

PLANNING AND THE BOARD OF ADJUSTMENTS

Presented by

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June 24, 2016

PLANNING PROCESS

The planning process exists to serve the public interest. While the public interest is a question of continuous debate, both in its general principles and in its case-by-case applications, it requires a conscientiously held view of the policies and actions that best serve the entire community.

Planning issues commonly involve a conflict of values and, often, there are large private interests at stake. These accentuate the necessity for the highest standards of fairness and honesty among all participants.

Those who practice planning need to adhere to a special set of ethical requirements that must guide all who aspire to professionalism.

Whether a professional or a volunteer, board or commission members, we are all planners.

ETHICS FOR THE BOA

Ethics: the principles of conduct governing an individual or a group
–*Merriam Webster*

There are standards for ethical conduct:

- Your city's Code of Ethics
- State Guidelines
- APA Statement of *Ethical Principles in Planning* and AICP Code of Ethics
- Your own moral compass

Ethical behavior is not always easy to achieve, but the *Ethical Principles in Planning* is a good place to start

WHAT IS THE BOARD OF ADJUSTMENT?

In Texas the authority for a Board of Adjustment is created in Section 211.008 of the *Texas Local Government Code*. This is the section on Zoning.

It is a quasi-judicial board.

It is subject to all of the requirements that other boards and commissions: Open meetings

- Serial meetings
- Conflicts of Interest
- Ex Parte
- Other ethical considerations and more.

THE BOA IS QUASI-JUDICIAL

What does it mean to be quasi-judicial?

Definition of *QUASI-JUDICIAL*:

“having a partly judicial character by possession of the right to hold hearings on and conduct investigations into disputed claims and alleged infractions of rules and regulations and to make decisions in the general manner of courts.” -*Merriman Webster*

Boards of Adjustments are quasi-judicial because they function as a court, as judge and jury.

Like a court, there is no ex parte communications between the applicant or members of the panel or any other member of the Commission or the public.

BOARD OF ADJUSTMENT

A quasi-judicial Board can be a separate Board or a portion of the Planning and Zoning Commission.

It can:

1. hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the Board to do so;
2. authorize in specific cases a variance/waiver from the terms of a zoning ordinance if the variance is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done;
3. hear and decide other matters authorized by an ordinance.
4. hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official.

Any appeal of the Board of Adjustment goes to District Court.

May BOA members go to the site in question, confer with interested parties, meet with neighbors, and investigate or evaluate the situation outside the public hearing process?

No. Members of a BOA act in a quasi-judicial capacity—the *ex parte* receipt of information or opinions is unfair and may deprive an applicant of due process.

Due Process requires:

- 1) an unbiased decision,
- 2) adequate notice of the hearing,
- 3) a hearing in which witnesses are sworn and in which there is an opportunity to present evidence and an opportunity for cross-examination, and
- 4) a decision based on the record supported by reasons and findings of fact.

ORGANIZATION OF THE BOA

Consists of Five Regular Members

May have up to Four Alternate Members

- Serve in the absence of regular member(s)
- Serve on an alternating basis

Serve staggered two year terms

May elects own Chair and Vice Chair

Vacancies filled by City Council

Removal for Cause on written charge after Public hearing

- Failure to attend three consecutive meetings unless unusual circumstances

ORGANIZATION OF THE BOA

The meetings are:

- Held at the call of the Chairperson/Staff
- Requires Notices same as other zoning cases
- Subject to Open Meetings Act including being open to the public
- Minutes required and should include Findings
- Quorum of Four is necessary to act
- ALL cases to be heard by a combination of at least Four Regular and Alternate Members
- Abstention is permitted only with valid conflict of interest so it may be opined that an abstention or recusal could be considered a positive vote

Exercise of Authority – In General

Appeals from Administrative Official's Decision

- The applicant bears the burden of proof.
- BOA may reverse or affirm, in whole or in part, or modify the official's order, requirement, decision or determination.
- BOA may make the correct order, requirement, decision or determination.
- For that purpose the Board has the same authority as the official.
- BOA shall decide the appeal within 45 calendar days after the Notice of Appeal was received.
- Requires concurring vote of 75% of BOA – defined by ordinance as 4 votes.

Appeals from Administrative Official's Decision continued

May involves the following Code provisions:

- Zoning Ordinance
- Subdivision Ordinance
- International Fuel Gas Code
- International Mechanical Code
- International Plumbing Code
- International Residential Code
- National Electrical Code
- Other City ordinances regarding land use and development regulations

EXERCISE OF AUTHORITY FOR VARIANCES

- The applicant bears the burden of proof.
- BOA may authorize a variance from zoning regulations when, in BOA's opinion, undue hardship will result from requiring strict compliance.
- BOA must make **specific findings** to grant a variance.
- Requires giving of public notice and holding of public hearing.
- Can **NOT** be used as automatic relief for any reason – Specific standards must be met.
- Requires concurring vote of 75% of BOA – defined by ordinance as 4 votes.

VARIANCES

A “variance” is defined by the Sixth Edition of *Black’s Law Dictionary* as “[p]ermission to depart from the literal requirements of a zoning ordinance by virtue of unique hardship due to special circumstances regarding [a] person’s property.”

“Authorization to a property owner to depart from literal requirements of zoning regulations in utilization of his property in cases in which strict enforcement of the zoning regulations would cause undue hardship.”

In reality, a variance actually sanctions violations of the strict technical terms contained in a zoning ordinance.

USE VARIANCES

- The BOA may **not** grant use variances.
- Variances may be granted from dimensional requirements such as setbacks; however, variances may not be granted which would allow a parcel of property to be used for a use that is not permitted under the zoning ordinance.

Unnecessary (Or Undue) Hardship

A variance may only be granted if there exists an unnecessary hardship. Although state law does not define the term “unnecessary hardship,” it **does not include**:

- property that cannot be used for its highest and best use;
- financial or economic hardship;
- self-created hardship; or
- the development objectives of the property owner are/or will be frustrated.

FINDINGS - VARIANCES

Inquiry

Findings

<p>Is the request for a variance owing to special condition inherent in the property itself?</p> <p>If yes, CONTINUE If no, STOP</p> 		<p>The property is/has . . . (e.g. odd-shaped, unusual topo, etc.</p>
<p>Is the condition one unique to the property requesting the variance?</p> <p>If yes, CONTINUE If no, STOP</p> 		<p>The condition is unique to this property.</p>
<p>Is the condition self-imposed or self-created?</p> <p>If yes, STOP If no, PROCEED</p> 		<p>The condition necessitating the request was not created by the property owner</p>
<p>Will a literal enforcement of the zoning ordinance result in an unnecessary hardship?</p> <p>If yes, CONTINUE If no, STOP</p> 		<p>Strict enforcement of the zoning ordinance would impose a hardship above that suffered by the general public.</p>
<p>Will the hardship prevent any reasonable use whatsoever?</p> <p>If yes, CONTINUE If no, STOP</p> 		<p>Without the grant of the requested variance, the property owner would be deprived of the right to use his property. Financial considerations alone cannot satisfy this requirement.</p>
<p>Would the grant of the variance be contrary to public interest?</p> <p>If yes, STOP If no, CONTINUE</p> 		
<p>Is the request within the spirit of the ordinance and does it further substantial justice?</p> <p>If yes, CONTINUE If no, STOP</p>		

CONSIDERATIONS FOR VARIANCES

- The Board of Adjustment **may** authorize a variance from these regulations when, in its opinion, undue hardship will result from requiring strict compliance. For example, if the subject property substantially differs from other similarly zoned land parcels by being of such restricted area, shape or slope that it cannot reasonably be developed in the same manner as other similarly zoned land parcels, then a variance of the building setback, lot width or depth, parking requirement, or other development standard may be warranted.
- The Board shall take into account the nature of the proposed use of the land involved, existing uses of land in the vicinity, the number of persons who will reside or work within the proposed use, and the probable effect such variance will have upon traffic conditions and upon the public health, safety, convenience and welfare of the community.

FINDINGS REQUIRED FOR VARIANCES

The BOA must make the following findings and identify specific facts supporting such findings:

1. That there are special circumstances or conditions affecting the land involved such that the strict application of the provisions of this Ordinance would deprive the applicant of the reasonable use of his/her land; and
2. That the variance is necessary for the preservation and enjoyment of a substantial property right of the applicant; and
3. That the granting of the variance will not be detrimental to the public health, safety or welfare, or injurious to other property within the area; and
4. That the granting of the variance will not have the effect of preventing the orderly use of other land within the area in accordance with the provisions of this Ordinance; and

FINDINGS REQUIRED FOR VARIANCES CONTINUED

The BOA must also make written findings that an undue hardship exists, using the following criteria:

1. That literal enforcement of the controls will create an unnecessary hardship in the development of the affected property; and
2. That the situation causing the hardship or difficulty is neither financial in nature, self-imposed nor generally affecting all or most properties in the same zoning district; and
3. That the relief sought will not injure the permitted use of adjacent conforming property; and
4. That the granting of a variance will be in harmony with the spirit and purpose of these regulations.

LIMITATIONS ON VARIANCES

- Variances may be granted only when in harmony with the general purpose and intent of this Ordinance so that the public health, safety and welfare may be secured and that substantial justice may be done.
- A variance shall not be granted to relieve a self-created or personal hardship, nor shall it be based solely upon economic gain or loss, nor shall it permit any person the privilege in developing a parcel of land not permitted by this Ordinance to other parcels of land in the particular zoning district.
- No variance may be granted which results in undue hardship upon another parcel of land.

SPECIAL EXCEPTIONS*

In general, Special Exceptions are specifically called out in the Zoning Ordinance and are limited to the requirements and conditions of the Ordinance.

The BOA may:

- Permit the reconstruction or enlargement of a nonconforming structure or the expansion of a Nonconforming use. Standards in the zoning district in apply.
- 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.
- Permit Residential Setback Encroachments
- Adjust Off-Street Parking Requirements
- Grant a special exception to Fencing requirements - a number of conditions may apply.

* See Section 4.3.7 of the Decatur Zoning Ordinance

SPECIAL EXCEPTIONS CONTINUED

Specifically the BOA may:

- For a Nonconforming Structure or Use permit the reconstruction or enlargement of a Nonconforming Structure or the expansion of a Nonconforming Use. Any enlargement of a Nonconforming Structure shall conform to the existing standards in the zoning district in which it is located.
- 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 which 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.
- For Residential Setback Encroachments for existing single-family residential and duplex (two family) structures that were legally constructed prior to the effective date of this Ordinance, the Board of Adjustment may authorize a Special Exception for any Structure that was constructed over a setback line established by this Ordinance.

* See Section 4.3.7 of the Decatur Zoning Ordinance

SPECIAL EXCEPTIONS CONTINUED

For Off-Street Parking Requirements, the Board of Adjustment may grant a Special Exception to the requirements of **Section 7.3 Off-Street Parking and Loading Regulations** of this Ordinance when the BOA determines:

That the size and shape of the lot to be built on is such that off-street parking provisions could not be complied with, and the proposed use will not create undue traffic congestion in the adjacent streets, or

That the use can share parking with other adjacent uses upon provision of a shared parking study and a shared parking agreement

SPECIAL EXCEPTIONS CONTINUED

The Board of Adjustment may grant a Special Exception to allow fencing within a front or side Building Line under the following conditions: Requests for front and side yard fences that do not meet the requirements 35 of **Section 7.1 Area Regulations** of this Ordinance.

If approved by the Board of Adjustment, any fencing must also meet the following conditions (abbreviated)

Fencing shall:

- allow access for public safety services shall be maintained.
- be structurally sound; kept in an attractive state and in good repair at all times.
- shall not be sight-proof either by construction or ornamentation
- shall allow clear vision while backing onto a street;
- contain at least one gate with an unobstructed clear width;
- not obscure or restrict the access to any fire hydrant or any fire connection;
- not be located in the street right-of-way.

PROCEDURES FOR BOA CASES

The instructions are in your Zoning Ordinance.

- Application and Fees
- Review and Report by the City including the staff site visit and report of findings
- Notice and Public Hearing
- Action by the Board based on compelling evidence provided by the applicant that the conditions are met

Note: BOA may impose conditions, limitations and safeguards.

CONTACT INFORMATION

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