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## **Boards of Adjustment and Variances**

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## BOARDS OF ADJUSTMENT AND VARIANCES

### I. Zoning Structure

Zoning is accomplished through a structure similar to the federal government: executive, legislative and judicial. City staff, often led by a City Manager, provides the executive function: administering the Zoning Code. City Council, usually with the advice of the Zoning Commission, provides the legislative function: adopting and amending the Zoning Code. The Zoning Board of Adjustment (sometimes referred to as the BOA, but more commonly as the ZBA) serves the judicial function: making interpretations, considering fact-specific requests and providing a “safety valve” to prevent inequitable hardships.

### II. Board of Adjustment

The ZBA has a critical place in zoning world. This paper provides a detailed review of the ZBA, and its unique position on land use law including the ZBA’s creation, power, procedure and unusual appeal process. The role of ZBAs is fully discussed in more detail in Chapter 6 of *Texas Municipal Zoning Law* (Mixon, Dougherty, et al., Lexis Law Publishing, 3d Ed., updated 2015) (“TMZL”).

#### A. Authority

The ZBA is authorized by Texas Local Government Code Chapter 211 (the Texas Zoning Enabling Act) for the purposes of hearing and deciding only the following issues:

- Appeals from administrative decisions, particularly interpretations of the Zoning ordinance;
- “Special Exceptions;”
- “Variances;” and
- “Other matters authorized by ordinance”

TEX. LOC. GOV’T CODE § 211.009.

Judicial expansion of the ZBA’s power has included allowing a ZBA to supervise the phasing out of nonconforming uses. *See White v. City of Dallas*, 517 S.W.2d 344 (Tex. Civ. App.—Dallas 1974, no writ). Legislation enacted in 1993 authorizes delegation of “other matters” to a ZBA by ordinance. TEX. LOC. GOV’T CODE § 211.009(a)(4). Some cities delegate enforcement duties to the ZBA; *see, e.g.*, MONT BELVIEU, TEX., ORDINANCES § 25-96.

Especially when a variance is requested, the ZBA is authorized to ameliorate exceptional instances which, if not relieved, could endanger the integrity of a zoning plan. *Thomas v. City of San Marcos*, 477 S.W.2d 322, 324 (Tex. Civ. App.—Austin 1972, no writ); *Swain v. Bd. of Adjustment of City of University Park*, 433 S.W.2d 727, 735 (Tex. Civ. App.—Dallas 1968, writ ref’d n.r.e.). A ZBA must act only within its specifically granted authority. *W. Tex. Water Refiners, Inc. v. S & B Beverage Co.*, 915 S.W.2d 623, 626 (Tex. App.—El Paso 1996, no writ). If the ZBA acts outside its specifically granted authority, it is subject to a collateral attack in district court; and the suit is not governed procedurally by Texas Local Government Code

§211.011 (the petition for writ of certiorari discussed below). *Id.* For example, if a board grants a special exception that is not a conditional use expressly provided for under the ordinance, then the board has exceeded its authority to act. *Id.* at 627. The ZBA may not grant special exceptions or variances that amount to a zoning ordinance amendment; only the city council may approve or disapprove zoning amendments. *See* Op. Tex. Att'y. Gen. No. JM-493 (1986) (under the zoning ordinance in question, a “specific use permit” was a type of ordinance amendment that only the city council could approve).

In *Town of Bartonville Planning and Zoning Bd. of Adjustments v. Bartonville Water Supply Corporation*, 410 S.W.3d 23 (Tex. App. – San Antonio 2014, pet. denied), the court held that a ZBA lacks the authority to decide if the city zoning ordinance is pre-empted or “trumped” by State law, in this case the Texas Water Code. Instead, the appropriate venue is District Court for a declaratory judgement. The author finds this holding inconsistent with the ZBA’s authority to consider permit appeals and ordinance interpretations, as all have elements of legal precedent. *See, Board of Adjustment for City of San Antonio v. Kennedy*, 410 S.W.3d 31,34 (Tex. App. – San Antonio 2013, pet. denied), where the court held that a ZBA could consider case law from other state when interpreting the word “College”, *Board of Adjustment of City of University Park, Texas v. Legacy Hillcrest Investments*, 2014 WL 6871403 (Tex. App. – Dallas 2014, pet. denied), where the ZBA interpreted the word “Adjacent”, and *CPM Trust v. City of Plano*, 461 S.W.3d 661 (Tex. App. – Dallas 2015, no pet.), where the ZBA interpreted the words “destroyed”, “dilapidated”, and “deteriorated.”

The “big three” matters heard by ZBA’s are:

(1) Interpretations of a zoning ordinance.

Interpretations of a zoning ordinance by a city’s “administrative official” (typically a city staff member) can be appealed to a ZBA. The Zoning Commission and City Council have no authority to hear such an appeal or interpret the zoning ordinance in that situation (except when the council of a “Type A general-law municipality” is acting as a board of adjustment under Texas Local Government Code §211.008).

(2) Special exceptions.

Special exceptions are site-specific special permissions that are created by a zoning ordinance. The ZBA may not grant a special exception unless that authority is specifically granted in a particular zoning ordinance provision. There is no “floating” special exception right outside the ordinance. Usually, the ordinance establishes criteria and standards. Special exceptions typically run with the ownership of the property, unless stated otherwise.

(3) Variances.

Variances are site-specific approvals for a particular property to vary from zoning requirements—actually to *violate* zoning requirements—upon a finding of hardship, etc. The ZBA has a “floating” right to grant variances that comes from state law. TEX. LOC. GOV’T CODE §211.009(a)(3).

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