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# Board of Adjustment Deep Dive: Key Topics & Issues

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Development Services Department  
February 22, 2024

# Agenda

- General Background & History of BOA
- Core BOA functions & requirements:
  - Variances
  - Special Exceptions
  - Appeals
  - BOA Process Issues
- Boat Docks
- Environmental & Lake/Shoreline Presentations
- Residential Review

# ....but first, introductions:

## BOA Members

Thomas Ates  
Jessica Cohen  
Melissa Hawthorne  
Brian Poteet  
Marcel Gutierrez-Garza  
Margaret Shahrestani  
Jeffery Bowen  
Janel Venzant  
Michael Von Ohlen  
Yung-ju Kim  
Kelly Blume (Alternate)  
Suzanne Valentine  
(Alternate)

## City Staff

Keith Mars  
Brent Lloyd  
Chris Johnson  
Elaine Ramirez  
Diana Ramirez  
Lyndi Garwood  
Alex Creel  
Mike Peralta  
John Clement  
Clarissa Davis

# Zoning Boards of Adjustment

- Included in the 1929 model “state zoning enabling act,” promulgated by U.S. Dept. of Commerce.
- Intended to provide greater flexibility by authorizing “variation” of zoning regulations and provide administrative oversight.
- Unlike municipal planning/zoning commissions, which performs a mix of advisory and decision-making functions, all BOA functions are quasi-judicial.

# Austin's Board of Adjustment

- Austin's BOA established by 1931 zoning ordinance:

## BOARD OF ADJUSTMENT.

SECTION 24. THAT there is hereby created and established a Board of Adjustment. The Board of Adjustment shall consist of five members, who shall be elected by the City Council, three members of which shall serve for the term ending January 1st, 1932, and two members of which shall serve for the term ending January 1st, 1933, and thereafter the term of such members shall be for a period of two years from the termination of their respective terms. Members of the board may be removed by the City Council upon written charges and after public hearing. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant from any cause.

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# Zoning Variances

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# Zoning Variance Criteria per Land Development

Findings for Approval		Guidelines
No Reasonable Use	<i>The requirement does not allow for a reasonable use of property.</i>	Determined by context. Landowner needn't prove a "taking" (i.e., loss of all economically viable use), but desire for "highest & best" use is insufficient.
Harship	<i>Harship is unique to the property and is not generally characteristic of the area in which the property is located.</i>	Typically involves features of the property itself, but overall context of development may also be considered.
Area Character	<i>Development under the variance does not: (a) alter the character of the area adjacent to the property; (b) impair the use of adjacent property; or (c) impair the purposes of the applicable zoning district regulations.</i>	Considers how development allowed by variance would impact properties differently than development without a variance, as well as development patterns in the surround area and goals of the regulations

# Variance Standard per State Law

➔ Per Chapter 211 of the Local Government Code, a board of adjustment may:

*“[A]uthorize 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.”*



# Variance Factors (cont'd)

- ***Balancing Test.*** A BOA should balance the equities that favor granting a variance with the “public interest.”
- ***Unique Factors.*** A variance must be based on “special conditions”; typically, that involves features of the property itself, but BOAs aren’t prohibited from considering other unusual factors of proposed development.
- ***Spirit of Zoning Ordinance.*** When viewed against the purpose or “spirit” of zoning regulations, a variance should have minimal overall impact. Literal enforcement should be unnecessary to achieve the purpose of a zoning ordinance.

# Variance Factors (cont'd)

- ***“Use” Variances Aren’t Allowed.*** A BOA cannot, for example, approve a prohibited industrial use in a residential zone.
- ***Hardships Can’t be “Self-Created.”*** Subdividing a parcel into smaller sized or odd-shaped lots may amount to a self-created hardship weighing against approval of a variance.
- ***Permits Issued in Error.*** BOA has discretion to consider reliance on permits approved in error, but mistakes by the City don’t entitle landowners to a variance.

# Variance Factors (cont'd)

- ***Variance Conditions.*** BOA may impose conditions on a variance, but they must be directly related to the impacts of development allowed by the variance.
- ***Financial Hardships.*** Historically, financial impacts of regulations on property could not be the primary basis for granting a variance, but could be a factor.
- ***New Legislation.*** HB 1475, passed in the 2020 regular session, authorizes BOAs to consider a wider range of factors related to impacts of regulation on property.

# HB 1475

“[T]he board may consider the following as grounds to determine whether compliance with the ordinance as applied to a structure that is the subject of the appeal would result in unnecessary hardship:

- (1) the financial cost of compliance is greater than 50 percent of the appraised value of the structure as shown on the most recent appraisal roll certified to the assessor for the municipality under Section 26.01, Tax Code;
- (2) compliance would result in a loss to the lot on which the structure is located of at least 25 percent of the area on which development may physically occur;
- (3) compliance would result in the structure not being in compliance with a requirement of a municipal ordinance, building code, or other requirement;
- (4) compliance would result in the unreasonable encroachment on an adjacent property or easement; or
- (5) the municipality considers the structure to be a nonconforming structure.”

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# Special Exceptions

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# Authorization for Special Exceptions

➤ Per Chapter 211 of the Local Government Code:

*“[T]he governing body may authorize the board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, to make special exceptions to the terms of the zoning ordinance that are consistent with the general purpose and intent of the ordinance and in accordance with any applicable rules contained in the ordinance.”*

# Special Exceptions – Distinct From Variances

- Unlike variances, BOAs may only grant special exceptions if authorized to do so by ordinance.
- Factors for granting an exception are defined by ordinance and generally focus on issues besides “hardship.”
- City councils can use special exceptions to provide relief tailored to particular contexts. In some cities, certain uses are permitted only by special exception—meaning that the BOA must make specific findings in order for staff to approve a permit allowing the use.

## Special Exceptions (cont'd)

- Special exceptions may also be used to relax site development restrictions in certain contexts—again, only where authorized by ordinance and only by the terms specified in the ordinance.
- In Austin, special exceptions are authorized to approve certain older structures that were built without proper permits and could not be permitted today.



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# Administrative Appeals

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# Administrative Appeals

- State law authorizes BOAs to hear appeals that “allege error in an order, requirement, decision, or determination made by an administrative official” in enforcing zoning regulations.
- Appeals most often challenge decisions related to permits issued for particular projects, but they may also challenge general determinations not related to a particular application or property.
- Appeals must be filed within 20 days after the decision and, for a project-level appeal, may only be brought by applicants or aggrieved landowners within 200 feet.

# Administrative Appeals (cont'd)

- Appeals have been filed to challenge how:
  - Site development standards are applied in review and approval of building permits under residential zoning regulations; and
  - Land uses are classified, for purposes of determining if a use is allowed, prohibited, or conditional.
- Depending on the issue, the BOA's decision in an appeal can impact how the City applies regulations going forward.

# General Process Issues

- BOA Guidebook
- Recusal vs. abstention
- Voting requirements & use of alternates
- Judicial temperament; rule against ex parte contacts
- Austin Energy approvals