

DUTIES AND ROLE OF THE ZONING BOARD OF ADJUSTMENT

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The Zoning Board of Adjustment is a quasi-judicial board which has the power to alter and/or terminate property rights within the bounds of the law. All actions taken before the Board can have significant legal repercussions and neither the City nor any individual should pursue any action without the advice and representation of an attorney. The following information is presented as a general guide for those who enforce and administer zoning ordinances and should not be interpreted as legal advice or opinions.

Responsibilities

The Board of Adjustment's role is to:

- (i) provide equity for individuals who, through no fault of their own,, would suffer injury if the Zoning Ordinance were strictly applied to their unique situation;
- (ii) grant special exceptions when provided by the Zoning Ordinance;
- (iii) hear appeals to decisions of administrative officials; and
- (iv) decide other matters delegated to them by the governing body.

In some instances landowners have sought and received Board approval for a land use change and varying platting regulations. This has been clearly decided by the courts to be an improper and invalid exercise of Board powers, as the Board serves a judicial role, and cannot act in a legislative capacity. Use determinations are legislative and cannot be delegated to the Board, even under the fourth option.

A particularly troublesome issue faced by many Boards is deciding when to approve a variance to the terms of the Zoning Ordinance. The Ordinance itself can assist by listing provisions which can be varied, such as required yards, required parking, building setbacks, height limitations, lot coverage, and the like. If no guidance exists in the Ordinance to limit the variance power, the Board may be required to hear and decide variance requests to any part of the Ordinance.

A variance is not authorized merely for the convenience or financial benefit of the appellant.

Powers

The zoning board of adjustment is a quasi-judicial board created by the City Council under authority granted by Article 211.008 of the Local Government Code. Under this section of the Local Government Code, the city "may" provide for a board of adjustment, but is not obligated to create a Board. (Tex. Local Gov. Code, § 211.008 [hereinafter Texas Local Government Code referred to as "LGC"]). A city with a population of more than one million may appoint several panels to the board of adjustment. Only one panel, however, may consider a particular case.

The board of adjustment must have five members who are appointed for terms of two years, and the city may by charter or ordinance, provide for alternates (*Id.* at § 211.008 (b,c)). All cases before the Board must be heard by at least seventy-five percent of the members. *Id.* at 211.008(d)). The city's zoning ordinance creates the board and provides the powers which include the following as set forth in the Local Government Code:

1. To hear and decide appeals that allege an error in an order, requirement, decision, or determination made by an administrative official of the city in the enforcement of zoning regulations. &. at 211.009). The Board of Adjustment may only *decide* issues within the Zoning Ordinance.

In reviewing an appeal, the Board may reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which the appeal is taken and make the correct order, requirement, decision, or determination__

The Board of Adjustment may only exert jurisdiction to the extent allowed by State Law and the specific provisions written into the Zoning Ordinance. If the regulation is not within the Zoning Ordinance, such as may occur if the city adopts a separate noise ordinance, junk car ordinance, or other regulation, the Board of Adjustment lacks jurisdiction.

An appeal to the Board may be brought by (1) a person approved by the decision of the administrative official, or (2) any officer, department, board, or bureau of the city affected by the administrative official's decision.

The Local Government Code provides that the person filing the appeal must file a notice of appeal stating the specific grounds for the appeal with the Board and with the administrative official who rendered the decision. Ind. at 211.010). The official, upon receipt of the notice, must immediately transmit to the Board all the papers constituting the record of the administrative official's action. (4)

Filing the appeal stays all proceedings in furtherance of the action unless the official whose action is being appealed, certifies in writing to the Board the appropriate facts supporting his opinion that a stay would cause imminent harm to life or property. If such is provided, the proceedings may only be stayed by a restraining order granted by the Board or a court of record on application, after notice to the official, if due cause is shown.

Upon receipt of the notice of appeal, the Board must set a reasonable time for the appeal hearing and give public notice of the hearing and due notice to the interested parties. (Id.) The Board must decide the appeal within a reasonable time. a4.)

2. To hear and decide special exceptions to the terms of a Zoning Ordinance

when the Ordinance requires the Board to do so. (Id.)

A special exception allows a property owner to put his property to a use under the zoning regulations in accordance with specific conditions. Moody v. City of University Park, 278 S.W. 2d 912 (Tex. Civ. App. — Dallas, 1955, writ res. n.r.e.) The zoning ordinance must specifically set forth the special exceptions and provide guidance to the Board for approval. Many zoning ordinances do not contain the specific language and direction required to provide the authority for the board to act and, in such cases, no special exceptions may be granted. These are not the same as special permits or conditional use permits, which may be granted by the planning and zoning commission or city council under the terms of the adopted ordinance.

Special exceptions might include allowing temporary use of property for the sales office in a newly developing subdivision; allowing a concrete batch plant or asphalt plant to operate during the construction of a project; a temporary banner for a concert; or approval of home occupations in a residential area. Each instance must be specified in the Ordinance.

3. Authorize in specific cases a variance from the terms of the Zoning Ordinance when the variance is not contrary to the public interest and, due to special conditions, a literal enforcement would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done.
a_4.)

As opposed to special exceptions which allow an owner to use his property for a specific use, a variance allows him to use his property in a manner generally forbidden by the zoning ordinance, as for instance, by varying the setbacks. Congregation Committees, North Ft. Worth Congregation, Jehovah's Witnesses v. City Council of Halton City, 217 S.W. 2d 700 (Tex. Civ. App. -- Ft. Worth, 1956, no writ.)

A property owner who wants to construct a home but because the city widened the street in front of his lot, he no longer has enough depth to meet the front yard setback may request a variance to the zoning regulations front yard setback. If it were not for the loss of land suffered by the street widening, there would be no problem. The Board of Adjustment may only authorize variances which cure the effect of such unique, non self-created hardships that do not grant special advantages - or changes in uses not otherwise available to other similarly situated properties. The following are criteria which the board of adjustment considers in cases where a variance is requested:

- a. The hardship must not be self-created (for example, platting of tracts into irregularly shaped lots);
- b. The property must have specific conditions in which the literal enforcement of the Ordinance would create a hardship for the property owner different from his neighbors or other similar properties;
- c. The variance must not result in granting special advantage to the property not also available to other similar properties;
- d. The variance must not result in allowing a change of use of the property not permitted within the zoning classification of the property.

In some cities, as specifically outlined in the zoning ordinance, the board may be empowered with additional powers including the following: (i) to interpret the zoning ordinance when disagreement arises; (ii) to decide how unclassified uses should be treated; and, (iii) to

allow for the expansion, change, or termination of nonconforming uses. In many older zoning ordinances,

there may be no provision for a use such as a video game parlor, water slide park, etc. The ordinance may grant the board of adjustment the power to classify such uses.

4. To hear and decide other matters authorized by a zoning ordinance.

An amendment by the Texas legislature several sessions ago allows councils to grant to boards of adjustment authority to hear other matters. Such matters must be specifically enumerated in the ordinance. One of the more common matters reviewed by boards, as set forth in zoning ordinances, concerns the review of nonconforming uses.

"Nonconforming uses" are uses that were authorized under one set of regulations, but not permitted under current regulations. Inevitably, whenever a city enacts a new ordinance, or substantially amends an existing zoning ordinance, some uses will be deleted as allowed uses in some districts. Similarly, whenever development standards or building codes are enacted or amended, some existing developments and buildings will be impacted

Many current zoning ordinances provide special regulations which address nonconforming uses and, to a lesser degree, nonconformities as to development and building standards. These regulations generally provide, (i) the ability of the nonconformity to continue until abandoned, change to a conforming status, or terminated, (ii) the effect of destruction, (iii) the definition of "abandonment," (iv) the expansion of a nonconformity, (v) the change of a nonconformity to a conforming status, and (vi) the termination of nonconforming use by the Board of Adjustment. The inability to reconstruct a nonconformity and the ability of the city to terminate nonconforming uses are the two most troubling aspects of nonconformity.

Nonconforming *uses* are generally protected by zoning ordinances based on the premise that the owner acquired some vested rights having relied in good faith on the regulatory scheme and incurred substantial costs in construction of the improvements. However, as identified by Texas Courts, "all property is held subject to the lawful exercise of a municipality's power" Town of Renner v. Wiley, 458 S.W. 2d 516 (Tex. Civ. App. - Dallas, no writ, 1970). The same is applicable to nonconforming uses.

Establishment of a Nonconforming Use

The essential determination in establishing nonconforming rights is the requirement that the use was a legal, pre-existing use. This issue will be a question of fact. Generally, the nonconforming status will result from one of two events: either annexation or an amendment to a current regulation. Establishing that a condition existed prior to a change in an ordinance is probably easiest demonstrated by an issued building permit and certificate of occupancy.

Effects of Destruction

Zoning ordinances often provide that a nonconforming use will lose its status upon destruction of the structure. What differs among cities is the degree of destruction needed for a use to lose nonconforming rights. Some cities will state that the nonconforming status is lost upon total destruction, while others only require fifty or seventy-five percent destruction in order to lose the nonconforming status. Some cities, such as Dallas, will only acknowledge the loss of nonconforming status if the destruction was the result of a willful intent of the owner. Many cities will only allow reconstruction of all or part of a demolished nonconformity upon approval of the board of adjustment.

Abandonment

Generally, a nonconforming use will lose its status upon abandonment of the use. Texas courts have required a showing of (i) an intent to abandon, and (ii) some overt act or failure to act that carries the implication of abandonment (Rosenthal v. City of Dallas, 1948, writ ref'd n.r.e.).

Expansion of a Nonconforming Use

Most zoning ordinances permit the expansion of nonconforming uses upon the approval of the board of adjustment. Texas courts have upheld the board's authority to permit the expansion of nonconforming uses. Boelune Bakery v. City of San Angelo, 185 S.W.2d 601 (Tex. Cir. App. - Austin, 1945), rev'd, 144 Tex. 281 (1945). The zoning ordinance will generally set forth the process and may prescribe standards by which the board is to act.

Change from Nonconforming to Conforming

Rezoning a nonconforming use to a conforming use will terminate the nonconforming status of a property. Consequently, the use may not later be turned back into a nonconforming

use. Often rezoning is undertaken to correct an error in the current zoning regulations. Kenny v. Kelly, 254 S.W. 2d 535 (Tex. Civ. App. - San Antonio, 1953, no writ).

Termination of Nonconformity

Easily the most controversial aspect of nonconformity is the city's ability, through its board of adjustment, to terminate nonconforming uses through a process by which the owner of the use has an opportunity to recoup his investment in the use. Texas courts have long upheld this authority to the city. City of University Park v. Brenners 485 S.W.2d 773 (Tex. 1972). The court in Brenners stated that "municipal zoning ordinance requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police power; and that property owners do not acquire a constitutionally protected vested right in property uses once commenced or zoning classification once made." Id. at 778. The court further held that a program whereby the owner is afforded the opportunity to recoup any loss in property value was not an abuse of municipal discretion. Id. at 779. This process has been referred to as amortization.

Subsequent cases have attempted to clarify the factors the board can consider in the amortization process. In Murmur Corp. v. Board of Adjustment of the City of Dallas, 1986 writ ref d n.r.e.) the court held that it was appropriate that the owner be given a reasonable opportunity to recoup his investment in the nonconforming structure or in the nonconforming use at the time of the zoning change. The Murmur court further stated that the appropriate measure was the owner's actual investment in the nonconforming structure rather than its market value or some other measure of full value in determining the recovery to which the owner was entitled.

In The Neighborhood Committee on Lead Pollution v. Board of Adjustment v. Board of Adjustment of the City of Dallas, 728, S.W. 2d 64 (Tex app - Dallas 1987, writ ref d n.r.e.), the court held that investment made after a use became nonconforming, and investments made to maintain the use during the amortization period In that case the owner was required to invest \$1.4 million pursuant to a court order and judgment in an earlier suit and invest about the same amount in additional pollution control equipment. The court disagreed with the property owner's contention that the rule that subsequent investments are not amortized does not include investments

needed to keep the use going, "if Dixie Metals' (the owner) operations were subject to termination because of its failure to meet environmental standards or other requirements of law, that termination would be independent of any zoning regulations." Id. at 70.

The court in Board of Adjustment of the City of Dallas v. Wrindes, 832 S.W. 2d 803 (Tex. App. - Dallas, 1992, writ denied), further clarified the amortization process. In that case, the City terminated the owner's nonconforming landscape supply business. The court stated that the board must measure reasonableness of the opportunity for recoupment by conditions at the time the existing use became nonconforming and that these costs include the full value of the investment in the nonconforming structure and "other costs such as the cost of remaining a nonconforming structure and setting up the business in a different location." Id. at 806. The court held that substantial evidence existed on the record to support the board's decision.

Texas courts have also held that a person's investment which is being amortized may pass to subsequent purchasers. Such was the case in Board of Adjustment of the City of Dallas v. Pate, 887

- S.W. 2d 90 (Tex. App. - Texarkana 1994, no writ) in which the court ruled that the amortization period for an investment in a nonconforming hotel was passed from one owner to another.

Procedures

Pursuant to Section 211.008(e) of the Local Government Code, the Board shall adopt rules for its operation. LGC at § 211.008(c). The rules generally establish the following rules of procedure:

- Appointment of a chair;
- Dates or frequency of meetings;
- Rules for placing items on its agenda;
- Methods for sending notices;
- Order of testimony and limits (if any) on time;
- The method and timing for reaching decisions and notification to the parties involved;
- Creation and keeping of records of its examinations, minutes, and other official actions;
- Rule of ethics relating to conflicts of interest for members or officials; and

- Other matters which set out the operations of the Board.

The statute empowers the board to administer oaths and compel the attendance of witnesses. As in a court proceeding, it is preferable to place those who appear before the Board under oath, and establish rules for introducing evidence. In cases where one or more parties or witnesses are uncooperative, the Board may issue subpoenas. The same is true if the Board needs evidence in any person's custody.

The Board of Adjustment is required to keep minutes of its proceedings which indicate the vote of each member, or whether a member was absent or failed to vote. (Id. at § 211.008(f)). Additionally, the Board is required to keep records of its examinations and other official actions. ad.). Such minutes and records are public and must be filed immediately in the Board's office. 11¹.)

Judicial Review of Board Decisions

The appeal of a decision of the Board of Adjustment is to a court of record. That term **has** been recently amended by the legislature to include county courts or district courts. A City Council is not empowered to hear such an appeal. An appeal may be made by: (i) a person affected by the decision of the Board; (ii) a taxpayer, or, (iii) an officer, department, board, or bureau of the municipality.

The appeal must state that the decision of the Board is illegal in whole or in part and specify the grounds of illegality. The petition must be filed within ten days after the date the decision is filed in the Board's office. Because every case is open to appeal, the Board should carefully record its minutes and safeguard all evidence which it may be required to be present to the District Court. Such evidence may include every document, exhibit, and building, zoning or other permit in anyway involved **in** the case.

Upon receipt of the petition, the Court may grant a writ of certiorari directed to the Board to review the Board's decision. The purpose of the writ is to require the Board to forward to the Court the record of the decision being appealed. Davis v. Zoning Board of Adjustment, 865 S.W.2d 941, 942 (Tex. 1993).

The Board of Adjustment's return must state any pertinent and material facts that show the grounds of the decision under appeal. (LGC at § 211.011(d)). At the hearing, the court may take evidence or appoint a referee to take evidence. (Id.).

The court may reverse or affirm, in whole or in part, or modify the Board's decision. In reviewing the case, the Court is to consider the original papers before the Board, as well as evidence introduced before the Court, and whether or not the Board abused its discretion. Board of Adjustment of City of Corpus Christi v. Flores, 860 S.W.2d 622, 625 (Tex. App. — Corpus Christi 1993, writ denied). The review of the Board's decision by the court is not by trial de novo where facts are established. Rather, the review is limited to the legality of the order, that is, the appellant has the burden to show that the action of the Board is illegal and present a very clear showing that the Board abused its discretion.

The Board's action is deemed legal and the appellant has the burden of showing the illegality of the Board's action. Nu-Wav Emulsions, Inc. v. City of Dalworthington Gardens, 617 S.W.2d 188, 189 (Tex. 1981). In deciding whether the Board has abused its discretion, the Court will ask whether the Board "acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable. "Southwest Paper Stock, Inc. v. Zoning Board of Adjustment of Ft. Worth, 980 S.W.2d 802, 805 (Tex. App. — Fort Worth 1998, pet. denied). However, if there is some evidence of substantive and probative character that supports the Board's decision will generally be sufficient to support the Board's decision upon appeal. Id.

Conclusion

The Zoning Board of Adjustment, as a quasi-judicial body, has specific mandates under law. It is critical for all members of the Board and the coordinators of Board activities to know the powers of the Board, standards of review and procedures. It is likewise crucial to establish clear, organized records of Board actions to support the actions in case of appeal to Court. Finally, it is imperative to review the powers, standards, procedures and scope of review with the City Attorney to assure familiarity and compliance. Failure to do such could place the decision of the Board at risk in a court proceeding.