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## ZONING BOARD OF ADJUSTMENT

## **I. Statutory Basis - Chapter 211, Texas Local Government Code**

### **§ 211.008. Board of Adjustment**

(a) The governing body of a municipality may provide for the appointment of a Board of adjustment. In the regulations adopted under this subchapter, the governing body may authorize the board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, to make special exceptions to the terms of the zoning ordinance that are consistent with the general purpose and intent of the ordinance and in accordance with any applicable rules contained in the ordinances.

(b) A board of adjustment must consist of at least five members to be appointed for terms of two years. The governing body must provide the procedure for appointment. The governing body may authorize each member of the governing body, including the mayor, to appoint one member to the board. The appointing authority may remove a board member for cause, as found by the appointing authority, on a written charge after a public hearing. A vacancy on the board shall be filled for the unexpired term.

(c) The governing body, by charter or ordinance, may provide for the appointment of alternate board members to serve in the absence of one or more regular members when requested to do so by the mayor or city manager. An alternate member serves for the same period as a regular member and is subject to removal in the same manner as a regular member. A vacancy among the alternate members is filled in the same manner as a vacancy among the regular members.

(d) Each case before the board of adjustment must be heard by at least 75 percent of the members.

(e) The board by majority vote shall adopt rules in accordance with any ordinance adopted under this subchapter. Meetings of the board are held at the call of the presiding officer and at other times as determined by the board. The presiding officer or acting presiding officer may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public.

(f) 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.

### **§ 211.009. Authority of Board**

(a) The board of adjustment may:

(1)hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter;

(2)hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so;

(3)authorize in specific cases a variance 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; and

(4)hear and decide other matters authorized by an ordinance adopted under this subchapter.

(b) In exercising its authority under Subsection (a)(1), 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.

(c) The concurring vote of 75 percent of the members of the board is necessary to:

(1) reverse an order, requirement, decision, or determination of an administrative official;

(2) decide in favor of an applicant on a matter on which the board is required to pass under a zoning ordinance; or

(3) authorize a variation from the terms of a zoning ordinance.

#### **§ 211.010. Appeal to Board**

(a)Any of the following persons may appeal to the board of adjustment a decision made by an administrative official:

(1)a person aggrieved by the decision; or

(2)any officer, department, board, or bureau of the municipality affected by the decision.

(b) The appellant must file with the board and the official from whom the appeal is taken a notice of appeal specifying the grounds for the appeal. The appeal must be filed within a reasonable time as determined by the rules of the board. On receiving the notice, the official from whom the appeal is taken shall immediately transmit to the board all the papers constituting the record of the action that is appealed.

(c) An appeal stays all proceedings in furtherance of the action that is appealed unless the official from whom the appeal is taken certifies in writing to the board facts supporting the official's opinion that a stay would cause imminent peril to life or property. In that case, the proceedings may be stayed only 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.

(d) The board shall set a reasonable time for the appeal hearing and shall give public notice to the parties in interest. A party may appear at the appeal hearing in person or by agent or attorney. The board shall decide the appeal within a reasonable time.

**§ 211.011. Judicial Review of Board Decisions**

(a) Any of the following persons may present to a district court, county court, or county court of law verified petition stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality:

(1) a person aggrieved by a decision of the board;

(2) a taxpayer; or

(3) an officer, department, board, or bureau of the municipality.

(b) The petition must be presented within 10 days after the date the decision is filed in the board's office.

(c) On the presentation of the petition, the court may grant a writ of certiorari directed to the board to review the board's decision. The writ must indicate the time by which the board's return must be made and served on the petitioner's attorney, which must be after 10 days and may be extended by the court. Granting of the writ does not stay the proceedings on the decision under appeal, but on application and after notice to the board the court may grant a restraining order if due cause is shown.

(d) The board's return must be verified and must concisely state any pertinent and material facts that show the grounds of the decision under appeal. The board is not required to return the original documents on which the board acted but may return certified or sworn copies of the documents or parts of the documents as required by the writ.

(e) If at the hearing the court determines that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take evidence as directed. The referee shall report the evidence to the court with the referee's findings of fact and conclusions of law. The referee's report constitutes a part of the proceedings on which the court shall make its decision.

(f) The court may reverse or affirm, in whole or in part, or modify the decision that is appealed. Costs may not be assessed against the board unless the court determines that the board acted with gross negligence, in bad faith, or with malice in making its decision.

**II. Functions And Powers Of The Zoning Board Of Adjustment**

In Texas, a zoning board of adjustment must act within the parameters established by the state legislature and the municipal ordinance that both establishes the board and defines its local function and powers. Further, a zoning board of adjustment must not stray outside its specifically granted authority. If it does so, its actions may be held by a court to be null and void.

In Flower Mound, the Town's Code of Ordinances and the Land Development Code (Chapter 12 of the Town's Code of Ordinances) define the powers of the Zoning Board of Adjustment. They are as follows:

1. “To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official of the Town in the enforcement of this chapter, pursuant to Section 6.11, Appeals.” Land Development Code § 6.10(c)(1). This provision is applicable to (1) Uniform Plumbing Code appeals [Code of Ordinances, ch. 3, § 2.00 *et seq.*]; (2) Uniform Mechanical Code appeals [Code of Ordinances, ch. 3, § 3.00 *et seq.*]; (3) Uniform Electrical Code appeals [Code of Ordinances, ch. 3, § 4.00 *et seq.*]; (4) Swimming Pool Code appeals [Code of Ordinances, ch. 3, § 5.00 *et seq.*]; Tree Code violations such as removal of protected trees [Land Development Code § 5.08(e)(3)].

2. “To permit variances or modifications to the height, yard, area, coverage and parking regulations, pursuant to Section 6.12, Variances.” Land Development Code § 6.10(c)(2).

3. “To hear and decide special exceptions to the terms of this chapter, pursuant to Section 6.13, Special exceptions.” Land Development Code § 6.10(c)(3). In the Land Development Code, special exceptions are limited in scope and apply to the following:

a. Reconstruction of nonconforming buildings. Land Development Code § 6.13(a).

b. Expansion of nonconforming buildings. Land Development Code § 6.13(b).

c. Discontinuance of nonconforming uses. Land Development Code § 6.13(c).

d. Although not a special exception, the Zoning Board of Adjustment shall, from time to time, inquire into the existence, continuation or maintenance of any nonconforming use within the Town. Land Development Code § 6.13(d).

4. “[T]o permit such variances or modifications of . . . sign . . . regulations as may be necessary. . . .” Land Development Code § 6.12(a).

5. Building and Fire Code Board of Appeals. Code of Ordinances, ch. 8, § 8.00 *et seq.* The Board of Adjustment is authorized to hear Building Code or Fire Code appeals from decisions by the Director of Community Development or the Fire Chief, respectively. This ordinance also provides that a representative of the Building Department and a representative of Fire Department shall serve as non-voting ex officio members of the Board of Appeals.

### **III. 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. The purpose of a variance is to prevent the unconstitutional application of the zoning ordinance.<sup>[1]</sup> It is in the nature of a waiver of the strict letter of the zoning law upon substantial compliance with it and without sacrificing its spirit and purpose. [It is] [a]n 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.<sup>[2]</sup> An administrative official of a city cannot approve a variance.

### **IV. Special Exceptions**

A special exception refers to uses that a zoning ordinance permits, but that are screened and specially approved by the board of adjustment for situational suitability. Special exceptions do not require a showing of hardship, unlike variances. As a practical matter, most special exceptions are handled by many cities as specific (or special) use permits. There is no authority to grant a special exception unless the zoning ordinance specifies that special exceptions may be granted. Thus, a zoning ordinance should specify the conditions that must be met for a special exception to be granted or the standards that a zoning board of adjustment is to employ when granting a special exception.

## **V. Use Variances**

The Zoning Board of Adjustment 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.

## **VI. 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 (1) property that cannot be used for its highest and best use (*see Board of Adjustment of the City of San Antonio v. Willie*, 511 S.W.2d 591 (Tex.Civ.App.-San Antonio 1974, writ ref’d n.r.e.)); (2) financial or economic hardship (*see Caruthers v. Board of Adjustment of the City of Bunker Hill Village*, 290 S.W.2d 340 (Tex.Civ.App-Galveston 1956, no writ); *Southland Addition Homeowner’s Ass’n v. Board of Adjustments of City of Wichita Falls*, 710 S.W.2d 194 (Tex.App-Fort Worth 1986, writ ref’d n.r.e.); *Bat’tles v. Board of Adjustment and Appeals of the City of Irving*, 711 S.W.2d 297 (Tex.App-Dallas 1986, no writ)); (3) self-created hardship (*see Currey v. Kimple*, 577 S.W.2d 508 (Tex.Civ.App.-Texarkana 1979, writ ref’d n.r.e.)); or (4) the development objectives of the property owner are or will be frustrated (*see, e.g., Willie, supra*).

Professor Mixon in his treatise, *Texas Municipal Zoning Law*, defines “unnecessary hardship” as a “hardship that is self-induced or that is common to other similarly classified properties will *not* satisfy the requirement.” *Id.*, Glossary at 11 (emphasis added).

**VII. Variance Findings Flowchart**

To guide your Zoning Board of Adjustment members in their deliberations, the following is a variance “findings” flowchart:

**Findings - Variances**

Inquiry		Findings
<p>Is the request for a variance owing to special condition inherent in the property itself?</p> <p>If yes, <b>CONTINUE</b></p> <p>If no, <b>STOP</b></p>		<p>The property is/has . . . (e.g., odd-shaped, unusual topography, etc.)</p>
<p>Is the condition one unique to the property requesting the variance?</p> <p>If yes, <b>CONTINUE</b></p> <p>If no, <b>STOP</b></p>		<p>The condition is unique to this property.</p>
<p>Is the condition self-imposed or self-created?</p> <p>If yes, <b>STOP</b></p> <p>If no, <b>PROCEED</b></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, <b>CONTINUE</b></p> <p>If no, <b>STOP</b></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, <b>CONTINUE</b></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>

If no, <b>STOP</b>		
<p>Would the grant of the variance be contrary to public interest?</p> <p>If yes, <b>STOP</b></p> <p>If no, <b>CONTINUE</b></p>		
<p>Is the request within the spirit of the ordinance and does it further substantial justice?</p> <p>If yes, <b>CONTINUE</b></p> <p>If no, <b>STOP</b></p>		

Religious Land Use And Institutionalized Persons Act Of 2000

1 As one Texas court has stated,

the essential inquiry is whether in the circumstances the specific application of the general regulation would constitute an unnecessary and unjust invasion of the fundamental right of property.

*Board of Adjustment v. Stovall*, 218 S.W.2d 286, 288 (Tex.Civ.App.--Fort Worth 1949, no writ).

2 For this reason, the rule is that “[t]he power to vary conditions of zoning ordinances should be sparingly exercised.” *Board of Adjustment of City of San Antonio v. Levinson*, 244 S.W.2d 281, 285 (Tex.Civ.App.--San Antonio 1951, no writ).