

Final Draft
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**BOA RULES OF
PROCEDURE**

BOARD OF ADJUSTMENT
RULES OF PROCEDURE

Approved by the Board of Adjustment on _____, 2019

ARTICLE I. GENERAL PROVISIONS

(A) Legal Authority & Jurisdiction.

- (1) The Board of Adjustment (“BOA” or “Board”) is a sovereign board established by the City Council pursuant to Subchapter A of Chapter 211 of the Texas Local Government Code (“Chapter 211”). The BOA derives its authority from state law, as well as City Code § 2-1-111 (*Board of Adjustment*) and Chapter 25-2 (*Zoning*).
- (2) As stated in Chapter 211 and the City Code, the BOA’s primary functions are to hear and decide:
 - (a) Requests for variances from site development regulations adopted under Chapter 25-2, Subchapter C (*Use and Development Regulations*) and from certain sign regulations under Chapter 25-10 (*Sign Regulations*);
 - (b) Requests for special exceptions from site development regulations, where expressly authorized by Code; and
 - (c) Appeals of administrative decisions made in the enforcement and administration of City zoning regulations and decisions made in the enforcement of Chapter 211.

(B) Rules of Procedure.

- (1) These Rules of Procedure (“Rules”) establish standards, guidelines, and requirements for:
 - (a) the conduct of public hearings and the resolution of cases before the BOA;
 - (b) applications for variances or administrative appeals; and
 - (c) processing of applications for variances and administrative appeals filed with the Development Services Department; and
 - (d) notification to the BOA of the filing of an application for a variance and administrative appeals.

- (2) In the event of a conflict with City Code, Chapter 211 or other applicable law, the Code, Chapter 211 or other law supersedes these Rules.
- (3) Applicants should familiarize themselves with these Rules before filing an application or presenting a case to the BOA for decision. For more detailed information regarding Board and the rules for variances, special exceptions, and appeals, see the *Board of Adjustment Community Guidebook*, at:

https://www.austintexas.gov/sites/default/files/files/Planning/Applications_Forms/Board_of_Adjustment_Guidebook_July_2015_.pdf

ARTICLE II. REQUIREMENTS FOR REQUESTING BOARD ACTION

(A) Complete Application Required.

All requests to the BOA shall be filed on an application form provided by the staff liaison. The staff liaison shall determine if an application is complete before accepting it for filing.

(B) Timing of Submittal & Other Application Requirements.

(1) *Variances & Special Exceptions.*

- (a) Except as provided in Paragraph (B)(1)(b), below, an application for a variance or special exception may be filed at any time provided that the Development Services Department has determined that the development proposed by an applicant requires a variance or special exception.
- (b) A variance or special exception may not be requested for one year if the Board has denied a variance or special exception for the same or substantially similar project.
- (c) Depending on the nature of the project, staff may require an applicant to submit a full permit application before accepting an application for a variance or special exception. At a minimum, staff will require a general plot plan and other detail regarding what the applicant proposes to build.

(2) *Administrative Appeals.*

The BOA is authorized by state law to hear and decide appeals alleging error in an order, requirement, decision, or determination made by staff in the enforcement of Chapter 211 and City zoning regulations, including action on

development applications, code interpretations, land use determinations, and suspension or revocation orders. The rules in Paragraphs (2)(a)-(d), below, supplement the requirements for administrative appeals established under the Land Development Code.

- (a) **Deadline for Filing Appeal.** Under the Land Development Code, an Interested Party must file an administrative appeal within 20 days from the date of the staff decision being appealed, unless a different deadline is specifically established. The BOA may accept an appeal after the deadline on the basis of waiver, estoppel, misrepresentation, misinformation, the interest of justice, or other appropriate legal and equitable grounds. In calculating the deadline for appealing particular types of administrative decisions, the following rules apply:
- (i) If the Land Development Code requires notification of an administrative decision, the deadline begins to run on the date that notification of the decision is provided in accordance with City Code § 25-1-134. (Examples of decisions requiring notification include approval of site plans for which an interested party has registered under City Code § 25-5-114 and use determinations obtained prior to submitting a development application under City Code § 25-1-197).
 - (ii) If the Land Development Code does not require notification of a decision, the appeal deadline begins to run on:
 - For a building permit, the date the permit is issued;
 - For an administrative site plan, the date the site plan is released;
 - For a non-project code interpretation or use determination not associated with a development application, the date the determination is published; and
 - For other types of decisions related to City zoning regulations, the date that the decision is published.
- (b) **Appeal Forms and Other Procedures.** An appeal must contain the information required under City Code § 25-1-183 and be on a form provided by the Development Services Department. and shall:

- (i) Provide the Board an opportunity to review and approve appeal forms; and
 - (ii) Make the required forms available on the City's website, along with useful guidance on how to appeal the decisions listed in Paragraph (2)(a)(i)-(ii), above, and how to obtain formal interpretations of City zoning regulations.
 - (c) **Notice of Appeal.** On receiving the notice of appeal, the official from whom the appeal is taken shall immediately, no later than 3 business days, transmit to the Board the relevant papers constituting the record of the action that is appealed in order that the Board may make a determination.
- (3) ***Payment of Fees Required for All BOA Applications.***
- (a) An applicant must pay the fee established in the City's annual fee schedule at the time an application for a variance, special exception, or administrative appeal is filed.
 - (b) For a variance or special exception, staff may defer payment of the fee until any time prior to the date initially scheduled for the public hearing.
 - (c) For an administrative appeal, staff may not defer payment of the required fee beyond the deadline required for filing the appeal.
- (C) **Standing & Jurisdiction.**
- (1) ***Variances & Special Exceptions.***
- (a) An application for a variance or special exception may be filed by the property owner or by an authorized agent of the property owner.
 - (b) City staff or the Board may require additional information, other than a completed application form, in order to substantiate that an applicant has authority to file an application.
 - (c) The BOA may only consider requests for variances and special exceptions from site development regulations adopted under City Code Chapter 25-2 (*Zoning*). Staff cannot accept applications for variances or special exceptions that are beyond the Board's legal authority.
- (2) ***Administrative Appeals.***

- (a) Notwithstanding the requirements of City Code § 25-1-131 (*Interested Parties*), any “aggrieved party” has standing to appeal a decision to the Board in accordance with applicable requirements of the Land Development Code and these rules. The Board shall determine standing, timeliness, ripeness, and any objections thereto, prior to conducting a public hearing on the appeal.
- (b) The BOA may only consider appeals relating to the interpretation of site development regulations or the classification of a land use under Chapter 25-2, Subchapter C (*Use and Development Regulations*), or a separately adopted zoning ordinance. The Board may not consider an administrative appeal that is beyond its legal jurisdiction.

(D) Public Notice.

- (1) Before the Board conducts a public hearing on a case, public notice is required in accordance with requirements of state law and the Land Development Code. An applicant bears the cost of providing public notice.
- (2) For variances, special exceptions, and appeals relating to a particular site, signs describing the requested action must be posted on the subject property in a manner visible to the public no less than ten (10) days prior to the hearing date. If the subject property is adjacent to more than one public street, separate signs facing each public street must be posted. Mailed notice may also be required, as provided in the Land Development Code.
- (3) If an applicant fails to maintain a sign in accordance with applicable requirements, the Board may postpone a public hearing until adequate notice is provided in accordance with the Land Development Code.
- (4) In accordance with City Code, the postponement or continuation of a public hearing does not require additional notice if the postponement or continuance is to a specific date and time no later than 60 days from the date of the hearing for which notice was given.

ARTICLE III.
SUBSTANTIVE REQUIREMENTS FOR VARIANCES AND SPECIAL
EXCEPTIONS

(A) General Requirements.

- (1) This article summarizes the findings that the BOA is required to make in order to approve a variance or special exception and the number of votes required for approval. More detailed information can be found in the *Board of Adjustment Community Guidebook*, which is accessible via hyperlink in Rule (I)(B), above.
- (2) The applicant bears the burden of demonstrating that his or her case satisfies the required findings. As such, an applicant should provide pictures, drawings, and other visual aids to show the impact that the proposed development would have on adjacent properties and provide context for development patterns in the surrounding area.
- (3) The BOA may request additional information if the material provided by an applicant is insufficient to determine whether a request satisfies the required findings.

(B) Zoning Variances.

- (1) ***Number of Votes Required.*** The concurring vote of at least 75% of the Board is required in order to grant a variance. In calculating the required 75% super-majority:
 - (a) If all eleven (11) authorized seats on the Board have been appointed (i.e., no vacancies) and no member is legally required to recuse him or herself from a variance request, then approval of the variance requires a concurring vote of at least nine of the 11 boardmembers.
 - (b) In calculating the required 75%, all vacant positions and members legally required to recuse themselves are excluded. Thus, if one seat is vacant and one member has a financial conflict of interest that requires recusal, then approval of the variance requires the concurring vote of at least 7 of the nine members.
 - (c) Fractions are rounded to the highest whole number when calculating the required 75% super-majority. That is why, for example, an 11-member

board would require nine rather than 8 votes in order to approve a zoning variance (i.e., $0.75 \times 11 = 8.25$, rounded to 9).

- (2) ***Required Findings.*** In order to grant a zoning variance, the Board must find that:
 - (a) The zoning regulations applicable to the property do not allow for a reasonable use;
 - (b) The hardship for which the variance is requested is unique to the property and not general to the area in which the property is located; and
 - (c) The variance will not alter the character of the area adjacent to the property, will not impair the use of adjacent conforming property, and will not impair the purpose of regulations to the zoning district in which the property is located.
 - (3) ***Optional Findings/Narrative.*** In addition to the findings required under Rule III(B)(2), above, the Board's motion to approve a variance may also include additional, case-specific explanation highlighting particular facts in support of the Board's findings. The BOA is not required to include a case-specific explanation, however, and making the findings in Rule III(B)(2), above, is legally sufficient to approve a variance.
 - (4) ***Conditions.*** The Board may impose reasonable conditions on a zoning variance that directly mitigate the impacts of approving the variance on surrounding properties or are otherwise necessary in order for the Board to make one or more of the findings required under Rule III(B)(2), above.
 - (5) ***Limited Effect of Variance.*** A zoning variance:
 - (a) Applies only to the use for which the variance was granted and does not run with the land on which the use is located; and
 - (b) Expires one-year after the date of approval—which means that any site plan or building permit applications for which the variance is required must be submitted within one-year from the date the BOA approves the variance.
- (C) **Parking Variances.**

- (1) ***Requirements for Zoning Variances Apply.*** A variance from the minimum parking requirements in Chapter 25-6, Appendix A (*Table of Off-Street Parking & Loading Requirements*) of the Land Development Code is a zoning variance and subject to all of the requirements in Rule III(B), above.
- (2) ***Additional Required Findings.*** In addition to the findings required under Rule III(B)(2), above, the Board must make the following additional findings if a requested variance involves a regulation addressing loading facility or off-street parking requirements:
 - (a) Neither present nor anticipated future traffic volumes generated by the use of the site or the uses of sites in the vicinity reasonably require strict or literal interpretation and enforcement of the specified regulation;
 - (b) Granting the variance will not result in the parking or loading of vehicles on public streets in a manner that interferes with the free flow of traffic on the streets; and
 - (c) Granting the variance will not create a safety hazard or any other condition inconsistent with the objective of the regulations.

(D) Sign Variances.

- (1) ***Requirements for Zoning Variances Not Applicable.*** The Board is authorized by ordinance to consider requests for variances from the development standards in Chapter 25-10 (*Sign Regulations*). Since these requirements are not zoning regulations,¹ the concurring vote of a simple majority of authorized positions (i.e., 6 of 11) is sufficient to approve a variance from a sign regulation.
- (2) ***Required Findings.*** The BOA may grant a variance from the development standards of Chapter 25-10 if it finds that granting the variance does not provide the applicant with a special privilege not enjoyed by others similarly situated or potentially similarly situated; and makes one or more of these additional findings:
 - (a) the variance is necessary because strict enforcement of the provisions of the sign regulations prohibit any reasonable opportunity to provide

¹ Pursuant to established case law, decisions on the legal non-conformity of an off-premise sign are treated as zoning determinations for purposes of the super-majority voting requirement in Rule III(B).

adequate signs on the site, considering the unique features of a site, such as its dimensions, landscaping or topography;

- (b) granting the variance will not have a substantially adverse impact upon neighboring properties; or
- (c) granting the variance will not substantially conflict with the stated purposes of the sign regulations.

(E) Findings for Airport Zoning Variances.

- (1) ***Number of Votes Required.*** Approval of a variance from regulations under Chapter 25-13 (*Airport Hazard and Compatible Land Use Regulations*) requires the concurring vote of at least 75% of the Board, as calculated in accordance with Rule III(B)(1), above.
- (2) ***Required Findings.*** Pursuant to state law, the findings required for the BOA to approve an airport zoning variance are different than the findings required for a general zoning variance under Rule III(B), above. In order to approve a variance from a development regulation under Chapter 25-13, the Board must find that:
 - (a) a literal application or enforcement of the regulation would result in practical difficulty or unnecessary hardship; and
 - (b) the granting of the relief would:
 - i. result in substantial justice being done;
 - ii. not be contrary to the public interest; and
 - iii. be in accordance with the spirit of the regulation and Chapter 241, Local Government Code.

(F) Special Exceptions.

- (1) ***Distinct From Standard Zoning Variance.*** The BOA may approve a special exception for an existing structure with minor setback violations, as specified under the Land Development Code. Approval of a special exception requires the concurring vote of at least 75% of the Board, per Rule III(B)(1), above.
- (2) ***Required Findings.*** The Board may approve a special exception if:
 - (a) the residential use for which the special exception is sought is allowed in an SF-3 or more restrictive zoning district;

- (b) the building official performs an inspection and determines that the violation does not pose a hazard to life, health, or public safety; and
- (c) the Board finds that:
 - i. the violation has existed for at least 25 years;
 - ii. the use is a permitted use or a nonconforming use;
 - iii. the structure does not share a lot with more than one other primary residence; and
 - iv. granting a special exception would not:
 - alter the character of the area;
 - impair the use of adjacent property that is developed in compliance with city code; or
 - grant a special privilege that is inconsistent with other properties in the area or in the district in which the property is located.

ARTICLE IV.

SUBSTANTIVE REQUIREMENTS FOR ADMINISTRATIVE APPEALS

- (A) **Appeals Limited to Interpretations of Site Development Regulations & Land Use Determinations.** The BOA may consider an administrative appeal alleging error in an order, requirement, decision, or determination made by City staff in enforcing a substantive requirement of Chapter 25-2 or other City zoning regulation, including appeals challenging the approval or disapproval of a site plan or building permit and formal code interpretations not related to a particular development.
- (B) **Number of Votes Required.** In order to grant an appeal reversing or modifying a decision by City staff regarding a code interpretation or use determination, the concurring vote of at least 75% of the Board is required, as calculated in accordance with Rule III(B)(1), above.
- (C) **Basis for Decision.** In deciding an appeal, the Board may affirm or reverse, in whole or in part, or modify the administrative decision under review, but may not exceed the authority of the City official who made the decision. Before deciding an administrative appeal, the Board shall consider:
 - (1) the facts and statements in the application;
 - (2) the testimony and other evidence presented at the public hearing;
 - (3) the responsible city official's statement on the appeal; and

- (4) the Board's consideration and evaluation of the language of the regulations and of related ordinances bearing thereon.
- (D) **Decision and Findings.** In order to grant an appeal reversing or modifying an administrative decision, the Board must:
- (1) find that City staff's determination is erroneous and provide a statement of grounds in support of the finding;
 - (2) state what the Board determines to be the correct interpretation of the site development or use regulation(s) at issue in the appeal.

ARTICLE V. HEARINGS AND DECISIONS

- (A) **Applicant or Registered Agent/Representative.** The applicant, or a party in opposition, may appear in person or be represented by counsel or an agent.

- (B) **Order of Business.**

After the chair calls the meeting to order, the staff liaison shall call each matter in the order filed and shall announce the case number, the name of the applicant, and the location of the property. The staff liaison shall describe the nature of the case and advise the Board of any communications received. The chair shall administer an oath to all persons providing testimony or other evidence.

- (C) **Procedure for Hearings on a Variance or Special Exception.** A public hearing on a request for a variance or special exception should generally adhere to the following format:

- (1) The chair shall call the applicant, who shall first address standing to appear before the Board by establishing status as:
 - (a) the agent or owner for the subject property; or
 - (b) an interested party under the notice provisions of the Land Development Code or an individual otherwise affected by the applicant's request.
- (2) The applicant shall present arguments. The chair shall then inquire if there are others affected who support the variance or special exception, who may then speak, within the remaining time allotted.
- (3) The chair shall call next those opposed to the applicant's request to present arguments. The chair shall then call the applicant to rebut arguments presented by opposition. Following rebuttal, the chair shall order the hearing closed.

- (4) Each side shall proceed without interruption by the other and all arguments and pleadings shall be addressed to the Board. No argument between applicant and opponents is permitted. The chair may allow limited cross-examination between applicant and opponents.
 - (5) The Board may continue a hearing on any matter for which the applicant fails to appear, unless the applicant has requested that the Board act without the applicant's being present.
 - (6) The Board may deny any matter in which the applicant has failed to appear without cause for two meetings for which the variance or special exception was posted for consideration, provided the Board shall hear those persons appearing in response to the notice of hearing.
- (D) **Administrative Appeals.** A public hearing on an administrative appeal should generally adhere to the following format, but the Board may modify the format for particular cases as deemed appropriate:
- (1) ***Standing to Appeal & Requests for Postponement.***
 - (a) The chair should begin by stating: *“Before we open the public hearing, are there any requests for postponement or issues of standing that anyone would like to raise?”*
 - (b) If objections to standing (which include issues of timeliness, jurisdiction, or ripeness) or requests for postponement are raised, the chair should resolve them before proceeding to the public hearing. The chair should limit testimony to only those issues, not the merits of the case. If no objections are raised, the chair should open the public hearing and follow the format below.
 - (2) ***Format for Appeal Hearing.***
 - (a) Presentation by the appealing party or their lead representative (suggest limiting to 10 minutes with no donation of time allowed);
 - (b) Report from City staff and all opposing parties regarding the basis for the decision (suggest limiting to 10 minutes);
 - i. if the appeal challenges approval of a permit or other project-specific administrative decision, a presentation by the permit-holder or project applicant, or their representative (suggest limiting to 10 minutes with no donation of time allowed);

- (c) Comments by citizens in support of or in opposition to the appeal (3 minutes each, with donation of time allowed), subject to reasonable limits imposed by chair to save time and avoid redundant or irrelevant testimony; and
- (d) Rebuttal by the appealing party (3 minutes).

(E) Time Limits for Presentations.

- (1) ***Variations.*** Presentations on behalf of an application for a variance shall be limited to a total of five minutes. Presentations on behalf of opponents shall be limited to a total of five minutes. The applicant shall have a total of two minutes to rebut the arguments of the opponents.
- (2) ***Administrative Appeals.*** Presentations to the Board on administrative appeals should generally adhere to the time limits specified in Rule IV(D), above.
- (3) ***Increase of Time Limits.*** By majority vote of the Board, or upon ruling by the chair, time limits may be equitably extended. After the public hearing is closed, no further public comment shall be accepted unless requested by the chair.

(F) Deliberation, Voting and Post-Hearing Procedures.

- (1) ***Board Deliberation.*** After closing the public hearing, the Chair may call for questions from the Board to the applicant, staff, witnesses and interested parties in order to bring out all relevant facts, circumstances and conditions affecting the matter and then call for questions from other Board members or the responsible city official. During its deliberation, the Board may call on any party to the proceeding or witness for further questioning.
- (2) ***Disposition.*** The Board may defer action on an appeal if it concludes that additional evidence is needed, alternate solutions need further examination, or evidence presented at the hearing requires further review. The Board may dismiss or postpone a matter if the Board finds that it was improperly filed.
- (3) ***Vote Required.*** In addition to the substantive rules specified in Article III, above, the calculation of votes is subject to the following additional rules:
 - (a) If a motion in favor of an applicant fails to receive the minimum number of affirmative votes required for approval, it shall be regarded as a vote to deny.

- (b) If a member is absent and the vote of that member added to the number voting for the applicant would equal the minimum number of affirmative votes required to approve a request, the motion shall be regarded as a vote to postpone action and continue consideration of the matter to the next meeting.
 - (c) If a motion to deny a zoning variance or administrative appeal receives at least three affirmative votes, it shall be regarded as a vote to deny. If a motion to deny a variance from Chapter 25-10 (*Sign Regulations*) receives at least five votes, it shall be regarded as a vote to deny.
- (4) **Reconsideration.** The following rules apply to a request that the Board reconsider a prior determination:
- (a) A matter on which the Board has acted may be reconsidered once by the Board.
 - (b) A request to reconsider may be filed by any person having original standing in the matter—i.e., for a variance or special exception, an individual who qualifies as an interested party or their agent or the landowner or their agent; for an administrative appeal, an aggrieved party or their agent.
 - (c) Requests for reconsideration shall be filed in writing with the staff liaison within 10 days after the Board’s decision and must: (i) state how the Board erred in its determination; (ii) state why the action should be reconsidered; and (iii) be supported by new or clarified evidence.
 - (d) When a request to reconsider has been properly filed, the staff liaison shall place the matter on the agenda of the next regular meeting. The Board shall review the request and shall, on the basis of the written material submitted by the applicant in support of the request, determine whether to reconsider the matter because of an error in its original determination or on the basis of new or clarified evidence not presented to the Board at the original hearing that might affect its determination.
 - (e) A member may move to reconsider regardless of the member’s vote on the original appeal. The affirmative vote of six (6) members of the Board shall be necessary to reconsider a matter, which shall then be heard immediately following the Board’s decision to reconsider.

Failure of a motion to reconsider shall constitute final action on the matter.

- (f) Action on a matter for which reconsideration has been granted is subject to the same voting requirements as the original determination.

(5) *Decision Sheet.*

- (a) Upon final disposition of a case, the staff liaison shall file in the Board's offices a decision sheet stating:

- (i) the ultimate disposition of a case;
- (ii) if applicable, any conditions imposed on a variance or special exception; and
- (iii) the Board's findings.

- (b) For an administrative appeal:

- (i) The decision sheet may include an addendum stating the Board's interpretation of the regulation or land use category at issue in the appeal. A decision by the Board is a final determination unless the decision is reversed by District Court or the relevant Code provisions are amended by the City Council.
- (ii) The City shall post precedential BOA decisions on the City's website.

- (c) The record before the Board at a public hearing on a variance, special exception, or administrative appeal is automatically incorporated into the decision sheet.

(6) *Appeal to District Court.* Final decisions of the Board may be appealed to District Court within 10-days, as provided under Sec. 211.011 of the Texas Local Government Code and other applicable law. For purposes of these Rules, a decision is deemed to be "filed in the board's office" on the later of:

- (a) The first business day after the expiration of the reconsideration period established under Rule V(F)(4), above; or
- (b) If a timely request for reconsideration is filed, the first business day after: (i) the meeting at which the Board denies the reconsideration

request; or (ii) if a request to reconsider a case is granted, the meeting at which the Board takes action on the case.

ARTICLE VI. PROHIBITION ON *EX PARTE* COMMUNICATIONS.

- (A) ***Quasi-Judicial Body.*** The BOA is a quasi-judicial body with authority to decide the rights of individual parties, subject to the requirements of state law and the Land Development Code. In deference to its decision-making role, no one other than City staff may contact a boardmember outside of a public hearing regarding a matter that is pending, or may in the future be pending, before the Board. All communications to the Board outside of a public hearing should be directed to the staff liaison.
- (B) ***Limitations on Outside Investigations.*** Members shall not individually investigate cases before the Board, other than routine site visits or reviewing publicly available information.
- (C) ***Disqualification.*** A BOA member that receives material information regarding a case that is not made available to other boardmembers is disqualified from participating in the case unless the member publicly discloses the information and its source at the earliest reasonable opportunity. A BOA member may disqualify him or herself if an applicant, interested party, or agent has sought to influence the member's vote other than in a public hearing or through documents made available at the public hearing.
- (D) ***Attendance of Required Witnesses.*** The chair may compel the attendance of witnesses at public hearings before the Board.