1982) (Dunkin J.).
MORTGAGE FINANCING

The BSA requires that every workout contain a calculation of the effects on periodic expenses of mortgage financing to cover a conventional amount of the total development cost. This is required no matter what the actual or projected financing situation of the project is. The intent of the Board is to remove from the workout the effects of the particular owner's business or financial status, and to achieve the theoretical purpose of comparing the property to its neighbors generally.

Having calculated what a reasonable average mortgage will be, the interest payments are subtracted as part of operating costs from the gross income to yield net return. The principal amount of the mortgage is subtracted from the total development costs to gain the "owner's equity" figure against which the net return will be compared. If the workout is calculated over time, then principal repayments are added back in to raise the "owner's equity" figure. They are not allowed to be subtracted as part of the operating expense figure.

RETURN ON EQUITY

The bottom line figure that the workout yields is a net income figure which is calculated against the "owner's equity" figure. This return on investment is then analyzed by the Board in the light of its own knowledge of market expectations.

ITEMS NOT INCLUDED

As a further method of insuring that the workout is not affected by the personal or business status of any individual, the BSA requires the exclusion of certain items that appraisers or analysts would normally include. These are calculations of depreciation and other income tax related losses or gains, and calculations of discre-

115. In Application of 154-58 West 18th Street, Manhattan, BSA Cal. No. 947-80-BZ the Board of Estimate overturned the grant of a variance giving additional floor area for a residential tower, finding that the workout accepted by the BSA improperly included a "land financing costs as part of the applicant's expenses, artificially creating a lower rate of return than that which would actually be recovered from such construction. . . ." Since in a normal project of this type, the land acquisition would be the equity figure (and had, in fact, been shown as equity here), its inclusion was double-dipping which inflated the expense calculations. 67 BSA BULLETIN 172 (Feb. 2, 1982), overturned, Board of Estimate Cal. No. 115, April 30, 1981.

116. See supra note 85; T & D Realty Co. v. BSA No. 91287/82 (New York County Supreme Court, Aug. 3, 1985) (Saxe J.).
tionary government programs not generally available in the area or for the type of project being considered. 117

MINIMUM VARIANCE

The full workout demonstrating the inability to earn a reasonable return from conforming or complying development must be matched by an additional workout demonstrating how the proposed project with the variance will perform. This workout addresses the finding of minimum variance. It is in a form that is identical to the other workouts presented, for easy comparison. Its purpose is to show how the proposal solves the unusual costs or lack of return associated with the unique problems of the site, and how these solutions lead to a final return on equity that is reasonable in the market and the general area of the property. 118

The minimum variance workout is analyzed in the same manner as the other figures presented. If it appears to show that the variance results in a windfall to the owner, the Board will require changes in the proposal—less obtrusive uses, a smaller building or different configuration—to achieve a more reasonable result. 119

SHORTCOMINGS OF THE NEW YORK CITY APPROACH

The required workouts and comparables, and the analysis conducted by the BSA appear to go far in reaching the type of property-related evidence required by the courts. The approach has significant shortcomings, however, and by its very success, it has exposed a major flaw in the concept of "unnecessary hardship" as a test for administrative relief.

The shortcomings lie in the process of presentation of the "numbers" in each application, and in the limited capability of an admin-

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117. Application of 127 East 30th Street, Manhattan.
118. In Application of 1091/1109 Third Avenue, Manhattan, BSA Cal. No. 512-82-BZ the BSA found that site conditions created an extraordinary foundation construction cost amounting to about $2 million, and indicated at the public hearing that the Board would consider the grant of a variance allowing some additional floor area over the permitted 438, 311 sq. ft. The Board also stated that the applicant's request for 115, 978 sq. ft. (10 floors above the permitted 32 story height) was excessive and would yield an unacceptable windfall beyond the $2 million cost. The applicant declined to revise its proposal, and the variance was denied on minimum variance grounds. 69 BSA BULLETIN 967 (Aug. 7 1984).
119. The Board of Estimate overturned a variance to allow a contractor's establishment in a residence district on the basis that no comparable rates of return had been shown for less intrusive uses of the lot. Application of 17 Slaight Street, Staten Island, BSA Cal. No. 212-82-BZ, 68 BSA BULLETIN 99 (May 10, 1983), overturned, Board of Estimate Cal. No. 360, June 30, 1983.
istrative board to evaluate them. First, while the workouts are
designed to place the hardship costs or deficiencies in the context of
all the other factors to illuminate their “true” impact on overall re-
turn, the complexity and variability of these other numbers can ob-
scure the meaning of the hardship factors. Often, small differences
in individual figures can work their way through the analysis to
“make or break” the project on the bottom line.120 Unexpected mar-
et development have changed the feasibility of some projects
within a short time, causing applicants to return to the Board with
an argument that the minimum return granted is not enough to yield
a reasonable return.121 Similarly, in other cases where the Board has
tailored a minimum remedy to address the hardship or practical dif-
ficulty problem, the convergence of other factors has resulted in a
windfall to the owner.122 These cases demonstrate the inaccuracy of

120. In large scale projects particularly, small changes can be significant. For example,
in a projected building of 100,000 sq. ft. a difference in projected costs of construction of $300
per sq. ft. and $315 per sq. ft., works out to $1.5 million. Since the equity invested in such a
project would normally be about 10 percent, or $3 to $4 million, the impact of the small cost
difference on return on equity is very large.

121. In two recent cases, developers returned within a short time asking for additional
variance because their original projected return was inadequate. In Application of 255-275
Park Avenue, Brooklyn, BSA Cal. No. 482-BZ, the Board granted a variance to convert an
obsolete factory into 82 residential units. At a reopened hearing, the applicant brought evi-
dence that when work commenced, the structural flaws were found to be worse than antici-
pated and the costs of reconstruction far higher. Since it was the structural flaws that the
Board had found to be the hardship, additional variance in the form of an increased number of
apartments (125) and zoning rooms was determined to be justified. 70 BSA BULLETIN 566
(April 30, 1985). A different result was reached however, in the Application of 127 East 30th
Street, Manhattan, BSA Cal. No. 961-BZ, in which the inability of the developer to carry
forward the project was found by the Board to be the result of market factors. Such changes
did not affect the Board's earlier finding of minimum variance, and the additional apartments
and zoning rooms requested were denied. 72 BSA BULLETIN 122 (Jan. 29, 1987).

122. In Application of 61-48 167th Street, Queens, BSA Cal. No. 284-BZ, a vari-
ance was granted to permit construction of a single family house on an undersized, 20 foot
wide lot. Without the variance, the lot could not be used. The owner had purchased the lot at a
city auction. Upon receipt of the variance, the owner placed the lot, undeveloped, on the mar-
ket for $149,000 (N.Y. Times, Nov. 28, 1986 at D22, col. 2,) (Classified Advertisements). The
BSA refused to reopen the case and the Board of Estimate declined jurisdiction. Despite the
seeming windfall, the Board had determined that the bulk variance was, in fact, the minimum.
71 BSA BULLETIN 1559 (Nov. 25, 1986), jurisdiction declined, Board of Estimate Cal. No.
221, Jan. 8, 1987.

In Application of 48/64 Park Place, Brooklyn, BSA Cal. No. 25-84-BZ, 70 BSA BUL-
LETIN 1444 (Feb. 5, 1985), the variance was sought by the contract vendee of a former parochial
school, who proposed its enlargement and conversion to residential use. The Board accepted
the contract price of $800,000, contingent on the grant of the variance, as representing the
minimum variance value. It was revealed in subsequent litigation that the contract vendee had,
simultaneously with his presentation to the BSA, signed an undisclosed second contract for
resale (without any work undertaken) for $2.1 million. Rende and Esposito Consultants, Inc. v.
the process.

A second shortcoming lies in the drift toward a uniform workout presentation in every case. While the Board has refrained from publishing a standard form, knowledgeable applicants and their financial advisors have learned the system of “what the Board will take.” Thus, it becomes difficult to keep the financial evidence from becoming an artificial, fill-in-the-blanks procedure, rather than an accurate exposition of the owner's perception of the problems and potential of his or her property.

These shortcomings must be met by a careful awareness that the financial evidence is only an illustration of the hardship or practical difficulty, not the problem itself. In every case, the justification for the variance must be decisively demonstrated by evidence of unique problems inherent in the lot. The variance is not meant to be a government guarantee against loss or poor return, for the real estate market remains a capitalist system and investors are expected to shoulder its risks. It is also not meant to be an economic or social development tool. Worthy enterprises that have outgrown their pre-

St. Augustine's Church, N.Y.L.J., Jan. 10, 1986, at 13 col. 5.

123. It has been the practice of the BSA, through its staff, to require applicants to revise their financial evidence into the “proper” format prior to the review by the commissioners and the public hearing. Several Community Boards and neighborhood organizations have complained that this practice amounts to the BSA making the case for the applicant.

124. The problem was evident in the case of Galin v. Board of Estimate, 72 A.D.2d 114, 423 N.Y.S.2d 932 which appealed Application of 113 East 39th Street, Manhattan, BSA Cal. No. 13-77-BZ. The BSA granted a variance for the expansion of a brownstone row house occupied by a group dental practice into the entire rear yard. The variance was overturned by the Board of Estimate, which was reversed by the New York County Supreme Court but subsequently sustained by the Appellate Division and the Court of Appeals, both with vigorous dissents. The architect representing the owner before the board clearly stated the reason for making the variance, saying that the 24 staff medical practice was “bursting at the seams.” The architect stated: “It's a question of financial hardship, it's a question—they don't have enough space;” BSA hearing transcript Galin, 72 A.D.2d at 117, 423 N.Y.S.2d at 934. Such a business need basis for a variance was not proper, therefore, the BSA required the submission of a financial workout which said that the cost of space used by the doctors was $26 per square foot when the “going rate” for comparable space was $9 per square foot. Galin, 72 A.D.2d at 117 423 N.Y.S. at 934. The hypothetical workout using the $9 figure demonstrated a loss of $16,000 for the year, although this figure was contradicted by an “actual” workout also submitted which assigned an income of $45 per sq. ft. to the doctors space, and showed a profit of $25,000, and by copies of the realty company ledger book for the same year showing a net profit of $16,500. The BSA declared that there was a hardship, however, stating in its resolution that the medical partnership owned the house next door but could not expand there because it was occupied by rent controlled tenants who could not be displaced. 62 BSA BULLETIN 890 (Oct. 4, 1977). The Board of Estimate found that the numbers were unsubstantiated and that the true reasons for the variance were not permissible. Board of Estimate Cal. No. 330, May 25, 1978, sustained as Galin, 72 A.D.2d 114, 423 N.Y.S.2d 932, aff'd, 52 N.Y.2d 869, 418 N.E.2d 673, 437 N.Y.S.2d 80 (1981).
sent quarters must seek new locations, and desirable new enterprises must bear the burden of rent or property cost that all others face. Otherwise the market system becomes distorted. The variance is meant only to provide relief for a narrow set of problems related to lot conditions and to design or building function which the legislature could not foresee when it enacted zoning regulations for each district.

THE FLAWED CONCEPT OF "UNNECESSARY HARDSHIP"

The attempt by the Board of Standards and Appeals to require a strict, and disinterested feasibility analysis in every case has revealed a deeper conceptual flaw in the concept of hardship: that is, after the zoning system has been in place for a number of years, how can any hardship exist that is not self-created? This is a question that has troubled several boards and courts, and has led to a rule in some New York jurisdictions that an owner who has purchased property with knowledge of the zoning cannot claim hardship.125 This has never been the holding in a New York City case, because of the contrary rule in § 72-21(d). Yet it should not be held immediately inapplicable, because the rule appears to be a mere shorthand for the more difficult problem of analysis of the purchase price or fair market value.126

In a free market system, one would expect to find that the value of real estate is cyclical—as various neighborhoods are desired for productive use, values rise and improvements are made; then as technologies and fashions change the improvements depreciate to a point

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126. In Cowan v. Kern, what troubled both the Appellate Division and the Court of Appeals was the fact that the actual purchase price of an undersized parcel had not been put into the record. What was shown was that a neighboring owner had offered $1,000 for the property undeveloped, and that if the variance were granted, the lot would be worth $7,500. The fact that it had been foreclosed for unpaid taxes would indicate that for an earlier owner, it was worthless. Any subsequent purchaser, except the neighbor who would value it as a yard, could take it only as a speculation that the variance would be granted, or that he or she could profit from sale to the neighbor. Thus, the court held that without the tax auction price, the $1,000 offer of the neighbor could not be evaluated. Cowan v. Kern, 41 N.Y.2d 591, 363 N.E.2d 305, 394 N.Y.S.2d 579 (1977). A purchaser with knowledge is in the same position as the purchaser in the Cowan case, if he or she takes for any value beyond zero (or a discount to represent the level of difficulty), he or she is speculating on the variance in every case.
at which they are liabilities which must be removed or rebuilt and formerly subdivided lots must be reassembled to make the property productive again. The investor who enters at this point should be expected to offer a purchase price that is significantly discounted because he or she must overcome a series of problems—the need to demolish, rehabilitate or “build around” existing structures, and the need to consolidate small lots—in order to realize an appropriate development. A purchaser who cannot earn a reasonable return has either failed to adequately discount the price, or has anticipated escape from the limitations imposed by zoning. In either circumstance, any hardship is self-created. The only applicant for a variance who could be expected to present a “true” hardship is that owner who holds the property at the time the zoning regulation has been enacted, since he or she could not anticipate the zoning limitation.

Only in a rare case in which the unique problem factors are not readily discoverable would a genuine finding of hardship be recognized. Such cases would involve factors (perhaps underground conditions), that could not be known at time of purchase but would only emerge in the process of preparing a design or actually commencing construction. They would be factors whose costs could be easily documented as extraordinary and evaluated by an expert board of appeals without any elaborate presentation of financial evidence.

127. A typical case involving mismatch of the purchase price with the anticipation of return involves an occupied building in a desirable neighborhood, into which the owner wishes to put an additional, non-permitted use. In the Application of 347 East 65th Street, Manhattan, BSA Cal. No. 283-86-BZ, the owner purchased a tenement building occupied by rent controlled and rent stabilized tenants. In his application to the BSA to allow a commercial use on the basement floor, the owner demonstrated that with conventional financing, the building would yield only a 2.9 percent return on equity. Adding the variance use would increase this return to 3.1 percent. In response to the Board’s question of why the difference was so small as to be insignificant, it was explained that the purchase price of such a building is calculated merely as a multiple of its rent roll (by a common capitalization rate). Increasing the annual rent with the new use would lead the financing bank to increase the market value of the property by the standard multiple and increase the level of debt service correspondingly. Of course, the problem lay in the fact that the building was not purchased with a conventional financing package, and its true purchase price had not been based on an expectation of return from controlled rents. Rather, the owner took the property with both an expectation of future gain as apartment became decontrolled when tenants left, and an expectation of continued escalation of property values in Manhattan’s desirable Upper East Side. 72 BSA BULLETIN 225 (February 24, 1987).

128. See supra note 97.

129. In Application of 97 Columbia Heights, Brooklyn, BSA Cal. No. 97-83-BZ, the subterranean conditions and the unusual foundation work necessary were presented in an engineer’s report with accompanying costs estimates that were evaluated by the architects and
Thus, if a rational, capitalist real estate investment system is assumed, then in every case of hardship the market value must be zero, and in every case of genuine practical difficulty it must be discounted to the point where it just offsets the extraordinary costs of development. Any uncompensated cost or burden that is left must either stem from undiscoverable factors, or must be the result of the investor's own bad judgment.\textsuperscript{130}

The Board of Standards and Appeals has never interpreted the unnecessary hardship standard to have so narrow a result. Like the courts, its decisions have fluctuated, sometimes strictly viewing the variance as a "safety valve to prevent the taking of property," but at other times allowing its use as a method of flexibility to achieve development or occupancy of property that otherwise would remain underutilized, or to achieve a non-controversial expansion for a business or a homeowner.

If it were clearly determined that the board may allow deviation from the rigid district system in response to reasonable motivations and expectations of investors, then the analysis of standardized workouts attempting to compare the "hardship" property with "normal" properties, would have little meaning. Instead, the Board would be seeking to evaluate as clearly as possible the perceptions of the individual investor and to compare these to a "normal" or "reasonable" scenario as would have been anticipated by the legislative body when it enacted the zoning for the area. To the extent that the individual investor's situation does involve unanticipated problems and acceptable solutions to them, the variance would be justified. In this type of system, what would be wanted would be "true" illustration of the owner's or developer's situation, including the actual purchase price, the actual level of financing and all relevant business-related and tax-related calculations. These would be evaluated not as an illustration that the property would otherwise be valueless or useless, but would be used to show whether a rational or realistic approach to the development of a problem property was, indeed, being under-

\textsuperscript{130} The concept that the variance must not offer additional compensation is made clear in cases in which an undersized lot was created as the result of condemnation for a road widening. Several courts have held that the amount of the award is an essential item of evidence in a subsequent variance application. If the award rendered the owner whole, then a variance based on the lack of value and inability to use the residual land would represent an unjustified double award. Coliseum Builders, Inc. v. Kennedy N.Y. L.J. June 2, 1986 col.2 at 114; Aclerno v. Barr, 28 A.D.2d 541, 279 N.Y.S.2d 601 (1967), See also Zulhofiska v. Board of Zoning Appeals, 75 A.D.2d 604, 426 N.Y.S.2d 825 (1980).
taken. With such a full record, past laxity and abuses might be avoided, while present rigidity and formalism could be relaxed.\textsuperscript{131}

Such a readjustment to the process of financial analysis could be undertaken if the law were to continue to make clear that the key to the variance analysis must remain the uniqueness finding.\textsuperscript{132} When solid and clear evidence of development problems that are unique to the site is presented, the form of the financial evidence becomes less relevant while its ability to define and support the evidence of unique problems becomes the crucial issue. The financial evidence would then be seen not as the embodiment of the "unnecessary hardship" finding, but more clearly as a method of presenting evidence that illustrates development problems and a reasonable solution to them.

This approach could be adopted without a change in the law.\textsuperscript{133} As has been demonstrated above, the case law cannot coherently be read for strict and binding rules governing the presentation of evidence in every case. Rather, it makes more sense when broken down into a series of pertinent concerns and issues that are resolved in somewhat different ways in the different patterns of cases.

The experience of the Board of Standards and Appeals should demonstrate that a uniform set of questions is appropriate in all variances—with the five findings of § 72-21 providing an appropriate outline. Further, it should demonstrate that uniform evidence in response to those questions cannot be expected, and when it is required, often leads to a contrived record. There is no automatic substitute for thorough analysis and conscientious judgment by the Board members, and procedures which require them to fully hear and debate all issues and fully reveal their thinking provide the best method of insuring that legally sufficient and appropriate standards are applied.

\textsuperscript{131} This approach would require a corresponding responsibility of the Board to clearly spell out its method of analysis, and specific findings of the sufficiency or insufficiency of the facts presented. Under its present system, the "work sheets" prepared by Board staff to evaluate the applicant's financial submissions do not appear as part of the record of the case and are not seen by the public or by reviewing judges on appeal.


\textsuperscript{133} \textit{New York City Zoning Law} § 37 2-21 makes it clear that the finding of "no reasonable return" must be shown to flow from the finding that there are unique problems on the site.