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Advanced ZBA Issues

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I. Zoning Structure

Zoning is accomplished though a structure similar to the federal government: executive, legislative and judicial. City staff, often led by a City Manager, provides the executive function: administering the Zoning Code. City Council, usually with the advice of the Zoning Commission, provides the legislative function: adopting and amending the Zoning Code. The Zoning Board of Adjustment (sometimes referred to as the BOA, but more commonly as the ZBA) serves the judicial function: making interpretations, considering fact-specific requests and providing a "safety valve" to prevent inequitable hardships.

II. Board of Adjustment

The ZBA has a critical place in zoning world. This paper provides a detailed review of the ZBA, and its unique position on land use law including the ZBA's creation, power, procedure and unusual appeal process. The role of ZBAs is fully discussed in more detail in Chapter 6 of *Texas Municipal Zoning Law* (Mixon, Dougherty, et al., Lexis Law Publishing, 3d Ed., updated 2010) ("TMZL")

A. Authority

The ZBA is authorized by Texas Local Government Code Chapter 211 (the Texas Zoning Enabling Act) for the purposes of hearing and deciding only the following issues:

- Appeals from administrative decisions, particularly interpretations of the Zoning ordinance;
- "Special Exceptions;"
- "Variances;" and
- "Other matters authorized by ordinance".

TEX. LOC. GOV'T CODE § 211.009.

Judicial expansion of the ZBA's power has included allowing a ZBA to supervise the phasing out of nonconforming uses. *See White v. City of Dallas*, 517 S.W.2d 344 (Tex. Civ. App.—Dallas 1974, no writ). Legislation enacted in 1993 authorizes delegation of "other matters" to a ZBA by ordinance. TEX. LOC. GOV'T CODE § 211.009(a)(4). Some cities delegate enforcement duties to the ZBA; *see, e.g.*,. MONT BELVIEU, TEX., ORDINANCES § 25-96.

Especially when a variance is requested, the ZBA is authorized to ameliorate exceptional instances which, if not relieved, could endanger the integrity of a zoning plan. *Thomas v. City of San Marcos*, 477 S.W.2d 322, 324 (Tex. Civ. App.—Austin 1972, no writ); *Swain v. Bd. of Adjustment of City of University Park*, 433 S.W.2d 727, 735 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.). A ZBA must act only within its specifically granted authority. *W. Tex. Water Refiners, Inc. v. S & B Beverage Co.*, 915 S.W.2d 623, 626 (Tex. App.—El Paso 1996, no writ). If the ZBA acts outside its specifically granted authority, it is subject to a collateral attack in district court; and the suit is not governed procedurally by Texas Local Government Code §211.011 (the petition for writ of certiorari discussed below). *Id.* For example, if a board grants a special exception that is not a conditional use expressly provided for under the ordinance, then

the board has exceeded its authority to act. *Id*. at 627. The ZBA may not grant special exceptions or variances that amount to a zoning ordinance amendment; only the city council may approve or disapprove zoning amendments. *See* Op. Tex. Att'y. Gen. No. JM-493 (1986)(under the zoning ordinance in question, a "specific use permit" was a type of ordinance amendment that only the city council could approve).

The "big three" matters heard by ZBA's are:

(1) Interpretations of a zoning ordinance. Interpretations of a zoning ordinance by a city's "administrative official" (typically a city staff member) can be appealed to a ZBA. The Zoning Commission and City Council have no authority to hear such an appeal or interpret the zoning ordinance in that situation (except when the council of a "Type A general-law municipality" is acting as a board of adjustment under Texas Local Government Code §211.008).
(2) Special exceptions. Special exceptions are site-specific special permissions that are created by a zoning ordinance. The ZBA may not grant a special exception unless that authority is specifically granted in a particular zoning ordinance provision. There is no "floating" special exception right outside the ordinance. Usually, the ordinance establishes criteria and standards. Special exceptions typically run with the ownership of the property, unless stated otherwise.
(3) Variances. Variances are site-specific approvals for a particular property to vary from zoning requirements—actually to *violate* zoning requirements—upon a finding of hardship, etc. The ZBA has a "floating" right to grant variances that comes from state law. TEX. LOC. GOV'T CODE §211.009(a)(3). A zoning ordinance may establish additional requirements or limitations on a ZBA granting a variance. *City of Dallas v. Vanesko*, 189 S.W.3d 769, 773 (Tex. 2006).

B. Organization

The ZBA is organized as follows:

- The board is appointed by the governing body of the city.
- The board is composed of at least five members.
- Members serve two year terms, with vacancies filled for the remaining term.
- Each member of the governing body may be authorized to appoint one member and remove that member for cause after a public hearing on a written charge.
- A city, by charter or ordinance, may provide for "alternate" members to sit in place of regular members when requested to do so by the mayor or city manager.
- Quorum is seventy-five percent (75%) of the ZBA members (usually, four out of the five members).
- The ZBA may adopt rules pursuant to an ordinance authorizing it to do so.
- The presiding officer may administer oaths and compel attendance of witnesses.
- All meetings must be public.

- Minutes must be maintained reflecting each member's vote and attendance.
- Minutes and records are public and must be filed immediately.
- The governing body of a Type A municipality may act as its ZBA. TEX. LOC. GOV'T CODE §211.008.

Cities with a population of 500,000 or more may create multiple panels, each of which have the powers of the ZBA. TEX. LOC. GOV'T CODE §211.014. In 2005, the Texas legislature reduced the threshold from 1.8 million. This provision was originally adopted in 1993 to facilitate the zoning of Houston, then anticipated to be implemented in 1994.

C. Super-Majority Vote Required

A concurring vote of seventy-five percent (75%) (which is 4 out of 5 or 6 out of 7) of the members of the ZBA is necessary to: (i) decide in favor of the applicant on a special exception or other matter provided in a zoning ordinance, (ii) grant a variance or (iii) reverse an interpretation or other action by the administrative official. TEX. LOC. GOV'T CODE § 211.009.

D. Quasi-Judicial Nature of ZBA

The ZBA is a "quasi-judicial" body. *Vanesko*, 189 S.W.3d at 771; *Bd. of Adjustment of City of Corpus Christi v. Flores*, 860 S.W.2d 622, 625 (Tex. App.—Corpus Christi 1993, writ denied); *Bd. of Adjustment of City of Dallas v. Winkles*, 832 S.W.2d 803, 805 (Tex. App.—Dallas 1992, writ denied); *Galveston Historical Found. v. Zoning Bd. of Adjustment*, 17 S.W.3d 414, 416 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). However, the Fifth Circuit earlier struggled with this assessment in *Shelton v. City of College Station*. 780 F.2d 475, 479-83, 486-90 (5th Cir. 1986) (nine judge majority decision held the ZBA's decision on a variance was quasi-legislative while a five judge dissent said it was quasi-judicial).

The ZBA provides a due process opportunity for an aggrieved party (typically the land owner, but sometimes a neighbor or other person with standing; see below) to have an administrative remedy before having to seek redress through the courts. The structure of the ZBA is intended to provide fair notice and opportunity to appear, a fair process in which to be heard, notice and opportunity for the public and other interested parties to appear and be heard (in some cases), the opportunity to submit evidence, a tough standard for approvals (super majority-vote required), and a reasonable avenue to appeal to the courts..

E. Standards for a Variance

1. Statutory Basis- Variances are authorized by TEX. LOC. GOV'T CODE § 211.009 (a):

"The board of adjustment may…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 is done…."

TEX. LOC. GOV'T CODE § 211.009. Most zoning ordinances mimic this language but some ordinances limit variance to more narrow circumstances. *See Vanesko*, 189 S.W.3d at 773. Such limitation is controlling. *Id*.

2. Analysis- The state law elements for a variance are analyzed as follows:

- "*The board of adjustment may authorize in specific cases a variance from the terms of the zoning ordinance…*" The ZBA has discretionary power to permit violation of the zoning ordinance based upon specific facts.
- "*[I]f the variance is not contrary to the public interest…*" The ZBA must balance the equities in favor of the applicant not having to comply with the benefit to the general public of compliance.
- "*[A]nd, due to special conditions…*" The variance must be founded on unusual factual circumstances. Texas courts have diverged on the question of what can constitute "special conditions." *Compare: Bat'tles v. Board of Adjustment of the City of Irving*, 711 S.W.2d 297 (Tex. App.—Dallas, no writ) (narrower interpretation) to *Town of S. Padre Island v. Cantu*, 52 S.W.3d 287, 290 (Tex. App.—Corpus Christi 2001, no pet.) (broader interpretation).
- "*[A] literal enforcement of the ordinance would result in unnecessary hardship…*" Hardship is the core of a variance. The applicant must demonstrate the existence of a hardship and that it is unnecessary (a reference to the earlier elements requiring a balancing of the equities). Hardship is usually the key issue in a variance case; see discussion of caselaw below.
- "*[A]nd so that the spirit of the ordinance is observed and substantial justice be done*." The applicant must show that, considering the zoning ordinance as a whole, the variance is not material, and that the balancing of the equities tips in their favor.

3. Caselaw Limitations-

   i. Use Variances Prohibited. In Texas, deciding upon the allowable "uses" of property (e.g., residential, commercial) is considered a legislative function that cannot be delegated to the ZBA. Therefore, so-called "use" variances are prohibited in Texas. *Board of Adjustment of City of Fort Worth v. Rich*, 328 S.W.2d 798, 799-800 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.); *Davis v. City of Abilene*, 250 S.W.2d 685, 687 (Tex. Civ. App.—Eastland 1953, writ ref'd n.r.e.); *S & B Beverage Co.*, 915 S.W.2d at 628. A use variance may be challenged collaterally, since it is void. *Board of Adjustment of the City of San Antonio v. Levinson*, 244 S.W.2d 281, 285 (Tex. Civ. App.—San Antonio 1951, no writ); *Swain*, 433 S.W.2d 727. (These cases do

not prohibit a ZBA from granting a special exception to authorize a certain use in those situations where the ordinance allows it. For example, an ordinance could allow the ZBA to grant a special exception to authorize a theater in a light commercial district.)

ii. Financial Hardship. Some cases indicate the financial hardship alone is insufficient to support a variance. *City of Alamo Heights v. Boyar*, 158 S.W.3d 545 (Tex. App.—San Antonio 2005, no. pet.). The Texas Supreme Court in *City of Dallas v. Vanesko* enforced a local ordinance which prohibited granting variances "for financial reasons only." 189 S.W.3d at 773. One court held that accommodating "highest and best use" is not sufficient to support a variance. *Board of Adjustment of the City of San Antonio v. Willie*, 511 S.W.2d 591, 593-94 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

iii. Self Imposed Hardship. Many cases indicate that self created hardships do not support a variance. *Currey v. Kimple*, 577 S.W.2d 508, 512-13 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.). However, construction in reliance on a city permit or approval was held to support a variance in two cases. *Board of Adjustment of the City of Corpus Christi v. McBride*, 676 S.W.2d 705, 706-09 (Tex. App.—Corpus Christi 1984, no writ); *Town of South Padre Island v. Cantu*, 52 S.W.3d 287, 290 (Tex. App.—Corpus Christi 2001, no writ). Nonetheless, in *Dallas v. Vanesko*, the court held the hardship was self-created when the applicant designed a house exceeding height limits, even though the city reviewed and approved the plans and issued a building permit. 189 S.W.3d at 774.

iv. Right to Recreational Use. Some cases indicate that the right to use residential property to its fullest and the right to recreational use (the "right to recreat") can support a variance. *Board of Adjustment of the City of Piney Point Village v. Solar*, 171 S.W.3d 251, 255 (Tex. App.—Houston [14th Dist.] 2005, pet. denied); *Currey*, 577 S.W.2d at 513; *Cf. Boyar*, 158 S.W.3d 545.

F. Standards for Interpretations

The Texas Supreme Court outlined the following rules for interpreting an ordinance:

- The rules for construing state statutes are used;
- The objective is to discern the governing authority's intent;
- The first review is the plain meaning of the words of the provisions;
- Interpretation should be consistent with other provisions of the ordinance as a harmonious whole;
- Interpretation should avoid conflict and superfluities.

Board of Adjustment of City of San Antonio v. Wende, 92 S.W.d 424, 431-32 (Tex. 2002).

G. Standing for Appeal to a ZBA

The following parties may appeal a decision made by an administrative official to the ZBA:

(1) a person aggrieved by the decision, or
(2) any officer, department, board, or bureau of the municipality affected by the decision, other than a member of a governing body sitting on a ZBA under Texas Local Government Code section 211.008(g).

TEX. LOC. GOV'T CODE ANN. § 211.010 (a), (e) (Vernon 2008).

Standing to appeal an order, requirement, decision, or determination made by an administrative official requires the appealing party to demonstrate injury or harm to themselves other than as a member of the general public. *Galveston Historical Found.,* 17 S.W.3d at 416–17; *Texans to Save the Capitol, Inc. v. Bd. of Adjustment of City of Austin*, 647 S.W.2d 773, 775 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Standing does not require establishing either a direct link between a party's activities and the ZBA's decision or that a harm has already occurred. Residents in the same zoning district are aggrieved and therefore have standing. *Galveston Historical Found.,* 17 S.W.3d at 418. An adjacent city is aggrieved if the decision adversely affects it differently than the general public. *Bd. of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424 (Tex. 2002).

H. Disqualification of ZBA Member

The test for disqualification of a ZBA member from a vote is whether the member has an "irrevocably closed mind." *Shelton*, 780 F.2d at 486. In *Shelton*, the fact that a ZBA member was also a member of a church which actively opposed a variance before the ZBA (which was denied) did not require the disqualification of the ZBA member. *Id.*

I. Appeal of ZBA Decision

The procedures for challenging a ZBA decision are "rather unique." *Tellez v. City of Socorro,* 226 S.W.3d 413, 414 (Tex. 2007). The ZBA's decision can be challenged by petition to a court of record to review the ZBA's decision by writ of certiorari. The petition must be filed *within ten days* after the decision. *Tellez*, 226 S.W.3d at 414; TEX. LOC. GOV'T CODE §211.01. The court wrote that "jurisdiction exists" when a party timely files such a petition. *See* further discussion below. The petition must state that the ZBA decision was illegal and specify the grounds. *Tellez*, 226 S.W.3d at 414; TEX. LOC. GOV'T CODE §211.01. Failure to do is a procedural defect which may the attacked by the ZBA. *Tellez*, 226 S.W.3d at 414. However, if the ZBA fails to raise these defects, they are waived because they do not affect subject-matter jurisdiction. *Id*.; *Davis v. Zoning Board of Adjustment of the City of La Porte*, 865 S.W.2d 941, 942 (Tex. 1993). The court may reverse or affirm wholly or in part and modify the decision reviewed. § 211.011. The right to appeal a ZBA decision is limited exclusively to writ of certiorari under section 211.011. *Lamar Corp. v. City of Longview,* 270 S.W.3d 609, 614 (Tex. App.—Texarkana 2008, no pet.); *Reynolds v. Haws*, 741 S.W.2d 582, 584 (Tex. App.—Fort Worth 1987, writ denied). However, a property owner may independently challenge the validity

of the zoning ordinance rather than seeking a variance from its provisions. *City of Amarillo v. Stapf*, 129 Tex. 81, 89, 101 S.W.2d 229, 234 (1937). Declaratory judgment is not an alternative to petition for writ of certiorari if the issues sought to be declared are subsumed in the issues reviewed by the ZBA. *Sea Mist Council of Owners v. Town of South Padre Island Board of Adjustments*, 2010 WL 2784081 (Tex. App.—Corpus Christi 2010, no pet.)(mem. op.). The court may also remand the case to the ZBA for further actions taking into consideration the court's judgment. *Wende v. Bd. of Adjustment of City of San Antonio*, 27 S.W.3d 162, 173 (Tex. App.—San Antonio 2000, pet. granted), *rev'd on other grounds*, 92 S.W.3d 424 (Tex. 2002).

If an aggrieved party decides to appeal an order of the ZBA by requesting a writ of certiorari, "[t]he petition must be presented *within 10 days* after the date the decision is filed in the board's office." TEX. LOC. GOV'T CODE §211.011; *Davis v. Zoning Board of Adjustment of City of La Porte*, 865 S.W.2d 941, 942 (Tex. 1993); *Reynolds*, 741 S.W.2d at 584. The aggrieved party must establish compliance with this requirement in order to be entitled to appeal. *Fincher v. Bd. of Adjustment of City of Hunters Creek Village*, 56 S.W.3d 815, 817 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The ten day period is "jurisdictional." *Davis*, 865 S.W.2d at 942; *Tellez*, 226 S.W.3d at 414. Failure to timely appeal is a bar to challenging the ZBA decision which may prevent exhaustion of administrative remedies which then prevents other causes of action becoming ripe for adjudication. *City of San Antonio v. El Dorado Amusement*, 195 S.W.3d 238 (Tex. App.—San Antonio 2006, pet. denied); *Buffalo Equities, Ltd. v. City of Austin*, 2008 WL 1990295 (Tex. App.—Austin, 2008 no. pet.) (mem. op.); *Horton v. City of Smithville*, 2008 WL 204160 (Tex. App.—Austin, 2008 no pet.) (mem. op.).

The ZBA itself is an indispensable party and must be named as a defendant, even if individual members of the ZBA are served and answer. *Reynolds*, 741 S.W.2d at 587. When the petition names all members of the ZBA in their official capacities without specifically naming the board as an entity, the petitioner may amend the petition to include the board after expiration of the statutory ten day period for filing a writ of certiorari. *Pearce v. City of Round Rock*, 992 S.W.2d 668 (Tex. App.—Austin 1999, pet. denied). A similar result applies if the petition names the city instead of the ZBA. *Tellez*, 226 S.W.3 at 414. In *Tellez*, the Texas Supreme Court noted that the Local Government Code does not specify against whom the petition is to be filed, but its requirements suggest that the ZBA is the proper party as it must be served with the writ and file a verified answer. *Id*.

The writ of certiorari is the method by which the court conducts it review and its purpose is to require the ZBA to forward to the court a record of the decision being challenged. *Davis*, *Id.* Failure to serve the writ of certiorari is not jurisdictional. Id. There is no statutory deadline for the issuance of the writ. *Id*. However, when no writ is actually served, and the ZBA fails to file a verified return containing the record of the ZBA proceedings, then the ZBA decision will be upheld since the court must presume that the ZBA decision was valid. *Tellez*, 296 S.W.3d 645.

1. Rules for Review of ZBA Decision.

   i. A legal presumption exists in favor of the ZBA's decision. *Sw. Paper Stock, Inc. v. Zoning Bd. of Adjustment*, 980 S.W.2d 802, 805 (Tex. App.—Fort Worth 1998, pet. denied); *Bd. of Adjustment of City of Piney Point Village v. Amelang*, 737 S.W.2d 405, 406 (Tex. Civ. App.—Houston [14th Dist.] 1987, writ denied). The burden of proof to establish its illegality rests upon the contestant. *Sw. Paper Stock, Inc.*, 980 S.W.2d at 805; *Swain*, 433 S.W.2d at 731. The showing of abuse of discretion must be "very clear." *Vanesko*, 189 S.W.3d at 771.

   ii. "If the evidence before the court as a whole is such that reasonable minds could have reached the conclusion that the Board of Adjustment must have reached . . . the order must be sustained." *McDonald v. Bd. of Adjustment, City of San Antonio*, 561 S.W.2d 218, 220 (Tex. Civ. App.—San Antonio 1977, no writ); *See Vanesko*, 189 S.W.3d 769 (holding that a party challenging a ZBA ruling must establish that the ZBA could have reasonably reached only one conclusion).

   iii. The review of the decision of a ZBA is not a trial de novo where facts are established but is based on whether the ZBA abused its discretion. *Vanesko*, 189 S.W.3d at 771. With respect to factual findings, the court must not substitute its judgment for the ZBA's. Id.

   iv. The only question which can be raised is the legality of the ZBA decision. *Vanesko*, 189 S.W.3d at 771. The review of legal conclusions by the ZBA is similar in nature to a de novo review and less deferential than the review of factual determination by the ZBA. Id.

   v. The court should make its decision on the legality of the ZBA's decision based on the materials obtained in response to the writ of certiorari and any testimony received. *Tellez v. City of Socorro*, 296 S.W.3d at 650.

   vi. The legality of a ZBA's denial is a question of law. *Sw. Paper Stock, Inc.*, 980 S.W.2d at 805. As a question of law, whether a ZBA decision should be upheld is appropriately determined by summary judgment. *Sw. Paper Stock, Inc.*, 980 S.W.2d at 805; *Amelang*, 737 S.W.2d at 406.

   vii. A ZBA abuses its discretion if it acts without reference to any guiding principles or clearly fails to correctly analyze or apply the law. *Vanesko*, 189 S.W.3d at 771.

2. The ZBA does not abuse its discretion if it bases its decision on conflicting evidence. *Tellez v. City of Socorro*, 296 S.W.3d at 652.

The foregoing rules incorporate the "abuse of discretion" rule which was adopted by the Texas Supreme Court in *City of San Angelo v. Boehme Bakery*, 190 S.W.2d 67 (Tex. 1945), and reaffirmed recently in *City of Dallas v. Vanesko*, 189 S.W.3d at 7. Some courts of appeals previously applied the "substantial evidence" rule, requiring a factual basis for the ZBA's decision, whereas the "abuse of discretion" standard only inquires whether the ZBA's decision is arbitrary and unreasonable. *See Pick-N-Pull Auto Dismantlers v. Zoning Bd. of Adjustment*, 45 S.W.3d 337, 340 (Tex. App.—Fort Worth 2001, pet. denied) (court cites the "abuse of discretion" rule, but applies the "substantial evidence" rule); *Flores*, 860 S.W.2d at 625–26 (discussing the conflict). This conflict is fully reviewed in TMZL § 11.516.

In *Wende v. Board of Adjustment*, the court of appeals applied non-zoning law applicable in mandamus actions to determine whether a ZBA abused its discretion. 27 S.W.3d 162 (Tex. App.—San Antonio 2000, pet. granted), *rev'd on other grounds*, 92 S.W.3d 424 (Tex. 2002). That court cited to its earlier opinion of *Walker v. Packer*. 827 S.W.3d 833 (Tex. 1992). In that case, the court held that an abuse of discretion occurs if a decision is so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker*, 827 S.W.3d at 839. The court specifically rejected the "substantial evidence" rule. *Wende*, 27 S.W.3d at 167. The court considered a ZBA as a quasi-judicial body to be subject to the same limitations as a trial court being reviewed in a mandamus action. *Id.* In *Wende*, the appellate court held that the trial court misapplied the zoning ordinance and remanded the matter for further action consistent with the appellate court's decision. *Wende*, 27 S.W.3d at 173. However, the Supreme Court disagreed with the court of appeals' interpretation and upheld the ZBA interpretation. *Wende*, 92 S.W.3d at 425-26. The Supreme Court's opinion indicated that a reviewing court should give greater deference to the ZBA interpretation, but did not overrule the court of appeals analysis, just its result. *Wende*, 92 S.W.3d at 429-432. The court of appeals analysis gives the aggrieved party more room for success on appeal, but the Supreme Court's reversal, even without directly overruling the mandamus analogy takes away most of the benefit.

The ZBA does not abuse its discretion if it bases its decision on conflicting evidence. *Tellez*, 296 S.W.3d at 652. Even if the City Attorney issues an opinion supporting the appellant's position, the ZBA is not bound by that opinion. *Id*. A ZBA may consider expert testimony in a report attached to a City staff report to the ZBA (apparently the expert did appear at the hearing and did answer some questions, but it was not clear if he was cross examined by the appellant). *Christopher Columbus St. Market, LLC v. Zoning Board of Adjustments of Galveston*, 302 S.W.3d 408, 418 (Tex.App.—Houston [14th Dist.] 2009, no pet.). This court indicated that the some rules of evidence apply in a ZBA hearing and the ZBA has broad discretion to admit expert testimony. *Id. See* further discussion in this paper under "Recent Cases."

J. Official Immunity.

ZBA members have official immunity if acting within their scope of authority while making a discretionary decision in good faith.

In *Ballantyne v. Champion Builders*, the Texas Supreme Court stated that the fifty year old doctrine of official immunity is based on well settled public policy to (i) encourage confident decision making by public officials without intimidation, even if errors are sure to happen, and

(ii) ensure availability of capable candidates for public service by eliminating most individual liability. 144 S.W.3d 417 (Tex. 2004). The court held that ZBA members are entitled to official immunity if the following three issues are satisfied:

(1) Scope of authority. The action must fall within state law authorizing action by the official. Whether the ZBA made an incorrect decision or had never previously revoked the permit is irrelevant.

(2) Discretionary not ministerial action. The action must be a discretionary action, which is one involving personal deliberation, judgment and decision. A ministerial act is one where the law is so precise and certain that nothing is left to the exercise of discretion or judgment.

(3) Objective good faith. If a reasonably prudent official under the same or similar circumstances could have believed their conduct was justified based on the information available, then this objective good faith supports official immunity. Neither negligence nor actual motivation is relevant. They need not be correct, only justifiable. Specifically, the personal animus of the Board members in *Ballantyne* to apartment residents established on the record did not preclude a objective good faith holding and, in fact, was irrelevant.

Id. at 422.

The court analogized to U.S. Supreme Court decisions interpreting qualified immunity for federal officials. *Id*. at 424. The facts in *Ballantyne* were quite pro-developer, including tapes of an executive session considering the request in issue which clearly demonstrated personal prejudice of the ZBA members to all apartment projects and their inhabitants. *Id*. at 418-21. Specific derogatory comments were included. *Id*. Nonetheless, the court held that these personal feelings, even if the basis for the ZBA decision, are not sufficient for individual liability. *Id*. at 427-29.

III. ZBA Hearings

The ZBA, as a "quasi-judicial" body, acts like a "mini-court" to consider a request, hear testimony, consider written evidence and apply the zoning ordinance and applicable law. Some ZBA's will render a formal decision after following a formalized procedure intended to provide procedural and substantive due process to the owner of the property in question. Some ZBA's may not operate so formally.

When handling a ZBA hearing, you must consider the distinctions between the different matters considered by a ZBA, especially the "big three:" (1) interpretations, (2) special exceptions, and (3) variances.

A. Interpretation

The issue in an appeal to the ZBA is whether the administrative interpretation is proper. An administrative interpretation may include both factual and legal determinations. This appeal pits the appellant against the City Staff, which has already made an adverse determination. The appellant already knows the City Staff position is negative.

Key issues for an appellant in an interpretation appeal:

- Challenge the interpretation, not City Staff—State that there is an honest disagreement, but you believe you are right. City Staff is the ZBA's friend and helper. Never make City Staff look stupid. Don't get too lawyerly.
- Use reference materials lay people understand—Dictionaries, even *Black's Law Dictionary*, are clear and concise. If case law is used, edit carefully and use only directly applicable cases.
- Explain context—Be sure the ZBA understands the "big picture" reason for the provision and tie it together in the general regulatory scheme.
- List similar phrases in the Zoning Ordinance—Suggest that yours is a consistent and logical interpretation.
- Point our illogical/unintended consequences—Force the ZBA to consider the ramifications of their decision.
- Seek to win only what you need—Remember that you are advocating for a client and you need only what will permit the client to be successful.

B. Special Exception

The applicant for a special exception has not had any adverse determination, but is simply seeking approval by the ZBA for a site specific permission listed in the zoning ordinance. Typically, the ordinance establishes criteria and standards, which the applicant must demonstrate it satisfies. Often, the applicant does not know how the City Staff will advise the ZBA, if an all, until close to the time of hearing.

Key issues for an applicant for a special exception:

- Seek City Staff support. In many cases, staff will submit a written report to the ZBA. Usually, staff will make a recommendation. Sometimes, staff only outlines the required considerations and findings. If staff is supportive, seek an affirmative recommendation. At a minimum, seek staff to state that the ZBA has the authority to grant the Special Exception, even if the staff does not want to make any recommendation.
- Outline the considerations and required findings. Using these issues, assemble your evidence. Use experts carefully, but when the issue is traffic or parking, an expert (whether presented in person or by report) is usually convincing. *See* the discussion of expert reports in this paper under "Recent Cases." Insure you present complete evidence so the ZBA can easily make its required findings. Consider a handout to the ZBA outlining the required finding and the evidence supporting them. Build your record in case you need to appeal.

- Watch your experts. An unprepared expert can kill your case. Be sure the expert spends time preparing so they appear confident and sure of their opinions. Meet the expert in advance and ask them any "tough" questions which could possibly arise. If an expert is strong technically, but not convincing in person, go with a report and the expert's resume. Be sure the report is complete, clear and persuasive. *But see* the discussion of expert reports in this paper under "Recent Cases."
- Obtain neighbor support. If all immediately affected neighbors support the Special Exception, document that support in writing. Argue to the ZBA that the citizens impacted by the proposed Special Exceptions have made the most important findings…that they support the Special Exception. Suggest that if there is any evidence to support the required findings, then the ZBA should support the "will of the neighbors".
- Carefully handle neighbor opposition. Use "kid gloves" to address immediate neighbor concerns. Legitimate issues raised should be validated as issues, but answered analytically. If the neighbor becomes emotional or irrational, let them burn themselves out…they will hurt their own cause. Keep your client calm and under wraps. Keep the focus on a reasonable, rational result.
- Consider limits to address ZBA and neighbor concerns. The request can be modified, even at the ZBA hearing to provide answers to objectionable elements. If things are going badly, counsel the client to "take half a loaf".

C. Variance

The variance is the toughest of the "big three" ZBA matters. A variance allows violation of a zoning ordinance, where literal compliance is a "hardship," but granting the variance will not be contrary to the general purposes of the zoning ordinance. The key is the determination of hardship which is not purely financial/economic and must relate to the unique characteristics of the real estate, not the personal desires or needs of the owner. As with the Special Exception, the applicant often does not know how the City Staff will advise the ZBA, if an all, until close to the time of hearing.

Key Issues for an applicant for a variance:

- Carefully outline the facts. Variances are all fact based. Tell a good story to establish the facts, and in doing so allow the ZBA to begin thinking about the hardship to your client. Make the hardship self evident. Pictures and site plans are the best evidence. Also, consider a timeline if there is a long history to explain.
- Articulate the hardship so the ZBA feels like the Applicant. Encourage the ZBA to consider how they would feel in this circumstance.
- Eliminate the financial hardship response up front. All ZBAs have been told that financial hardship alone is not sufficient for a variance. Some ZBA members may ask: "But isn't this just about the cost to comply?" Address this issue head on. Suggest to the ZBA that financial consideration may be an element in hardship, just not the sole justification. Most variances are granted where compliance is possible, so shift the discussion from ability to comply (and the cost) to impact on the client.

- Investigate city staff position. Often, staff will make a written report. Usually, staff outlines the considerations and findings, permitting the ZBA to make the judgment on the variance without a staff recommendation. If staff is supportive, push for an affirmative statement that the facts are sufficient to authorize a variance, if the ZBA is inclined to grant one. Do your best to insure that staff is not hostile to the variance.
- Outline the required findings. Some cities have more restrictive language than state law. Be sure to identify any unusual or additional required findings. Using these, assemble your evidence. Use experts carefully, but when the issue is traffic or parking, an expert (whether presented in person or by report; s*ee* the discussion of expert reports in this paper under "Recent Cases.") is usually convincing. Insure you present complete evidence so the ZBA can easily make its required findings. Consider a handout to the ZBA outlining the required findings and the evidence supporting them. Be sure you have all required evidence in the record in case you have to appeal.
- Watch your experts. An unprepared expert can kill your case. Be sure the expert spends time preparing so they appear confident and sure of their opinions. Meet the expert in advance and ask them any "tough" questions which could possibly arise. If an expert is strong technically, but not convincing in person, go with a report and the expert's resume. Be sure the report is complete, clear and persuasive. *But* s*ee* the discussion of expert reports in this paper under "Recent Cases."
- Obtain neighbor support. If all immediately affected neighbors support the variance, document that support in writing. Argue to the ZBA that the citizens impacted by the proposed variance have made the most important findings…that they support the variance. Suggest that if there is any evidence to support the required findings, then the ZBA should support the "will of the neighbors".
- Carefully handle neighbor opposition. Use "kid gloves" to address immediate neighbor concerns. Legitimate issues raised should be validated as issues, but answered analytically. If the neighbor becomes emotional or irrational, let them burn themselves out…they might just hurt their own cause. Keep your client calm and under wraps. Keep the focus on a reasonable, rational result. Advise your client that the reasoned opposition of an immediate neighbor is usually fatal to a variance. Have the client reach out to all immediate neighbors to attempt to resolve issues before the hearing.
- Consider Conditions to address ZBA and neighbor concerns. The request can be modified, even at the ZBA hearing to provide answers to objectionable elements. If things are going badly, counsel the client to "take half a loaf". The ZBA can approve a variance with conditions, or with an expiration. In a contested case, be ready with suggestions for conditions, but have them pre-approved by the client.

D. Making a Record

When an appeal is likely if the decision is adverse, the applicant must create a record for appeal. A court reporter can be used to create a record. Copies of all written material should be provided to the court reporter. Most ZBA meetings are tape recorded, and some visually.

E. Preparation

1. Due Diligence.

The following information should be obtained to knowledgeably handle a ZBA matter:

- Comprehensive plan (and confirmation of whether formally adopted and how adopted [resolution or ordinance]);
- Zoning ordinance (and all amendments);
- Rules of ZBA, including form for ZBA application;
- Confirmation that no zoning changes are pending (obtained through City Secretary/Secretary to Zoning Commission); and
- Zoning map.

Each of the documents must be confirmed to be the most current before it is adopted. Care should be taken to insure there are no pending changes.

The attorney should determine all zoning violations and list them (for a variance), review the Zoning Ordinance provisions regarding the ZBA, specifically, and be sure they understand the procedural process and the holdings required by the ZBA to approve the necessary variance/special exception. For interpretations, the attorney should look to see if there is specific language in the Zoning Ordinance relating to interpretations, or if the ZBA authority is simply based on state law.

The practitioner may, in appropriate situations, consider contacting the chief planning official with the city to review all issues and determine the following:

(1) The city staff's position;

(2) Treatment of similarly situated properties in the past (and why);

(3) Make-up and philosophy of the ZBA; and

(4) Current political issues in the city affecting land use decisions.

Often city staff can provide helpful (although perhaps biased) insights into issues critical to the city. Experienced local engineers, planners, real estate professionals and/or attorneys should also be consulted.

2. Application Process.

Before applying for a variance/special exception or appealing an administrative determination, the practitioner must be sure they have fully investigated the legal and political aspects of the situation. The application must not be considered simply a formality, but as the first presentation of the request. As public record, it may be circulated and quoted widely. It must not be sloppy, incomplete or non-persuasive. Do not be limited by the form as most cities will allow additional materials and or the retyping and reformatting of the application form in order to allow a more complete presentation of the project application.

3. Procedural Process.

Usually only one public hearing is held and the ZBA makes its decision at that meeting or the succeeding one. As an appointed body, the ZBA is somewhat distanced to the political issues which affect a City Council. Often, the ZBA has members with experience in their positions and an understanding of their authority, typically lawyers, engineers, architects, brokers and the like.

Variances require very careful consideration of the scope of the requested noncompliance. That scope should be kept as narrow as possible, but broad enough to provide the practical benefits desired.

Hardship is the usually the focus of a ZBA considering a variance. Keep in mind that most ZBA's deny the vast majority of variances and thus have a "negative" mind set. The requirement of a supermajority seventy-five percent (75%) vote is a structural guard against "easy" variances.

The applicant must do its best to articulate a legitimate argument based on the physical characteristics of the site to support the variance. Sometimes, a ZBA will be willing to distinguish between sympathetic owners and either (i) their predecessor or (ii) their contractor, where the violation was made by that "third party." However, where a mistake can be cured (what mistake cannot) there needs to be an argument that just because the mistake can be fixed for an exorbitant amount of money does not make it a purely financial hardship. The time to cure and the possibility that the cure will not look as good, or function appropriately should mentioned.

When appealing an administrative determination or interpretation, the applicant must carefully and logically lay out its proposed interpretation in a way which is not disrespectful to the city staff. Remember that city staff has ongoing interaction with the ZBA and the ZBA may be reluctant to overrule the individual they interact with regularly, unless the case is very well presented and supported.

4. Political Process.

The ZBA is appointed, not elected. The typical ZBA member is a technician, often a lawyer, engineer, architect or contractor. This is a tough audience who feels little, if any, political pressure. This group has no broad focus, but is very limited in the consideration of its

responsibility to the city. Many ZBAs will not allow direct contact of members to discuss pending matters, but rarely is this a written policy in smaller communities. The ZBA rules should be reviewed to determine what prohibitions on ex parte contact exist. An attorney should not contact ZBA members without permission from the City Attorney.

5. Public Presentations.

Public presentations are tricky and the applicant and its team must present a presentation carefully tailored to the city and specific project. Several rules apply:

- Know Your Forum – The ZBA is different from other governmental bodies, and is quasi-judicial. Treat it accordingly. Address the local concerns and be careful about citing other cities.

- Be Prepared – Know the facts, the law, the ZBA commissioners, the opposition and your presentation. Do not read a prepared presentation. Be ready to speak extemporaneously. Have exhibits mounted on boards and copies to distribute, if appropriate (enough for all of the zoning body and all city staff, perhaps copies for the audience).

- Be Professional – Keep cool and unemotional. Realize that many of the public will react emotionally and perhaps make personal accusations. Show knowledge and preparation in your presentation and response to issues. Dress appropriately to show respect for the forum and the importance of the issue. In asserting legal points, beware of being overbearing, unless part of your plan.

- Be On Point and Timely – Never ramble. Abide by procedural rules and time limits. Keep on point and directed. If irrelevant issues arise, do not hesitate to guide the hearing back on track.

- Prepare the Client – The client representative should be fully prepared to respond to questions from the zoning body. Any presentation by the client should be carefully outlined, and if needed, rehearsed. Prepare the client for any likely attacks, so they will not be surprised. Never let the client respond emotionally. Do what you can to prevent the client from harming their own cause.

- Be Ready to React – Be ready to speak extemporaneously. Have set answers to likely questions and concerns. Use the opportunity to respond as a forum to reassert applicant's position.

IV. Recent Cases

The following is a summary of recent cases relating to Boards of Adjustment. Many are memorandum opinions with only cites to Westlaw or Lexis. These cases may be cited and have precedential value. Tex. R. App. P. 47.4 and 47.7.

A. *Sea Mist Council of Owners v. Town of South Padre Island Board of Adjustments*, 2010 WL 2784081 (Tex. App.—Corpus Christi 2010, no pet.)(mem. op.)

In this case a group of condominium owners, Sea Mist, brought a claim asking the court to override the South Padre Island Board of Adjustments' decision to issue building permits to a condominium project, the Palms, that would allow it to become an establishment serving food and mixed drinks. Sea Mist also claimed that the sale of alcoholic beverages was a violation of the zoning restrictions at the location.

The court stated held the Board is s a quasi-judicial body; therefore, its decisions are subject to appeal by writ of certiorari. The district court sits as a reviewing court, and the only question is the legality of the board's order. To prove that an order is illegal, the party attacking the order must present a clear showing of abuse of discretion. A board abuses its discretion if it acts without reference to any guiding rules and principles.

The court found that the Board had evidence before it that the zoning ordinances allowed cafes. It also had before it a letter from a city official who stated that property similarly zoned as the Palms had historically been used as bars and restaurants. Consequently, the court did not err in dismissing Sea Mist's declaratory judgment action because there was sufficient evidence support for the Board's decision.

B. *Sea Mist Council of Owners v. Bd. of Adjustments for S. Padre Island Tex.*, 2010 WL 2891580 (Tex. App.—Corpus Christi 2010, no pet.)(mem. op.)

A group of condominium owners, Sea Mist, appealed the Board of Adjustments' denial of an appeal requesting the revocation of the occupancy permit of a cafe attached to a condominium as out of compliance with the city's parking requirements. Sea Mist argued the certificate of occupancy should be withdrawn because of the failure of the building inspector to determine the number and dimension of the parking spaces for the condominiums.

The owner of the condominiums, the Palms, successfully argued in its motion for summary judgment to the trial court that Sea Mist's appeal to the Boards' decision was not timely filed. At the time of Sea Mist's appeal, the Board had not passed a rule specifying what constituted a "reasonable" time for timely appeal of a Board decision as required by statute. The same day it denied Sea Mist's appeal, however, it adopted a rule that all appeals must be filed within 30 days of the decision by the administrative official. The building permit Sea Mist was appealing had been granted six months prior, and the occupancy permit had been granted four months prior.

The court, giving deference to the Board as a quasi-judicial authority, held that although at the time Sea Mist requested its appeal, the Board had not passed any rules restricting the length of time for an appeal. Under the common law, the four and six month delays were unreasonable as a matter of law. The court held that the right of Sea Mist to appeal must be weighed against the Palm's right to have its permits finally determined.

C. *El Hamad v. Commercial Board of Adjustments*, 2009 WL 1372955 (Tex.App.—Fort Worth 2009, pet. denied)(mem. op.)

El Hamad owned three adjacent parcels of land zoned for "light industrial" use in Fort Worth which were being used as an automobile junk yard pursuant to a special exception to the

zoning ordinance. In January 2006, the Board of Adjustment, a Division of the Zoning Board of Adjustment of the City of Fort Worth ("the Board") denied El Hamad's application for a 2 year extension of the special exception, granting instead a one year extension. In January 2007, the board again denied El Hamad's request for a 2 year extension and instead granted a six-month extension to give El Hamad time to close the business, apparently in response to complaints that the area around the junk yard was becoming increasingly residential making the junk yard an undesirable use.

El Hamad argued the board was improperly attempting to rezone his property due to political pressure and pointed out the Board had recently granted 10 year extensions for similar uses in the surrounding area.

The court held that the standard of review with regard to a board of adjustment's order is "whether the board of adjustment has abused its discretion, i.e. whether it has acted without reference to guiding rules and principles or whether it has acted arbitrarily and unreasonably." *El Hamad*, 2009 WL 1372955, *2. Further, the court explained a board's order carries the presumption of legality, placing the burden of proving its illegality on the party attacking the decision.

The court held that the Board acted within its discretion to not grant the special exception given the conflicting evidence that the junk yard was no longer compatible with the use of the neighboring property. Further, the court concluded the trial court had not abused its discretion by sustaining the Board's objections to El Hamad's affidavit in support of his proposed special exception.

D. *Christopher Columbus St. Market, LLC v. Zoning Board of Adjustments of Galveston,* 302 S.W.3d 408 (Tex.App.—Houston [14th Dist.] 2009, no pet.)

In this case, the Christopher Columbus Street Market, LLC and other owners ("Owners") of a property in the East End Historical District of Galveston sought approval to demolish a 2 story historic structure on their property as well as two other additions soon after acquiring the property in 2006. The Landmark Commission approved demolition of the additions because they were structurally unsound, but it concluded that the main structure was stable and denied the Owner's application to demolish it. The Owners appealed to the Zoning Board of Adjustments of the City ("Board") who upheld the decision of the Landmark Commission after a public hearing on the issue.

The Owners appealed the Board's decision to the district court and asserted several constitutional claims including a denial of due process at the Board hearing, an unconstitutional "taking" of the property without compensation, and a claim the ordinances and provisions governing denial of a demolition are unconstitutionally vague. The district court found that the Board did not abuse its discretion in upholding the Landmark Commission's decision. The court also granted the Board's motion to sever the order affirming the Board's actions from the constitutional challenges in the Owners' pleadings (note that these severed constitutional claims were not considered in this appeal).

The court of appeals held that because the Board was acting in a quasi-judicial role in reviewing the decision of the Landmark Commission, the standard of review was whether or not the Board abused its discretion in affirming the decision of the Landmark Commission. The burden on the Owners was to prove the decision was illegal by a very clear showing the Board

abused its discretion. Further, the court held the Board does not abuse its discretion by basing its decision on conflicting evidence.

The court found therefore that although the city and the Owners produced conflicting reports about the stability of the main structure, the Owners could only prevail by showing the Zoning Board could have reached only one decision, not the decision it made. The court found the Board had not abused its discretion by basing its decision on conflicting evidence, and there was a legal presumption in favor of the Board's order if there was "some evidence of substantive and probative nature" supporting the Board's decision. In this case the court held there was such evidence and the Board had not abused its discretion.

The court allowed the Board to consider an expert's written report. The expert apparently testified and answered some questions, but it was not clear if he was subjected to cross examination. The court indicated that some rules of evidence apply in ZBA cases, citing the state administrative procedure act, Texas Government Code § 2001.081. That section specifies relaxed rules of evidence for administrative proceedings:

> The rules of evidence as applied in a nonjury civil case in a district court of this state shall apply to a contested case except that evidence inadmissible under those rules may be admitted if the evidence is: (1) necessary to ascertain facts not reasonably susceptible of proof under those rules;(2) not precluded by statute; and (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs. TEX. GOV'T CODE § 2001.081.

E. *Lindig v. City of Johnson City*, 2009 WL 3400982 (Tex. App.—Austin 2009, no pet.) (mem. op.)

The Lindigs, wishing to remodel their home, filed an application for a building permit and began construction. A month later, the project was deemed "new construction" and was subject to a $1,000 permit fee. The Lindigs refused to pay the fee. The City then issued a stop work order and filed suit in the district court seeking an injunction and requested civil penalties for the Lindigs' violation of the stop work order.

As a result, the Lindigs initiated a series of countersuits in county and district court challenging the validity of the permitting regulation, the payment of the fee, and the City's request for injunctive relief. The Lindigs requested relief ranging from a declaratory judgment against the building fee permitting ordinance to compensation for the illegal taking of their property. The cases were all eventually consolidated into the County Court at Law. That court dismissed the Lindigs' claims and found that the Lindigs did not have standing to sue without first having paid the fee.

On interlocutory appeal, the Court of Appeals first held that a plaintiff has standing to sue when (1) he has sustained or is immediately in danger of sustaining some direct injury or (2) the plaintiff has a personal stake in the controversy. Accordingly, the court found that the Lindigs lacked standing to enjoin the City from charging building permit fees, to seek a declaration that the City's ordinance is invalid as applied to every residential remodel project, or to seek reimbursement of all building fees previously assessed by the City because they were not personally injured by these practices or had any stake in the reimbursement of any unlawfully gathered fees.

The court did find, however, that the Lindigs had standing to sue for injunctive relief from the fee assigned to them because the statute did not require them to pay the fee under protest before filing suit. Further, the Lindigs had standing because they had exhausted all of the administrative remedies available to them. Consequently, the Lindigs' taking claims were also ripe.

F. *Tellez v. City of Socorro,* 296 S.W.3d 645 (Tex. App.—El Paso 2009, pet. denied)

Tellez, who owned and operated Tellez motors, bought property and used it to store auto parts. Subsequently, the city of Socorro zoned the property as single family residential. About six years later, Tellez sought to have the property rezoned after receiving notices of zoning violations. The Planning Commission, City Council, and Board of Adjustment all denied the re-zoning request. Tellez then filed a petition for writ of certiorari in the County Court of Law asserting that the use of the property as an auto salvage yard constituted a legal non-conforming use. The court affirmed the Board's decision. On appeal, Tellez argued that the "County Court at Law abused its discretion by denying him a non-conforming use of his property." *Tellez*, 296 S.W.3d at 648.

The Court of Appeals, however, disagreed and concluded that the "review of the Board's decision is not a trial de novo. The reviewing court may reverse or affirm, in whole or in part, or modify the decision that is appealed." *Id*. at 649. Additionally, "the only question that may be raised by a petition for writ of certiorari is the legality of the board of adjustment's order." *Id*. Lastly, the court held that Tellez had the burden of providing evidence that was considered by the Board of Adjustment. The court stated that if there is no record of the board's decision, the reviewing court must presume that the board's decision is valid and uphold it. Even though there was conflicting evidence before the Board, it did not abuse its discretion.

G. *Boswell v. Board of Adjustment and Appeals of Town of South Padre Island,* 2009 WL 2058914 (Tex. App.—Corpus Christi 2009, no pet.) (mem. op.)

In *Boswell v. Board of Adjustment and Appeals of Town of South Padre Island*, Boswell and other property owners filed a petition for writ of certiorari against the Board of Adjustment challenging the Board's decision to grant zoning variances to a developer. The Board filed a motion to dismiss for lack of jurisdiction asserting that the petition was filed more than 10 days after the decision. The property owners countered that city officials mislead them as to the date of the decision, and thus, they should not be barred from filing certiorari.

The Court of Appeals held that Texas Local Government Code §211.011(b) creates a condition precedent to filing suit and is mandatory and jurisdictional rather than directory and procedural. Further, the court found that a government entity cannot be estopped from exercising

its governmental functions. However, an entity may be estopped "where the circumstances clearly demand its application to prevent manifest injustice." *Boswell*, 2009 WL 2058914, *2. Nonetheless, the court held that in order to apply the exception, it would first have to have subject matter jurisdiction. Since the petition for certiorari was filed outside the 10 day period, the court lacked jurisdiction to hear the matter. Accordingly, the court dismissed the petition.

H. *Lamar Corp. v. City of Longview,* 270 S.W.3d 609 (Tex. App.—Texarkana 2008, no pet.)

In this case, Lamar Corporation sought a variance from the City of Longview Zoning Board of Adjustment that would allow three billboards to remain in their current location. The Board, however, declined to grant the variance. Consequently, Lamar filed for declaratory judgment in the district court seeking review of the Board's decision and unconstitutional taking claims. The court affirmed the Board's decision and held that the ordinance was not an unconstitutional taking of the billboards.

The court of appeals held that the Board is a quasi judicial body, and as such, the district court sits as a court of review by writ of certiorari. A suit brought by any other means is an impermissible collateral attack unless all other administrative remedies are exhausted. Further, the court stated "that filing a petition for writ of certiorari is necessary in order to exhaust administrative remedies and avoid the review from being considered a collateral attack on the Board's decision." *Lamar Corp. v. City of Longview*, 270 S.W.3d 609, 614 (Tex.App.—Texarkana 2008, no pet.).

Since Lamar filed a declaratory action, and not a writ for certiorari, the district court lacked jurisdiction to review the Board's decision. However, the district court could properly hear the takings claims.

I. *Tellez v. City of Socorro,* 226 S.W.3d 413 (Tex. 2007)

Tellez bought property which he used to store auto parts for his auto salvage yard. Subsequently, the city of Socorro zoned the property as single family residential. About six years later, Tellez sought to have the property rezoned to heavy industrial after receiving notices of zoning violations from the city. The re-zoning request was denied. Tellez then filed a petition for writ of certiorari in the County Court of Law.

On appeal, the court dismissed Tellez's action because he sued the city rather than the Zoning Board of Adjustments and his petition did not assert how the Board's decision was illegal even though the city did not object to either defect.

The Texas Supreme Court disagreed and held instead that both defects were procedural in nature, not jurisdictional. Further, since the city did not object, the defects were waived.

J. *City of Dallas v. Vanesko,* 189 S.W.3d 769 (Tex. 2006)

The Vaneskos acquired a building permit to tear down their home and rebuild on the same lot. After construction had begun, the city informed the Vaneskos that the home violated the height ordinance. The Vaneskos sought a variance from the Zoning Board of Adjustment which denied the request. Consequently, the Vaneskos appealed by writ of certiorari.

The Texas Supreme Court held that a reviewing court may only consider the illegality of the Board's order. To prove illegality, the complaining party must clearly show that the Board abused its discretion. A Board abuses its discretion when it acts without reference to any guiding rules or principles or fails to analyze or apply the law correctly.

The Texas Supreme Court found that the Board did not abuse its discretion in denying the variance. While the Vaneskos suffered financial hardship, the hardship was personal in nature and not related to the area, shape, or slope of the parcel as required by the City of Dallas Ordinance Code. Further, the city's issuance of a building permit did not estop the city from enforcing its zoning ordinances.

K. *City of San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238 (Tex. App.—San Antonio 2006, pet. denied)

El Dorado owned a pool hall and bar that sold alcohol. After several years of operating the bar, the City of San Antonio re-zoned the property and the new ordinance prohibited the sale of alcohol. Consequently, El Dorado sought a non-conforming use permit from the San Antonio Zoning Board of Adjustment. The Board, however, declined to grant the permit. El Dorado then filed suit against the city asserting an unconstitutional taking of his property.

On appeal, the city argued that El Dorado was required to attack the Board's decision by writ of certiorari. Conversely, El Dorado asserted that "it has the right to collaterally attack the board's refusal to grant it a non-conforming use permit because the board's decision flowed from a void ordinance." *City of San Antonio v. El Dorado Amusement Co., Inc.*, 195 S.W.3d 238, 250 (Tex.App.-San Antonio 2006, pet. denied).

The court of appeals agreed with the city and held that a Board's decision can only be challenged by a writ of certiorari. Further, it was El Dorado's burden to challenge the Board's decision by writ. Since El Dorado did not file the writ, the trial court was divested of jurisdiction to determine whether the Board's decision was correct or incorrect.