

Presented:
2024 Land Use Conference

April 3, 2024
Austin, TX

**Boards of Adjustment:
The Safety Valve for Zoning**

Reid Wilson

Author contact information:

Reid Wilson
Wilson, Cribbs & Goren, P.C.
Houston, TX
rwilson@wcglaw.net
713-222-9000

Table of Contents

I. Zoning Structure	2
II. Board of Adjustment	2
A. Authority	2
B. Organization	4
C. Super-Majority Vote Required	5
D. Quasi-Judicial Nature of ZBA	5
E. Standards for a Variance	7
F. Standards for Appeals of Enforcement Decisions	14
G. Standards for a Special Exception	15
H. Appealing to the ZBA	16
I. Exhaustion of Administrative Remedies	
J. Disqualification of ZBA Member	21
K. Appeal of ZBA Decision	21
L. Official Immunity.	25
III. ZBA Hearings	26
A. Appeals of Enforcement Decisions	26
B. Special Exception	28
C. Variance	29
D. Making a Record	31
E. Preparation	32
V. Recent ZBA Cases (2006-2024)	35
VI. Chart of Variance Cases (1965-2024)	80

**BOARD OF ADJUSTMENT:
THE SAFETY VALVE FOR ZONING**

I. Zoning Structure

Zoning is accomplished through a structure similar to the federal government: executive, legislative and judicial. Typically, a City Manager and their administrative staff provides the executive function; their responsibilities largely entail administering and enforcing the Zoning Code. The City Council, advised by the Zoning Commission, provides the legislative function; its responsibilities concern adopting and amending the Zoning Code, among others. Lastly, a municipality’s Zoning Board of Adjustment (“BOA” or “ZBA”) acts in a judicial capacity when overseeing a dispute arising from different interpretations of the Zoning Code, considering fact-specific requests and providing a “safety valve” to prevent inequitable hardships.

II. Board of Adjustment

The ZBA is responsible for several critical zoning functions. This paper provides a detailed review of the ZBA’s role in municipal governance, and its unique authority in land use law, and 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 2023) (“TMZL”).

A. Authority

Texas Local Government Code Chapter 211 (the Texas Zoning Enabling Act) authorizes local governments to create a Zoning Board of Adjustment (“ZBA”) for the purposes of hearing and deciding the following issues:

- (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;¹
 - (2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so;²
 - (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;³ and
 - (4) hear and decide other matters authorized by an ordinance adopted under this subchapter.⁴

¹ Tex. Loc. Gov’t Code Ann. § 211.009(a)(1)

² Tex. Loc. Gov’t Code Ann. § 211.009(a)(2)

³ Tex. Loc. Gov’t Code Ann. § 211.009(a)(3)

⁴ Tex. Loc. Gov’t Code Ann. § 211.009(a)(4)

New in 2023, pursuant to SB 929, a nonconforming use termination payment under Tex. Loc. Gov't Code Section 211.019 may be appealed to the ZBA, which appeal must be filed within 20 days of the city's determination of the amount of the payment.⁵ The city has the burden of proof to show the determination was correct.

In addition to expressly defining ZBA power, the legislation permits cities to delegate responsibility to ZBA's by passing an ordinance pursuant to § 211.009.⁶ The judiciary has interpreted this to permit Zoning Boards of Adjustment to supervise the phasing out of nonconforming uses.⁷ 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.⁸

A ZBA must act only within its specifically granted authority.⁹ If the ZBA action exceeds its statutory parameters, it may be subject to a collateral attack in district court outside the procedural mechanisms of the Texas Local Government Code §211.011 (the petition for writ of certiorari discussed below).¹⁰ For example, a board exceeds its authority to act when it grants a special exception (such as a conditional use) not expressly provided for under the ordinance.¹¹ This is due to the statutory limits on ZBA power; they cannot grant special exceptions or variances that function like a zoning ordinance amendment because it interferes with the zoning authority expressly granted to the city council.¹²

In *Town of Bartonville*, the court held that a ZBA lacks the authority to decide if state law preempts or “trump[s]” a city zoning ordinance.¹³ Instead, parties seeking to settle a conflict between state and local law should seek a declaratory judgment in the appropriate District Court. 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.¹⁴ In *Five Aces/SA*, the court held that the trial court misinterpreted the applicable zoning ordinance when applying it to the facts of the case, and reinstated the permit upheld by the ZBA, applying *de novo* review.¹⁵

⁵ Tex. Loc. Gov't Code Ann. § 211.019(j).

⁶ TEX. LOC. GOV'T CODE § 211.009(a)(4); *see e.g.* MONT BELVIEU, TEX., ORDINANCES § 25-96.

⁷ *See White v. City of Dallas*, 517 S.W.2d 344 (Tex. Civ. App.—Dallas 1974, no writ).

⁸ *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.).

⁹ *W. Tex. Water Refiners, Inc. v. S & B Beverage Co.*, 915 S.W.2d 623, 626 (Tex. App.—El Paso 1996, no writ).

¹⁰ *Id.*

¹¹ *Id.* at 627.

¹² *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).

¹³ *Town of Bartonville Planning and Zoning Bd. of Adjustments v. Bartonville Water Supply Corp*, 410 S.W.3d 23 (Tex. App. – San Antonio 2014, pet. denied) (considering whether a Zoning Board of Adjustment may decide that a municipal zoning ordinance preempts the Texas Water Code).

¹⁴ *See, e.g., Bd. of Adjustment for City of San Antonio v. Kennedy*, 410 S.W.3d 31,34 (Tex. App. – San Antonio 2013, pet. denied)(permitting a ZBA to consider case law from another state when interpreting the word “college”) *see also Board of Adjustment of City of University Park, Texas v. Legacy Hillcrest Investments*, 2014 WL 6871403 (Tex. App. – Dallas 2014, pet. denied), (reviewing a Zoning Board of Adjustment's interpretation of the word “adjacent”); *CPM Trust v. City of Plano*, 461 S.W.3d 661 (Tex. App. – Dallas 2015, no pet.)(construing the Zoning Board of Adjustment's construction of the words “destroyed”, “dilapidated”, and “deteriorated”).

¹⁵ *Five Aces/SA, Ltd. v. River Road Neighborhood Ass'n.*, 534 S.W.3d 598 (Tex. App.—San Antonio 2017, no pet.).

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 \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Board of Adjustment: The Safety Valve for Zoning

First appeared as part of the conference materials for the
2024 Land Use Fundamentals session

"Board of Adjustment: The Safety Valve for Zoning"