

Presented:
University of Texas Land Use Conference

March 26-27, 2014
Austin, TX

**Zoning Boards of Adjustment:
Traps and Pitfalls for the Unwary**

Steven A. Wood

Steven A. Wood
Taylor, Olson, Adkins, Sralla &
Elam, LLP
6000 Western Place, Suite 200
Fort Worth, TX 76107
swood@toase.com
(817) 332-2580

I. Introduction.

A zoning board of adjustment (“ZBA”) is a board created by a municipality pursuant to Chapter 211 of the Texas Local Government Code (“LGC”). The purpose of a ZBA is “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 ordinance.” Tex. Loc. Gov’t Code Ann. § 211.008. In other words, the ZBA exists to decide if in a particular case an exception to the rules should be made or if the rules should be enforced as written. A ZBA is a quasi-judicial body whose decisions are subject to appeal before a state district, county court or county court at law. *Id.* § 211.011. Any person who is aggrieved by a decision of a ZBA is permitted to challenge the decision by filing a writ of certiorari with the applicable court within ten days of the date the written decision of the board is filed in the board’s office. *Id.* § 211.011(a) & (b). Filing suit against the ZBA under Chapter 211 of the LGC is the only permissible way to challenge a decision of the ZBA. Thus, it is important to understand that the decisions of a ZBA can and often do lead to instantaneous litigation. For this reason, cities should take steps to avoid the potential pitfalls and traps that are commensurate with ZBAs. The focus of this paper is to explain how cities can do precisely that.

II. ZBA Authority.

Under state law, a ZBA has the authority: (1) to hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of [Subchapter A of Chapter 211, LGC (“Subchapter A”)] or an ordinance adopted under [Subchapter A]; (2) to hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so; (3) to 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) to hear and decide other matters authorized by an ordinance adopted under Subchapter A. *Id.* § 211.009(a). Thus, a city has the authority to adopt an ordinance that expands or limits the authority of a ZBA to grant exceptions to the city’s ordinance requirements. At least four out of the five members of the ZBA must vote in favor of an applicant’s request for a reversal of a decision of an administrative official or for a variance. *Id.* § 211.009(c). If an applicant fails to receive at least four concurring votes of the ZBA members, the applicant’s request is deemed denied.

III. Difficult Cases and Issues.

***City of Dallas v. Vanesko*, 189 S.W.3d 769 (Tex. 2009).** The Vaneskos decided they wanted a larger home. *Vanesko*, 189 S.W. at 770. Instead of hiring an architect and general contractor, the Vaneskos decided that they would design and build the home themselves. *Id.* They submitted their plans to the City of Dallas and paid an extra “review fee” to ensure that their plans complied with all applicable city ordinances. *Id.* The city approved the plans and issued a building permit. *Id.* After a year of frequent visits to the construction site by the city inspector without complaint, and after the roof of the home was framed in, the inspector informed the Vaneskos that the structure exceeded the city’s height restrictions for that district. *Id.* at 770-71. Instead of ordering the work to be stopped, the inspector advised the Vaneskos to

complete the construction of the home and to seek a variance from the city's board of adjustment. *Id.* at 771. At the hearing before the board, the city staff as well as eighty percent of the surrounding property owners supported the variance request. *Id.* No one opposed the request. *Id.* Nonetheless, the board denied the Vaneskos' request for a variance. *Id.*

On appeal, the trial court reversed the board's decision. *Id.* A divided panel of the court of appeals affirmed. *Id.* The Texas Supreme Court granted the city's petition for review and reversed. *Id.* at 774. The court noted that the board's ability to grant a request for a variance was governed by state law and by the city's ordinance requirements. *Id.* at 772. The city's ordinance permitted the board to grant a variance from the city's height regulations if the variance would

not be contrary to the public interest when, owing to special conditions, a literal enforcement of this chapter would result in unnecessary hardship, and so that the spirit of the ordinance will be observed and substantial justice done. The variance must be necessary to permit development of a specific parcel of land which differs from other parcels of land by being of such a restrictive area, shape, or slope that it cannot be developed in a manner commensurate with the development upon other parcels of land in districts with the same zoning classification. A variance may not be granted to relieve a self created or personal hardship, nor for financial reasons only, nor may a variance be granted to permit any person a privilege in developing a parcel of land not permitted by this chapter to other parcels of land in districts with the same zoning classification.

Id. at 772. The court then observed that a height restriction violation is not in any way related to the "area, shape or slope" of the land. *Id.* at 773. The court held that the Vaneskos' hardship was personal in nature and "self-created" because it arose from their decision to design their home, as opposed to nature and configuration of the land. *Id.* Finally, the court dismissed the argument that the board clearly abused its discretion when, in reaching its decision to deny the Vaneskos' variance request, it failed to consider the fact that the city issued a building permit in error. *Id.* at 774. "The mere issuance of a building permit does not render a city's zoning ordinance unenforceable, nor does the fact that a permit was issued in error entitle the property owner to a variance in every case." *Id.*

***Sea Mist Council of Owners v. Bd. of Adjustment for the Town of S. Padre Island*, No. 13-10-011-CV, 2010 WL 2891580 (Tex. App.—Corpus Christi, July 22, 2010, no pet.) (mem. op., not designated for publication).** Sea Mist Council of Owners ("Sea Mist") filed suit against the Town's board of adjustment alleging that the board should have revoked a building permit and an occupancy permit that was issued to the Palms Investment Group ("Palms") by the town's building inspector. *Id.* at *1. Sea Mist argued that the town's building inspector failed to determine the number and dimensions of parking spaces that would be required for the proposed construction of Palms' resort condominiums. *Id.* Palms filed a motion for summary judgment, alleging that Sea Mist failed to timely appeal the decision of the building inspector to the town's board of adjustment. *Id.* At the time of the appeal, however, the board had not adopted any rules prescribing the time in which to file an appeal from the building inspector's decision. *Id.* at *2. The building permit was issued to Palms in May 2006 and the occupancy permit was issued in September 2006. Sea Mist did not file its appeal to the board

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Zoning Boards of Adjustment: Traps and Pitfalls for the Unwary

Also available as part of the eCourse

[Fundamentals of Zoning, Zoning Boards of Adjustment, plus Board of Adjustment Appeals in the Courthouse](#)

First appeared as part of the conference materials for the
2014 Land Use Fundamentals session

"Zoning Boards of Adjustment: Traps and Pitfalls for the Unwary"