

JURISDICTION AND AUTHORITY OF A ZONING BOARD OF ADJUSTMENT

1. Introduction

The authority for the creation of a Zoning Board of Adjustment (“Board”) is found in §211.008, TEXAS LOCAL GOVERNMENT CODE. The purpose for which a Board is created is to provide an administrative outlet through which persons wrongfully aggrieved by city zoning regulations or zoning enforcement officers may seek relief without resorting to litigation. However, there are limitations to the authority of the Board.

A Board of Adjustment is a quasi-judicial body. As such, the Board has no legislative authority. Legislative authority is reserved to the City Council which determines the various regulations and districts as set forth in a city’s zoning ordinance. Even though the Board may disagree with a zoning regulation or district boundary, it has no authority to grant relief to an applicant simply because, given the power, it would have written the regulations differently.

The specific areas of authority listed below constitute the realm of the Board’s jurisdiction. If the Board is without authority to act, or if an applicant is unable to prove the elements necessary for relief, the applicant’s recourse is to seek an amendment to the ordinance by request to the City Council.

2. Areas of Authority

Section 211.009 of the TEXAS LOCAL GOVERNMENT CODE enumerates the statutory authority and function of the Board. Any limitations on such authority would be found in a city’s zoning ordinance.

Subsection (a) of said §211.009 reads as follows:

“(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 done; and

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

In general terms, a proceeding under (a)(1) would be referred to as an “appeal,” (a)(2) as a “special exception,” and (a)(3) as a “variance.” They will be discussed in the same order.

(1) Appeals. Pure and simple, appeals are appeals to the Board of the administrative official’s (zoning official) interpretation of the City’s zoning ordinance. If an affected person believes the administrative official has erred in the interpretation of the zoning ordinance, then that affected person may appeal such interpretation to the Board. Appeals may be taken by persons denied permits, or may be taken by persons who believe a permit was wrongfully issued. Appeals may be taken only from decisions of the administrative or zoning official. In the City of Hilshire Village, the Building Official is the administrative or zoning official. Thus, it is only the decision of the Building Official which is subject to appeal. Upon an appeal the Board assumes all authority of the official, and may reverse, decide in favor of, or modify the decision of the official.

(2) Special Exceptions. A Special Exception is a circumstance described in a zoning ordinance whereby a person, because of the existence of certain facts, may be granted an exception from one or more regulations. The criteria necessary to grant a Special Exception is established in the zoning ordinance. Such criteria is enumerated in section 91:04 of Hilshire’s Code of Ordinances.

(3) Variances. By far the most often litigated and least understood of all areas of authority of a Board, a variance may only be granted lawfully if the Board determines the existence of certain elements as set forth in the statute. These elements are:

- (a) the granting of the variance would not be contrary to public interest;
- (b) due to special conditions peculiar to the property in question, a literal enforcement of the zoning regulations would result in unnecessary hardship; and
- (c) if the variance is granted, it is done so in the spirit of the ordinance and so that substantial justice is done.

The first and third elements are, frankly, quite subjective and in most cases not going to be second-guessed by a court. Element number two is a different story.

Hardship has been addressed many times by the courts of this State. The rule is clear that unless an applicant can show an “unnecessary hardship” he is not entitled to a variance. What is “unnecessary hardship”?

In *Board of Adjustment of the City of San Antonio v. Willie*, 511 S.W.2d 591 (Tex. Civ. App. - San Antonio 1974, ref’d n.r.e.), the Court, addressing the issue of hardship, held

that a variance could only be authorized where the zoning ordinance **did not permit any reasonable use of the land**. In *Reiter v. City of Keene*, 601 S.W.2d 547 (Tex. App. - Waco 1980, *dism'd*), the Court stated that “a property owner challenging the action of a Board of Adjustment must show that **enforcement of the ordinance would destroy any reasonable use of his property**. A variance is not authorized merely to accommodate the highest and best use of the property, but where the zoning ordinance does not permit any reasonable use of such lot.” Thus, in considering an application for a variance, the most critical question to be asked is whether the applicant, if the variance is denied, will be deprived of any reasonable use of his property. If the answer is “no,” the Board has no authority to grant a variance. In addition, the Board has no authority to grant a variance that authorizes a use which is prohibited in the district in which the subject property is located.

3. Summary

The Zoning Board of Adjustment is a quasi-judicial body, not a legislative one. As such, it may not substitute its judgment for that of the City Council. It may only do that which it is authorized to do pursuant to state law and the city’s zoning ordinance. It has discretion in deciding issues before it, and its decisions will not be overturned unless such discretion has been abused.