

DRENNER
GROUP

August 13, 2018

Via Electronic Mail

Members of City of Austin Board of Adjustment
c/o Leane Heldenfels, Staff Liaison to Board of Adjustment
City of Austin Development Review Department
505 Barton Springs Road
Austin, TX 78704

RE: Comments to Proposed Revisions to Board of Adjustment Rules of Procedure (the "Rules")

Ladies and Gentlemen,

It has come to my attention that the City of Austin Board of Adjustment (the "Board") is proposing to amend certain provisions and procedures in the Rules. My firm received a copy of the proposed revisions on Thursday, August 9, 2018. It is my belief that many of these amendments violate existing provisions in the City of Austin Land Development Code (the "Code") and certain provisions of the Local Government Code of the State of Texas (the "LGC").

We are uncertain as to whether members of the public are able to contact the Board Members directly in this instance, as the proposed amendments are not project specific, or whether such contact would violate the anti-lobbying (ex parte) rules of the Board. Therefore, we are submitting this letter to outline our concerns. The Board is authorized to enact and adopt Rules pursuant to the City of Austin Code, which carries through State law authorizing the Board's establishment by the City. However, the Rules may not supersede or conflict with State Law or the Code. It is important to remember that the Rules are there to protect the Board from violating State law and the Code. As you all know, the Board Members benefit from the defense of sovereign immunity from lawsuit when acting in good faith and carrying out their duties as Board members. However, Texas cases have held that the defense of sovereign immunity is only available to individual members when such members' actions fall within State law authorizing the action. As further detailed below, the proposed amendments, if adopted, would allow Board Members to believe that they have greater authority than they actually do under City Code and State law. To give the illusion of absolute discretion (which, in my opinion the revisions to the Rules do just that) places current and future Board Members in jeopardy of violating the law and losing their defense of immunity as well as potentially subjecting Board Members to other liability. The Rules should enact and enable State law and City Code and should not infer that the Board has unfettered discretion.

- (1) **In general, the Board's request to hire outside counsel violates Section 2.1.43C of the Code.** City of Austin Code Section 2.1.43C states “A board may not conduct a closed meeting without the approval of the city attorney.” Removing a city attorney from the Board’s meetings would be in violation of this. The reason for this Code section is so that the City’s Board rules will comply with State law. Section 211.008 of the Texas Local Government Code requires all BOA meetings to be open to the public.
- (2) City of Austin Code Section 2.1.44B of the Rules states “Each board shall adopt the City's standard board bylaws. A bylaw amendment is not effective unless **approved by the council** after review by the Council Audit and Finance Committee.” I believe that certain of the Bylaws would have to be amended to implement some of their changes because they could conflict with Robert’s Rules.
- (3) **The Rules cannot extend the appeals period for administrative decisions or conflict with City or State Law.** City of Austin Code Section 2.1.44C states: “Boards may adopt special rules of procedure as required. A board's special rules of procedure **may not conflict with state or federal law, the board's bylaws, or the City Code**” (emphasis added). I believe extending the 45th day after the interested party receives notice of the staff decision is in direct conflict with City law because Section 25-1-182 states that the appeal must be brought not later than the 20th day after an administrative decision. I do not see a path to amend the Rules as proposed that would not conflict with the Code and therefore such amendment to the Rules would be tantamount to amending City Code which is not permissible without action by Council. Further, the addition of the provision allowing the BOA to accept appeals after the 45th day at their discretion and the tolling period due to the City’s error could potentially delay the decision of the Board indefinitely. Section 211.0101(d) of the LGC states that the Board shall decide the appeal within a reasonable time. Texas case law on the matter of what constitutes a reasonable period of time holds in a number of instances that a six (6) month delay (and in many instances time periods that are substantially less) is unreasonable *as a matter of law*. In *Sea Mist Council of Owners v. Bd. of Adjustments for S. Padre Island Tex.*, 2010 WL2891580 (Tex. App.—Corpus Christi 2010, no pet.) (mem. op.), the court held that “a delay of more than six-months from the issuance of the building permit and more than four months from the issuance of the occupancy permit is *unreasonable as a matter of law*. *Id.* at *3 (emphasis added).

We believe that the ability of a party to appeal a staff decision regarding deferral of the fee is intended to allow people to file endless numbers of appeals on the same administrative decisions (ie, to each building permit issued in a large single family project for example). Texas courts have applied the doctrine of *res judicata* to BOA decisions because the Board acts in a judicial capacity.

The Board’s discretionary authority to amend the time period for appeals would allow Board members to circumvent State law requirements. We are further concerned that the “sole decision” authority is also in contravention with the right of a party to appeal the decision to a District Court.

- (4) **Definition of Interested Person is not subjective.** The definition of “Interested Person” is defined in City Code (25-1-131). These criteria are not subjective. They are objective. Why does the Board need discretion to approve whether someone is an interested party? They either fit within the definition or they do not. However, I believe they are the decider of this per Section 25-1-181B of the Code. What is the purpose of this amendment?
- (5) The amendment to Sections AB3 specifically state that the BOA must see all appeals *even if they do not comply with laws*. State law (211.009 LGC) make it very clear what the Board of Adjustment may decide upon and what it may not. Further, giving the Board the authority to determine its own jurisdiction without reference to State law and City Code which specifically state what must be in an appeal attempts to give the Board of Adjustment the discretion to act in a manner inconsistent with applicable laws. As stated above, the Board of Adjustment is not allowed to enact Code (laws) by virtue of an interpretation decision. Many of the changes in the Rules (see change allowing the Board to exceed the City staff’s authority) allow the Board of Adjustment to act in an ultra vires manner and enact laws without Council action. Section 211.009 of the Local Government Code states: In exercising its authority under Subsection (a)(1), the board may reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decision, or determination, **and for that purpose the board has the same authority as the administrative official. State law does not allow the Board of Adjustment to exceed the authority of the staff member who made the decision.**

There may be other provisions in the proposed amendments that is in violation of City Code or State law, however, given the fact that we only received the proposed amendments on August 9, 2018, and in an effort to provide you with our analysis of these changes, we reserve the right to provide additional objections to the Rule amendments.

We stand ready to answer any questions you may have. We believe that we are aligned with the Board Members and the City in the desire to have a set of Rules that are unambiguous and consistent with and not in conflict with State law and the City Code.

Thank you for your consideration of our positions in this matter.

Yours truly,



Greta E. Goldsby

CC: Brent Lloyd, Assistant City Attorney
Rodney Gonzales, Director of Development Review Department
Stephen O. Drenner (of the Firm)