

Need Relief? Bored of Adjustment and Tools of the Trade

Presented by:

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Planning and Zoning Commission vs. Zoning Board of Adjustment

- Zoning Board of Adjustment
 - Quasi-judicial body
 - Deals with issues on a parcel-by-parcel basis

Zoning Board of Adjustment

- Local Government Code
 - §§211.008-211.011
- At least five (5) members
- Council adopts procedures for appointment
 - Appointment by City Council
- Serve 2-year terms
 - Removal for cause and hearing
 - Vacancy for unexpired term
- Alternates may be appointed by City Council
- BOA, ratified by City Council, creates the Rules
- Compliance with Texas Open Meetings Act



The Statutory Requirements



- All meetings of the board shall be open to the public.
- The Board shall keep minutes of its proceedings that indicate the vote of each member on each question or the fact that a member is absent or fails to vote.
- The Board shall keep records of its examinations and other official actions.
- The minutes and records shall be filed immediately in the Board's office and are public records.

Board of Adjustment Has Some Authority



Zoning Board of Adjustment

- LGC Sections 211.008-211.011
- Decide appeals from a decision of an administrative official regarding the Zoning Ordinance
 - May reverse, affirm, or modify an administrative official's order, requirement, or decision
- Authorize a variance, if:
 - Public interest is served;
 - Substantial justice is achieved; and
 - Unnecessary hardship would otherwise result.
- Decide other matters authorized by ordinance (Special Exceptions, etc.)

The Authority of the BOA

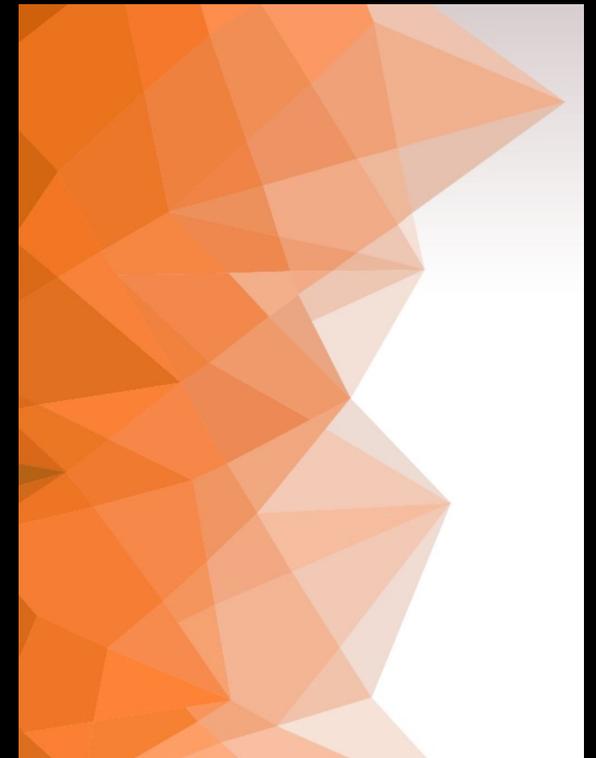
- The Board may hear and decide other matters authorized by an ordinance adopted under this subchapter.
- The Board may reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decision, or determination, and for that purpose the Board has the same authority as the administrative official.

The Authority of the BOA

- The concurring vote of 75 percent of the members of the board is necessary to:
 - Reverse an order, requirement, decision, or determination of an administrative official;
 - Decide in favor of an applicant on a matter on which the Board is required to pass under a zoning ordinance; or
 - Authorize a variation from the terms of a zoning ordinance.

Scope of Authority

- The Board may reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decision, or determination, and for that purpose the Board has the same authority as the administrative official.





What the Board of Adjustment CANNOT do

- Grant a “use” variance
- Grant an increase to the variance requested
- Overturn a staff decision, authorize a variance from the zoning ordinance, or approve an applicant’s request with less than 75% of the affirmative votes of the members.



What the Board of Adjustment CAN do

- Interpret the Zoning Ordinance and how to apply the facts
- Grant special exceptions when authorized by an ordinance
- Grant variance that will:
 - Not be contrary to public interest
 - Where due to special conditions literal enforcement would result in unnecessary hardship
 - So that the spirit of the ordinance is observed, and substantial justice is done
- Board of Adjustment is the escape valve for the Zoning Ordinance when land does not fit ordinance mold

Variations

Unnecessary Hardships

- WHAT THEY ARE NOT
 - Property that cannot be used for its highest and best use
 - Financial or economic hardship
 - Self-created hardship
 - The development objectives of the property owner are or will be frustrated

Variances

Findings Necessary to Grant Variances

**NO VARIANCE CAN BE
GRANTED UNLESS**

Variances

Findings Necessary to Grant Variances

- Not be contrary to public interest
- Where due to special conditions literal enforcement would result in unnecessary hardship
- So that the spirit of the ordinance is observed, and substantial justice is done

Findings of Fact - Example Criteria

Extraordinary Conditions

- That there are extraordinary or special conditions affecting the land involved such that strict application of the provisions of this Code will deprive the applicant of a reasonable use of the land.
- For example, a variance might be justified because of topographic or other special conditions unique to the property and development involved, while it would not be justified due to inconvenience or financial disadvantage.

Preservation of a Substantial Property Right

- That the variance is necessary for the preservation of a substantial property right of the applicant.

Findings of Fact - Example Criteria

Substantial Detriment - That the granting of the variance will not be detrimental to the public health, safety, or welfare, or injurious to other property in the area, or to the City in administering this Code.

Other Property - That the conditions that create the need for the variance do not generally apply to other property in the vicinity.

Applicant's Actions - The plight of the owner of the property for which the variance is sought is due to unique circumstances existing on the property, and the unique circumstances were not created by the owner of the property.

Findings of Fact - Example Criteria

Future Land Use Plan - That the granting of the variance would not substantially conflict with the Future Land Use Plan and the purposes of this Ordinance.

Utilization - That because of the conditions that create the need for the variance, the application of this Code to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property.

Additional Hardship Criteria

LGC Sec.211.009 (b-1)

- The Board may consider the following as grounds to determine whether compliance with the ordinance as applied to a structure that is the subject of the appeal would result in unnecessary hardship:
 - The financial cost of compliance is greater than 50 percent of the appraised value of the structure as shown on the most recent appraisal roll certified to the assessor for the municipality under Section 26.01, Tax Code;
 - Compliance would result in a loss to the lot on which the structure is located of at least 25 percent of the area on which development may physically occur;
 - Compliance would result in the structure not being in compliance with a requirement of a municipal ordinance, building code, or other requirement;
 - Compliance would result in the unreasonable encroachment on an adjacent property or easement; or
 - the municipality considers the structure to be a nonconforming structure.

Insufficient Findings of Fact - Example

- The following types of possible findings alone do not constitute sufficient grounds for granting a variance:
 - That the property cannot be used for its highest and best use.
 - That there is only a financial or economic hardship.
 - That there is a self-created hardship by the property owner or its agent.
 - That the development objectives of the property owner are or will be frustrated.
 - The fact that property may be utilized more profitably should a variance be granted.



Finding of Fact for Zoning Ordinance Variance

Applicant:

Address:

Upon giving public notice and conducting a public hearing on this variance request in accordance with Chapter 98 of the Zoning Ordinance, the Board of Adjustment adopts these specific, written findings as follows:

	Yes	No
1. That there are special circumstances or conditions to the property involved; and		
2. That the strict application of the terms of the Ordinance will impose upon the applicant unusual and practical difficulties or particular hardship.		
3. That literal interpretation of the Ordinance will deprive the applicant of rights commonly enjoyed by other properties in the same district under the Ordinance; and		
4. That the proposed variance is in harmony with the Ordinances' general purpose and intent; and		
5. That the granting of the variance will not merely serve as a convenience to the applicant; and		
6. That the granting of the variance will alleviate some demonstrable and unusual hardship or difficulty or difficulties for the applicant; and		
7. That granting the variance will not confer upon the applicant any special privilege that is denied by the Ordinance to other similarly-situated properties in the same district; and		
8. That the variance is in the public interest and will ensure that the public substantial justice will be done.		
9. That the surrounding property will be properly protected.		
10. Remaining regulations are adequate to govern the project.		

All findings must be determined in the affirmative for the variance to be granted.

With _____ members present, and upon a vote of _____ for, _____ against, _____ abstaining, the variance is hereby: _____ granted _____ denied



Special Exceptions

- Special exceptions must be specifically set forth and be found in the ordinance provisions themselves.
- Ordinance should include a procedure for processing and granting special exceptions.
- Criteria for evaluating special exceptions should be included in the ordinance. Criteria does not have to require an unnecessary hardship.
- Special exceptions can be used as a relief valve for regulations where the City wants the ability to grant relief or alternative compliance.
- Special exceptions cannot create an incompatibility.



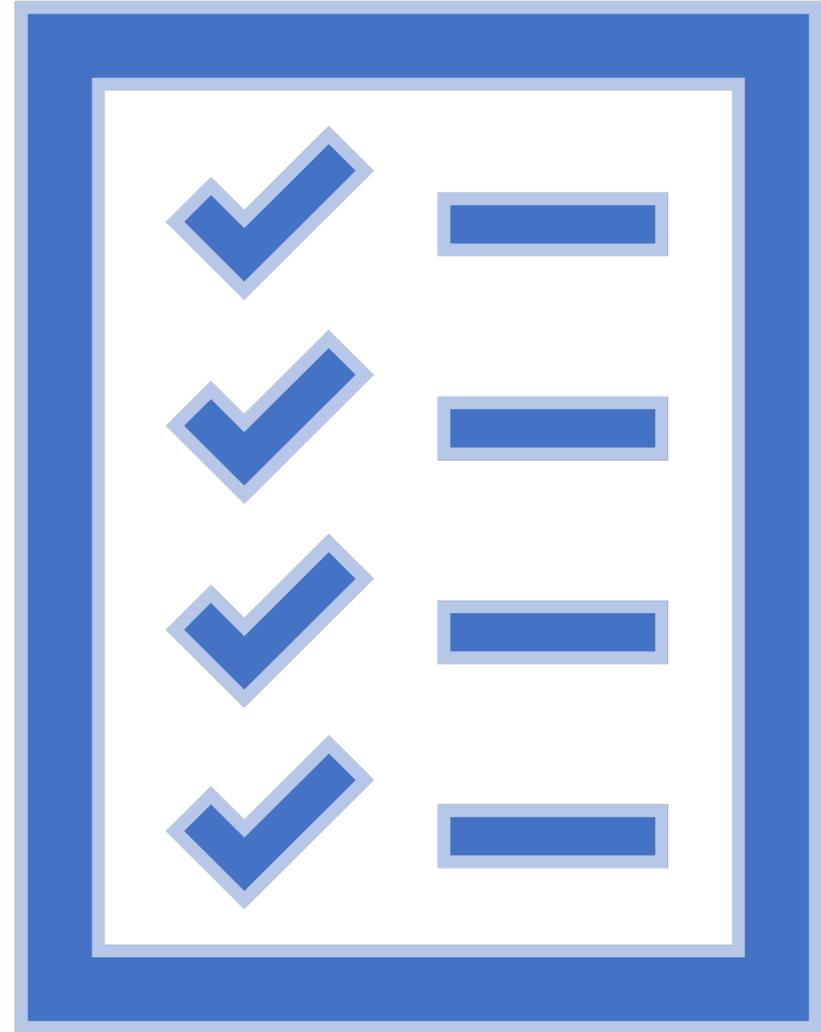
Special Exception Examples

- Reduce required off-street parking if it can be shown that the required minimum as herein established will not at any time be necessary because of the character of the proposed uses at a probable limited quantity of employees, clients, customers or tenants.
- Permit such modification of the height, yard, area, coverage, and parking regulations as may be necessary to secure appropriate development of a parcel of land that differs from other parcels in the district by being of such restricted area, shape, or slope that it cannot be appropriately developed without such modification.
- Reduce, substitute, or allow alternative screening and buffering between districts when the proposed alternative provides equal or greater mitigation of nuisances created by the non-residential or multi-family development and result in an equal or greater level of compatibility between the uses.

Variance vs. Special Exception

- Variances have been defined as suspensions of the literal enforcement of the ordinance against a particular use. Therefore, a variance is a permission to use land in a manner prohibited by the ordinance, while a special exception allows a deviation from the ordinance that is specifically provided for in the ordinance.
- A variance may be granted where the application of the law or use may present a practical difficulty or unnecessary hardship, and the literal enforcement of the regulations may be disregarded.
- Special exception must be specifically set forth and be found in the ordinance provisions themselves and may not be altered.
- Special exceptions and variances are not mutually exclusive, and it is possible for relief requests to qualify for both processes.

Process and Procedures



Zoning Board of Adjustment

LGC Sections 211.008-211.011

- Who may appeal an administrative decision **TO** the Board? (not related to a specific application, address, or project)
 - A person aggrieved by an administrative official's decisions.
 - Aggrieved means - interested, affected, or aggrieved in such a way that is different than a member of the general public.
 - Any officer, department, board, or bureau of the municipality affected by an administrative official's decision.

Zoning Board of Adjustment

LGC Sections 211.008-211.011

- Who may appeal an administrative decision **TO** the Board? (related to a specific application, address or project)
 - A person who filed the application that is subject to the decision; or
 - An owner or representative of the property that is subject to the decision; or
 - A person aggrieved by the decisions and owns property within 200' of the subject property
 - Any officer, department, board, or bureau of the municipality affected by an administrative official's decision.

Board Procedures for Appeals



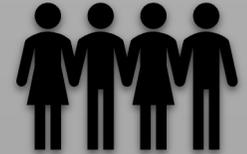
Appeal must be filed with board within 20 days after the administrative decision is made.



The grounds for the appeal must be specified.



Official shall immediately transmit the record to the board.



An appeal stays all proceedings unless such a stay would cause imminent peril to life or property.



Board Procedures

Appeals shall be set at a reasonable time for the appeal hearing and shall give notice of the hearing and due notice to the parties in interest.

Parties may appear in person or by agent/attorney.

The board shall decide the appeal within a reasonable time (no later than 60 days after appeal is filed).

- The concurring vote of 75 percent of the members of the board is necessary to:
 - Reverse an order, requirement, decision, or determination of an administrative official;
 - Decide in favor of an applicant on a matter on which the board is required to pass under a zoning ordinance; or
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**Super
Majority**



Don't get Bored and Pay Close Attention..... COURT APPEAL

Any person or persons, jointly or severally, aggrieved by any decision of the Board of Adjustment or any taxpayer, or any officer, department, board, or bureau of the city may present to a court of record as provided by law a petition, duly verified setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within ten (10) days after the filing of the decision in the office of the board.

Legal Pitfalls to Avoid



- Inconsistent standards of review.
- Work to ask similar and consistent initial questions and then follow where the responses and evidence takes you.
- If a proponent has presented no evidence or testimony that supports the legal requirements for a special exception or variance and you have no questions for them, you have fallen short of your responsibilities to the city if you grant their request.
- The general rule is that, to be considered, a variance must be supported by a hardship while a special exception must not create an incompatibility.
- The ordinance should establish guidelines for the granting of either to assist the board with its review.

Legal Pitfalls to Avoid



Cases that come before the board should be given the same review and consideration and held to the same standards and scrutiny regardless of the **location** within the City.

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Practical Tips

1. Be cautious - don't speed up the process.
2. Treat all applicants similarly.
3. Make proper findings.
4. Frame comments in objective terms.
5. Be attentive!
6. Avoid personal attacks.
7. When in doubt, ask your attorney.

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Questions?