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MEMORANDUM

TO: City of Austin Board of Adjustment

FROM:  Andrew J. Linseisen, Board Executive Chair,
Assistant Director, Development Services Department

DATE: July 6, 2018

SUBJECT: Board of Adjustment Resolution
Administrative Appeals Process

On June 11, 2018, the Board voted to approve a resolution which contemplates changing the rules for how administrative appeals are filed and processed. We have attached a copy of the resolution, along with Chair Burkhardt's email to Council describing the resolution and the process by which it was adopted.

The Development Services Department (DSD), in consultation with the City Clerk, respectfully asks the Board not to pass these rule changes because they are inconsistent with the process established by Council in City Code Chapter 25-1, Article 7 (*Appeals, Variances, Special Exceptions, and Adjustments*). Under the process in City Code, appeals are filed with the DSD director, not the City Clerk, and must be submitted within specified time limits. Unless Council amends the Code to modify these procedures, neither DSD nor the City Clerk's office has authority to change the manner in which the appeals process is administered.

The BOA does exercise sovereign powers on behalf of the City, but it is not exempt from administrative procedures established in City Code. Other sovereign boards that exercise authority under state law, including the Planning Commission and Zoning & Platting Commission, are also subject to procedures established in Code.

We are concerned that the process proposed in the Board's resolution, which provides that the Board determine standing, completeness, and timeliness, would result in uncertainty for parties affected by appeals of permitting decisions. This is because, once an appeal is accepted for filing, it automatically suspends the permit and requires all development to stop. If appeals could be filed even after the deadline established in City Code, projects that are several weeks or months into construction could be forced to cease construction until the Board has time to decide whether to hear the appeal.

Additionally, the changes proposed by the Board would also impact staff's ability to arrange and conduct the Code required meeting of the parties to see if an alternate resolution to the issue of appeal can be met. The meeting of the parties is a significant service that staff provides to applicants who have filed a valid appeal, and often results in a timely resolution for all parties

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without formal board action. If both parties determine that no mutually agreeable alternate resolution can be met, the appeal moves forward to the Board for consideration.

For all of these reasons, DSD recommends against the rule changes proposed in the Board's resolution. That said, and most important, we are committed to working with the Board to improve the appeals process, increase the public availability of information regarding the Board's actions, and to address all concerns that have been raised. As we discussed at the Board's June 2018 and going forward, DSD will provide a report of all appeals filed - including any cases that are determined not to be timely, or which are withdrawn after a meeting of the parties -and information on the number of informal inquiries made regarding appeal rights through the Board's staff liaison as part of a the Board's backup.

Along these same lines, several changes have been proposed in CodeNEXT that give the Board greater authority over the appeals process and provide much-needed clarification on issues about which current Title 25 is unclear. These improvements include the following:

- **Conforms Standing Requirements to State Law.**
Rather than conditioning an appellant's standing on "interested party" requirements established in City Code, the provisions in CodeNEXT allow any "aggrieved party" to file a BOA appeal and leaves it to the Board to determine whether an individual qualifies. This better aligns with applicable provisions of state law than current Title 25 and substantially expands the universe of individuals entitled to file appeals.
- **Clarifies Board's Authority.**
As currently drafted, Title 25 generally acknowledges the Board's authority to consider appeals of code "interpretations," but provides no guidance as to what that actually means. This has caused confusion, particularly in light of the fact that the Code assigns appeals of development permits to the Land Use Commission and the Building & Fire Code Board of Appeals — but not to the BOA.

Consistent with state law, and based on advice from the Law Department, CodeNEXT clarifies that any appeal alleging that a City decision does not comply with applicable zoning regulations is assigned to the BOA, whether the decision is associated with a permit, site plan, general interpretation letter, or enforcement order. This more accurately reflects the Board's authority, eliminates confusion that exists in current Code, and makes it easier for people to understand their appeal rights.
- **Rules for Non-Project Appeals.**
In addition to allowing code interpretations to be appealed in connection with particular permits, which are referred to as "project-level" appeals, CodeNEXT provides a clear option for obtaining more general ("non-project") interpretations of the Code and appealing the interpretation to the BOA.

This is consistent with the process Council adopted several years ago for "use determinations," which are decisions concerning how particular types of land uses are

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classified under applicable zoning regulations. It is intended to give the Board another way to adjudicate issues involving interpretation of the Code.

We believe that each of these changes, along with improvements to DSD's administrative procedures, will help address the issues that the Board has raised regarding the current process for handling appeals. We respectfully ask the Board to work within this framework, and to suggest any further refinements, rather than adopting the rule changes discussed in the Board's June resolution.

cc Mayor and City Council
Spencer Cronk, City Manager
Joe Pantalione, Interim Assistant City Manager
Rodney Gonzales, Director, Development Services Department
Jannette Goodall, City Clerk

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From: [Burkhardt, William - BC](#)
To: [Adler, Steve](#); [Renteria, Sabino](#); [Tovo, Kathie](#); [Pool, Leslie](#); [Houston, Ora](#); [Troxclair, Ellen](#); [Garza, Delia](#); [Casar, Gregorio](#); [Kitchen, Ann](#); [Alter, Alison](#); [Flannigan, Jimmy](#)
Cc: [Cronk, Spencer](#); [Guernsey, Greg](#); [Rusthoven, Jerry](#); [Pantalion, Joe](#); [Linseisen, Andrew](#); [Lloyd, Brent](#); [Morgan, Anne](#); [Heldenfels, Leane](#); [Hawthorne, Melissa Whaley - BC](#)
Subject: Board of Adjustment Resolution June 11, 2018
Date: Tuesday, June 12, 2018 2:11:08 PM
Attachments: [BOA Resolution to City Council June 11, 2018.pdf](#)

Mayor, Mayor Pro-Tem, and Councilmembers,

Please see the attached Resolution passed by the Board of Adjustment last night by a vote of 8-1-1-1 (eight in favor, one opposed, one abstention, and one absence).

The Resolution is the result of multiple hearings, presentations and testimony conducted by the Board, including a Special Called Meeting, beginning in February of this year.

The Resolution was crafted over that time to achieve the greatest consensus among the Board; with respect to the final vote, it's worth noting that relatively significant edits by one member were incorporated in an effort to achieve that greater consensus, but that member ultimately chose to abstain. Also worth noting is that the vote on the resolution had been postponed twice, and as such, even with one position absent (two regular members were out and only one alternate member was available), the Board elected to move the resolution forward rather than wait another month.

The resolution is of two parts; one is deserving attention as you deliberate CodeNEXT, since provisions of the proposed code are considered by the Board to be at variance with the Texas Local Government Code with respect to the role of a sovereign board such as the Board of Adjustment: it is the opinion of the Board that CodeNEXT as drafted abridges the right of citizens to due process with respect to Interpretation Appeals, of which we expect there may – or should - be significant numbers as the code is implemented, as it should be the prescribed role of the Board to determine such Interpretation hearings.

The second part of the Resolution is a budget item and will be forwarded as such, but is related to the first in that, with respect to Interpretation Appeals, there is a perceived conflict of interest that is best remedied by affording the Board separate counsel for these cases; the Board is aware that city legal disputes this concern, and nevertheless recommends action to correct the perception.

I'm available for questions at the request of Council.

Thank you for your attention,

William Burkhardt, Chair
City of Austin Board of Adjustment

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RESOLUTION

WHEREAS, the Board of Adjustment is a Sovereign board established by City Council pursuant to Chapter 211 of the Texas Local Government Code and;

WHEREAS, The Board of Adjustment derives its authority from state law as well as City Code 2-1-111 and Chapter 25-2, Zoning, to uphold, amend, and overturn administrative zoning related decisions when appealed by an aggrieved person or entity and;

WHEREAS, under section 211.010(b) of the Texas Local Government Code and the present City Code Chapter 25-2, the Board of Adjustment is authorized to adopt its own rules and to determine whether a person's Interpretation Appeal will be heard by the Board of Adjustment and;

WHEREAS, under Chapter 211, the deadline for filing a Board of Adjustment Appeal is determined by the Board based on the rules of the Board and;

WHEREAS, City staff has authority to implement a zoning code that necessarily involves interpreting the zoning code, which then is subject to review by the Board of Adjustment when an appeal is filed and;

WHEREAS, to maintain its integrity and independence, the Board of Adjustment has adopted a rule prohibiting all *ex parte* communications between Board members and interested parties and their representatives regarding a case before the Board of Adjustment and;

WHEREAS, City staff is an interested party in all Interpretation Appeals submitted to the Board of Adjustment and;

WHEREAS, the City Legal Department represents City staff and;

WHEREAS, at Board of Adjustment Interpretation Appeal hearings, the City Legal Department also serves as legal counsel to the Board of Adjustment and;

WHEREAS the City Legal Department is currently advising both City Staff and the Board of Adjustment and;

WHEREAS, the City Legal Department's representation of City staff and the Board of Adjustment on the same matter constitutes the appearance of a conflict of interest, detrimental to both the rights of the appellant and the public trust in the Interpretation Appeal process and;

WHEREAS, the above described practices have precipitated a broadly held public perception that the City Legal Department shields City staff decisions from proper statutorily authorized citizen oversight, thus creating a non-transparent, unfair, and unaccountable regulatory environment.

Therefore, be it RESOLVED:

1. BOA should immediately amend its Bylaws and/or Rules of Procedure to have Interpretation cases filed directly with the city clerk, officially date and time stamped upon receipt and immediately copied to the Chairman of the Board of Board of Adjustment and interested parties to have the Board of Adjustment determine standing, completeness and timeliness, and all other matters;
2. The BOA should retain independent legal counsel as it is a perceived conflict of interest for the Legal Department to represent City Staff with respect to interpretation cases, the subject of a Board of Adjustment Appeal, and then advise or go into executive session with the Board of Adjustment relating to that appeal.

William Burkhardt
Boards and Commissions

Scheduled Meeting Disclosure Information: Written disclosure is required by visitors when attending a scheduled meeting with a City Official regarding a municipal question for compensation on behalf of another person. Anyone scheduling or

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accepting a meeting invitation with a City Official must either acknowledge that the disclosure requirement does not apply or respond to the following survey: <https://www.surveymonkey.com/r/BCVisitorLog>

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