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Boards of Adjustment

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BOARDS OF ADJUSTMENT AND VARIANCES

I. Zoning Structure

Zoning is accomplished through 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 2016) ("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).

In *Town of Bartonville Planning and Zoning Bd. of Adjustments v. Bartonville Water Supply Corporation*, 410 S.W.3d 23 (Tex. App. – San Antonio 2014, pet. denied), the court held that a ZBA lacks the authority to decide if the city zoning ordinance is pre-empted or "trumped" by State law, in this case the Texas Water Code. Instead, the appropriate venue is District Court for a declaratory judgement. The author finds this holding inconsistent with the ZBA's authority to consider permit appeals and ordinance interpretations, as all have elements of legal precedent. *See*, *Board of Adjustment for City of San Antonio v. Kennedy*, 410 S.W.3d 31,34 (Tex. App. – San Antonio 2013, pet. denied), where the court held that a ZBA could consider case law from other state when interpreting the word "College", *Board of Adjustment of City of University Park, Texas v. Legacy Hillcrest Investments*, 2014 WL 6871403 (Tex. App. – Dallas 2014, pet. denied), where the ZBA interpreted the word "Adjacent", and *CPM Trust v. City of Plano*, 461 S.W.3d 661 (Tex. App. – Dallas 2015, no pet.), where the ZBA interpreted the words "destroyed", "dilapidated", and "deteriorated."

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).

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. *City of San Antonio Bd. of Adjustment v. Reilly,* 429 S.W.3d 707,715 (Tex. App. – San Antonio 2014, no pet.); *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 for parties to submit evidence, the right for parties to cross-examine adverse witnesses, the right for parties to rebut evidence, a tough standard for approvals (super majority-vote required), and a reasonable avenue to appeal to the courts. *Sumner v. Board of Adjustments of the City of Spring Valley Vill.*, 2015 WL 6163066*11 (Tex. App. – Houston [1st Dist.] 2015, pet. filed). However, ZBA hearings need not have the full procedural framework of a civil trial. Id. The ZBA has authority to (and should) adopt rule of procedure for their meetings. Tex. Loc. Gov't Code Sec. 211.008(e). Those rules should insure the constitutional due process described above. Only parties have these constitutional rights and protections. Many ZBA procedural rules permit 3rd parties to be designated with party status if their interest in the matter is significant and, usually, distinctive from others. In some Cities, the desire for administrative efficiency causes the ZBA to establish unreasonably short time limits on the applicant. Instead, the ZBA must permit an applicant a reasonable period of time to fully present their cases so they have a reasonable opportunity to prove the elements required by law. Any time limits should be aspirational only, and upon reasonable request during a public hearing, the ZBA should grant reasonable requests for extensions.

The ZBA has broad discretion in the consideration of evidence and is not required to apply strict rules of evidence. *Bd. of Adjustment of the City of San Antonio v. Willie*, 511 S.W.2d 591,594 Tex. App. – San Antonio 1974, writ ref'd n.r.e.); *City of San Antonio Bd. of Adjustment v. Reilly*, 429 S.W.3d 707, 715 (Tex. App. – San Antonio 2014, no pet.). Citizen testimony is acceptable, even if not experts in the subject matter. *Id*.

In *Board of Adjustment of City of University Park, Texas v. Legacy Hillcrest Investments,* 2014 WL 6871403 (Tex. App. – Dallas 2014, pet. denied), the court reviewed actions of a ZBA conducting a private "workshop" or executive session, thus indicating that such are permitted, such as they are for a City Council.

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. 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). Such limitation is controlling. *Id*. In *Vanesko*, the Texas Supreme Court noted that language incorporating the standards of §211.009 was broader than the Dallas variance language which prohibited variances for "self-created or personal hardships", plus limited variances to the resolve hardships arising from a restrictive conditions relating to the area, shape, or slope of a parcel. *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*…" Public interest should be broadly considered. The ZBA must balance the equities in favor of the applicant not having to comply with the benefit to the general public of compliance. The variance must not be materially adverse to the public interest, considered broadly.
- "*[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: Battles 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 equitable considerations in granting a variance). Hardship is usually the key issue in a variance case; see discussion of case law below. What is a hardship is case and site specific.
- "*[A]nd so that the spirit of the ordinance is observed…*" The applicant must show that, considering the zoning ordinance as a whole, the variance is not material.
- "*[A]nd substantial justice be done*." Variances are equitable in nature. The balancing of equities must justify the variance.

(3) Case Law-

(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.)

Use variances are considered disguised re-zonings. However, interpretations of what is a permitted use, such as where a new or unique use is proposed, should not be considered an illegal use variance.

(ii) *Financial Hardship*. Some cases state the financial hardship alone is insufficient to support a variance. *Battles v Board of Adjustment of Irving*, 711 S.E.2d 297 (Tex. App. – Dallas 1986, no writ); *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 specifically 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.). However, in *Sumner v. Board of Adjustments of the City of Spring Valley Vill.,* 2015 WL 6163066*11 (Tex. App. – Houston [1st Dist.] 2015, pet. filed), the court included, without negative comment, significant cost of compliance when an addition was substantially completed. Likewise, in *Bd. of Adjustment of City of Piney Point Vill. v. Solar*, 171 S.W.3d 251 (Tex. App. – Houston [14th Dist.] 2005, pet. denied), the court acknowledged that the increased cost to comply (and other impediments) would prevent the swimming pool, thus impeding the "right to recreate" which was the Court's basis for decision.

Financial issues which meaningfully impact the ability to use an owner's property can be considered by a ZBA, but can't be the *sole* basis for a variance.

(iii) *Self-Imposed Hardship*. Many cases indicate that self-created hardships do not support a variance, such as an owner subdividing a lot into 2 new triangular lots, then seeking a variance. *Currey v. Kimple*, 577 S.W.2d 508, 512-13 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.). Nonetheless, in *Dallas v. Vanesko*, the Texas Supreme Court held a 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.

Variances are not for those who bring ill upon themselves. However, simple ignorance or misplaced reliance should not disqualify an otherwise viable variance, such as the situations where the owner relied on government permits, 3rd parties or innocently made errors or decisions without understanding the rules or adverse consequences.

(iv) *Reliance on Permit*. An erroneously issued city permit or approval was held relevant and supported a variance in three cases. *Sumner v. Board of Adjustments of the City of Spring Valley Vill.*, 2015 WL 6163066*11 (Tex. App. – Houston [1st Dist.] 2015, pet. filed); *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). "[T]he uncontroverted evidence reveals that the Cantu's property was subjected to a unique, oppressive condition, caused by the Town's acquiescence to the building plans. Substantial permanent improvements were made with the Town's knowledge and under its supervision. At the point in time when the Town withdrew their authorization to continue the construction in accordance with the plans, the undisputed evidence reveals that the real property was subject to a unique, oppressive condition because the house could no longer be completed as designed without a variance. Therefore, the only decision which the Board could have arrived at was that enforcement of the ordinance would result in an unnecessary hardship to the Cantus." *Id.* at 290-291. *Vanesko* differentiated the results based upon the varied text of the variance provisions in the *Cantu* and *McBride* ordinances. The fact that the *Vanesko* owner made the design choices, and the fact that the building permit itself has exculpatory language. *Id.* at 773-4 and fn.6. However, the Supreme Court did not overrule *McBride* and *Cantu*. The Supreme Court left the impact of reliance on erroneously issued permits open when is stated "The mere issuance of a building permit does not render a city's zoning ordinances unenforceable, nor does the fact that a permit was issued in error entitle the property owner to a variance *in every case*." *Id*. at 774.

Reliance in good faith on a permit to construct valuable improvements may be considered in a variance context, unless prohibited by local ordinance (as in Dallas when the *Vanesko* case was decided).

(v) *Personal Hardships*. Some cases hold that a hardship must be related to the property and not the individual owner. *City of Alamo Heights v. Boyar*, 158 S.W.3d 545 (Tex. App.—San Antonio 2005, no. pet.); *Town of South Padre Island v. Cantu*, 52 S.W.3d 287, 290 (Tex. App.—Corpus Christi 2001, no writ). "…[A] hardship...must relate to the very property for which variance is sought, i.e., a condition unique, oppressive, and not common to other property." *Id*. Owner health conditions, admitted by the Court to be an undeniable hardship, were held personal in *Boyer*, and thus not supportive of a variance.

A variance request must be tied to the land, not the owner.

(vi) *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 (impediment to use of backyard for recreation was personal health situation of the owner). In Solar, the topography and desire to protect trees caused the hardship. *Solar*, id.

A variance request to permit the right to recreational use of land is justified, where not personal, but due to circumstances related to the land.

(vii) *Public Interest*. Many cases cite the statutory requirement that "the variance is not contrary to the public interest", but few analyze the issue. In *Town of South Padre Island v. Cantu*, 52 S.W.3d 287 (Tex. App.—Corpus Christi 2001, no writ), the court considered a challenge to an approved variance on this point. *Id*. at 291. First, the court disagreed that a variance to permit encroachment on a required setback is not, as a matter of law, against the public interest. Noting that such would preclude all variances and that in authorizing variances, the legislature envisioned that such variances would not affect public interest. *Id*. fn. 2. Second, the court cited the following factors supporting a holding that the variance was not contrary to public interest: an acceptable setback remained after the variance, no health/safety concerns were cited, neighbor support for the variance, and denying the variance would result in a less attractive property and general area.

Public interest is part of the part of the balancing act to be performed by the ZBA. Degree of violation, general public police power considerations and neighbor input are facts to consider.

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. 3d 424, 431-32 (Tex. 2002).

City of Glen Rose, Texas v. Reinke, 2016 WL 638060 (Tex. App.—Amarillo 2016, no pet.) (mem. op.) stated an expanded list of rules for interpreting ordinances:

- The reviewing court may not substitute its own judgment for the ZBA's with respect to the ZBA's factual findings, but legal conclusions made by the ZBA are not entitled to deference because they are reviewed de novo.
- Ordinances are construed under the same rules as statutes.
- Interpretation is a question of law.
- Courts are not bound by the City's interpretation.
- Meaning given one term must be internally consistent with other terms.
- Undefined terms are typically given their ordinary or plain meaning.
- An undefined term may not be given a meaning that is inconsistent with other terms.
- The plain meaning may not be assigned if it would lead to an *absurd* result.
- Land use ordinances are usually *strictly construed* against the municipality and in favor of the landowner.

In *Reinke*, the court applied the "looks like a duck, swims like a duck and quacks like a duck, then it is a duck" rule to a tortured interpretation by the City Administrator, holding that the proposed interpretation lead to an absurd result..

Other cases add guidance for interpretations"

1. Prior construction of the ordinance by the City may be considered. *CPM Trust v. City of Plano*, 461 S.W.3d 661, 670 (Tex. App. – Dallas, 2015, no pet.).
2. Out of state cases interpreting the same or similar terms may be considered even though they are not binding precedent. *Board of Adjustment for City of San Antonio*, 410 S.W.3d 31, 37 (Tex. App. – San Antonio 2013, pet. denied).
3. Since the trial court considers the issue "de novo", as a question of law, summary judgement is appropriate. *Id.* at 35. *CPM Trust*, *id*.
4. "Interpretation" does not mean that the ZBA may determine if an ordinance is valid, such as whether it was adopted by a required supermajority vote under TEX. LOC. GOV'T CODE § 211.006. *Trainer v. City of Port Arthur*, 2016 WL 3911202 (Tex. App.—Corpus Christi-Edinburg 2016, no pet.).

G. Standards for a Special Exception

(1) Statutory Authority. Special Exceptions are authorized by TEX. LOC. GOV'T CODE § 211.008:

"In the regulations adopted under this subchapter, the 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."

(2) Analysis of Elements. Elements of a special exception:

(i) Specific authority is required in each zoning ordinance, which may establish rules
(ii) The ZBA must make a factual decision whether each case is "appropriate"
(iii) The special exception must be "consistent with the general purpose and intent of the [zoning] ordinance" (similar to a variance)
(iv) The ZBA may impose "conditions and safeguards"

(3) Case Law.

(i) *Conflicting Evidence will Support Denial*. A court does not abuse its discretion in denying a special exception in light of conflicting evidence. *El Hamad v. Commercial Board of Adjustments*, 2009 WL 1372955 (Tex. App.—Fort Worth 2009, pet. denied) (mem. op.); *Pick-N-Pull Auto Dismantlers v. Zoning Bd. Of Adjustment of City of Fort Worth, 45* S.W.3d 337, 340 (Tex. App. – Fort Worth, 2001, pet. den.). So long as there is some substantive and probative evidence supporting the ZBA's denial, then the ZBA (or the trial court) did not abuse its discretion. *Id.* A trial court did not abuse its discretion in excluding from evidence an affidavit by the appellant asserting that similar activities in the surrounding area received special exceptions based on lack of relevancy. *See El Hamad,* 2009 WL 1372955.
(ii) *Summary Judgment Appropriate*. The issue of whether the ZBA abused its discretion is a question of law appropriately determined by summary judgment. *Id.*
(iii) *Burden on Appellant*. The ZBA's order carries the presumption of legality and the party attaching it bears the burden of establishing its illegality. *Id.*
(iv) *Compatibility of Use Required*. The ZBA may not grant special exception unless it determines the use is compatible with neighboring property. *Sw. Paper Stock, Inc. v. Zoning Bd. of Adjustment of City of Fort Worth,* 980 S.W.2d 802, 808 (Tex. App. – Fort Worth 1998, pet. den.).

H. Appealing to the ZBA

Under state zoning law, two categories of persons have the right to appeal *to the ZBA* from a decision made by an administrative official. They are:

(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 § 211.010.

Often, the appealing party is an owner/developer who is denied a permit by the administrative official; that party is, therefore, clearly "aggrieved." However, others can also appeal. For example, an aggrieved neighbor can appeal the *granting* of a building permit, and a fair number of reported cases have arisen that way. *See Currey v. Kimple*, 577 S.W.2d 508 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.) and *Battles v. Board of Adjustment & Appeals*, 711

S.W.2d 297 (Tex. App.—Dallas 1986, no writ). City officials and departments can appeal from a decision of the administrative official (who is usually a city official, too).

To have standing to appeal, a city official or department must be "affected" by the administrative official's decision. Other persons must be "aggrieved." There may not be much difference: "the terms 'aggrieved' and 'affected' are synonymous and both relate to the requirement that a person show a 'justiciable interest.' *Hooks v. Texas Dep't of Water Resources,* 611 S.W.2d 417, 419 (Tex. 1981).

Texas cases indicate that, to be "aggrieved," an appellant must show some special harm or injury to itself *other than* as a member of the general public. *See Galveston Historical Foundation*, 17 S.W.3d at 416–17, (foundation, which leased historical property in the same overlay zoning district as the proposed signs, showed that its business would be affected other than as a member of the general public and showed an interest peculiar to itself in preserving the historical nature of the neighborhood) and *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, which was based on Capitol views and property ownership, was called "at best . . . very weak," but held sufficient).

To appeal to the ZBA, a person must file "a notice of appeal" with *both* the ZBA and the administrative official whose decision is appealed. *See* § 211.010. The notice must specify "the grounds for the appeal" and it must be filed "within a reasonable time as determined by the rules of the board." *Id.* Anyone interested in a building permit or other decision by an administrative official would be well-advised to check the ZBA's rules at the earliest opportunity because the ZBA's rules may set a short time for appealing. (Note that state law sets a ten-day period for appealing *from* the ZBA to the courts, which is a different, but analogous, situation.)

If the ZBA's rules allow a long appeal time, the owner/developer may be presented with a dilemma even if he has a valid building permit. If he starts construction before the appeal time has run, he runs the risk of seeing the project shut down in mid-construction. That could happen if someone appeals and successfully reverses the decision to grant the permit.

The owner/developer's dilemma may be worse if the ZBA's rules do not set any time to appeal. In *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.), the ZBA's rules did not set a time to appeal. After an appeal was filed, the ZBA adopted a 30-day deadline for filing, but the court did not apply it. Instead, the court relied upon common law principles to rule that the appeal was filed too late:

> . . . A delay of more than six-months from the issuance of the building permit and more than four months from the issuance of the occupancy permit is *unreasonable as a matter of law*. *Id*. at *3 (emphasis added).

The *Sea Mist* court cited and discussed *Zoning Board of Adjustment v. Graham & Associates* which, in a similar situation, ruled that a six-month delay after issuance of the

building permit was unreasonable as a matter of law. 664 S.W.2d 430, 434 (Tex. App.--Amarillo 1983, no writ).

Failure to appeal to the ZBA can doom a subsequent lawsuit. Courts have adopted various legal theories to reject attempts to litigate un-appealed administrative decisions. See:

Exhaustion of administrative remedies, ripeness

- In *Anthony v. Board of Adjustment of City of Stephenville*, 2014 WL 3398139 (Tex. App. – Eastland 2014)(mem. op.), the owner made several requests to the City to build a convenience store all of which were denied and they appeal the last one. The court held that the last one was not materially different from the earliest request, and that the expiration of the appeal period for the first request meant that the owner could not exhaust its administrative remedies, to the case was permanently unripe. The case was dismissed for lack of subject matter jurisdiction.

- In *City of Grapevine v. CBS Outdoor, Inc.,* 2013 WL 5302713 (Tex. App. – Fort Worth 2013, pet. den.)(mem. op.), a sign company requested permission for the City to "shift" the sign face of a non-conforming billboard 4' to be out of the to-be-expanded right of way of a freeway. The City, in a letter from an in-house attorney both denied that request and stated that the sign could not "be moved, altered or adjusted." The sign company did not appeal. Several months later, the sign company simply cut off the 4', without a City permit. The City cited the act as a violation and demanded the entire sign be removed. The sign company appealed to the ZBA and additionally sought a variance. Both the appeal and variance were denied. The City asserted that the sign company could not appeal the interpretation that the sign couldn't "be moved, altered or adjusted", because the time to appeal that interpretation to the ZBA lapsed. The appeals court agreed and dismissed the ZBA appeal of the interpretation, since the issue was the same as the original interpretation and should have been appealed at that time. Failure to do so prevented the sign company from exhausting its administrative remedies, and thus the issues were permanently unripe. The court held that although the sign company's request was to shift the sign, when the denial contained the broader interpretation of limitation on the sign, the sign company should have appealed then. *Id*. at *12-13. The fact that the sign company felt shifting the sign and removing a portion of the sign were different acts, was irrelevant. Further, the letter of the in-house city attorney, even though he was not an "administrative officer", was still a decision of an administrative officer, as the attorney was acting on behalf of the building official. *Id.* at *15

- In *Buffalo Equities, Ltd. v. City of Austin*, 2008 WL 1990295 (Tex. App.—Austin 2008, no pet.)(mem. op.), a developer failed to appeal to the ZBA to challenge an informal staff ruling about a use classification. The failure was held to be a failure to exhaust administrative remedies, which deprived the court of jurisdiction. The court also indicated that the developer's taking claim was not ripe.

- In *Horton v. City of Smithville,* 2008 WL 204160 (Tex. App.—Austin 2008, pet. denied)(mem. op.), a state court ruled that Ms. Horton failed to exhaust administrative

remedies because she did not appeal a staff interpretation to the city council, which was acting as the board of adjustment. Therefore, "the trial court was deprived of subject-matter jurisdiction." In a closely-related case, *Horton v. City of Smithville,* 117 Fed. Appx. 345 (5th Cir. 2008), the Fifth Circuit

a. ruled, *sua sponte*, that: (i) "no final decision was ever reached on the interpretation . . . ," (ii) Hortons' takings claim was not ripe, and (iii) the court lacked jurisdiction to hear Horton's claim.

Res judicata, "preclusive effect"

- In *Dallas Bellagio Partners v. City of Dallas*, 2010 WL 1141388 (N. D. Tex. 2010), decisions of the building official became final when they were not appealed to the ZBA, and the doctrine of *res judicata* barred constitutional claims in court. The court wrote: "Texas courts would give the building official and the Board's fact-findings *preclusive effect* because the building official and the Board act in a judicial capacity and afford parties a full and fair opportunity to litigate."(emphasis added).

Also see the cases summarized in Section V, which contains summaries of all ZBA cases since 2006.

I. 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.*

An attorney serving on a ZBA is shielded by official immunity when he takes actions that may otherwise constitute a conflict of interest within the attorney client relationship if those actions are (1) discretionary duties, (2) within the scope of the lawyer's authority on the ZBA, and (3) performed in good faith. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004).

J. Appeal of ZBA Decision

As a "quasi-judicial body", the decisions of the ZBA are subject to appeal to the courts. *City of Dallas v. Vanesko,* 189 S.W.2d 769, 771 (Tex. 2006).

1. Procedure for Appeal. The procedures for challenging a ZBA decision are "rather unique." *Tellez v. City of Socorro*, 226 S.W.3d 413, 414 (Tex. 2007).
   a. *Petition.* 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 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).

b. *10 Days to Appeal.* 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; *Tellez*, 226 S.W.3d at 414. "Jurisdiction exists" when a party timely files such a petition. *Id.* 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.

c. *Appellate Court's Discretion.* The court may reverse or affirm wholly or in part and modify the decision reviewed. § 211.011. 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).

d. *Exclusive Appeal.* 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.). *City of Grapevine v. CBS Outdoor, Inc.*, 2013 WL 5302713*26 (Tex. App. – Fort Worth 2013, pet. den.)(mem. op.).

e. *Dismissal for Want of Prosecution.* The court may dismiss a petition for writ of certiorari where the appellant fails to obtain the issuance of the writ for an extended period, such that no return is filed by the ZBA, thus there is no record for deciding the case. *Sumner v. Bd. of Adjustments of the City of Spring Valley Vill.*, 2016 WL 2935881 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

2. Parties. 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*.

3. Writ of Certiorari. 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 the 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. The response to the writ of certiorari is usually called the "return", and should contain a copy of the full record of the ZBA hearing and submitted evidence. It is not clear whether the ZBA may "add" to the record as part of the return and related pleadings. If the ZBA were to submit an explanation of its holding, beyond want was contained in the order being appealed or the minutes of the hearing, it is not clear whether that explanation would be in the pleadings of the ZBA's attorney or whether it could be in a statement of the ZBA included with the return.

4. Exhaustion of Administrative Remedies/Ripeness. 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.). *Sumner v. Bd. of Adjustments of the City of Spring Valley Vill.*, 2016 WL 2935881 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

5. Abuse of Discretion Standard. The foregoing rules generally refer to the "abuse of discretion" standard for reviewing ZBA decisions. The abuse of discretion standard was adopted by the Texas Supreme Court in *City of San Angelo v. Boehme Bakery*, 190 S.W.2d 67 (Tex. 1945) and reaffirmed in 2006 in *Vanesko*.

   Among the lower courts, there have been divergent opinions about the proper standard for review resulting in potential conflicts regarding the substantial evidence rule and the abuse of discretion standard. *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" standard and applies the "substantial evidence" rule); *Flores*, 860 S.W.2d at 625–26 (discussing the conflict); *Wende v. Board of Adjustment*, 27 S.W.3d 162 (Tex. App.—San Antonio 2000, pet. granted), *rev'd on other grounds*, 92 S.W.3d 424 (Tex. 2002) (discussing three categories of issues: factual, legal and mixed). See also the extended discussion in TMZL §11.516 ("Possibly, the courts of appeals and the supreme court apply the same standard of review by different names.").

   Based on Supreme Court decisions, especially *Vanesko*, it is clear that Texas courts should apply a two-tier test when reviewing ZBA decisions:

   - *Fact findings*

When reviewing ZBA fact findings, courts should be very deferential to the ZBA. The reviewing court may not substitute its own judgment for the that of the ZBA. *Vanesko*, 189 S.W.3d at 771. To overturn a ZBA fact finding, a challenger "must establish that the board could only have reasonably reached one decision." ***Id. Note***: This approach to fact findings resembles what courts of appeal sometimes call the substantial evidence rule. Fact findings are critical to a special exception and variance case. *City of Alamo Heights v. Boyar,* 158 S.W.3d 545 (Tex. App. – San Antonio 2005, no pet.), is an example where the trial court reversed the ZBA's denial of a variance and the appellate court reversed again, reinstating the ZBA denial because the trial court improperly "substituted its judgement for that of the [ZBA]." *Id* at 554.

- *Legal conclusions*

When reviewing ZBA legal conclusions, "abuse-of-discretion review is necessarily less deferential," and it is "similar in nature to a de novo review." *Vanesko*, 189 S.W.3d at 771. *Note*: The Supreme Court apparently took this approach in *Wende v. Board of Adjustment*, 92 S.W.3d 424 (Tex. 2002), where the court applied its interpretation of the zoning ordinance. Interpretations should all be considered as a de novo appeal, like other appeals.

In a footnote, the *Vanesko* court emphasized how deferential the abuse-of-discretion standard is supposed to be: ". . . like mandamus proceedings, the standard of review in a zoning case requires a 'clear' abuse of discretion to warrant a reversal of the zoning board's decision." *Vanesko*, 189 S.W.3d at 771 n.4 (2006).

K. 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. Whether a ZBA may conduct any of its business in executive session is unclear. Tex. Loc. Gov't Code Section 211.008(e) provides "all meetings of the board shall be open to the public." In *City of Richardson v. Gordon*, the trial court held that a city charter which required all city council meetings to be open to the public may have precluded the city council from holding executive sessions, despite the general authority in Texas Open Meetings Act to otherwise do so. 316 S.W.3d 758, 760 (Tex. App.—Dallas 2010, no pet.). The appellate court, however, reversed and held that the plaintiff's claim became moot when the city council amended the charter to allow closed sessions "as otherwise permitted by State law." *Id*. at 760, 762. Section 211.008(e) could have the same effect.

The ZBA hearing should be conducted consistent with the requirements of procedural due process. At a minimum, due process requires notice and a hearing. *City of Arlington v. Centerfolds*, 232 S.W.3d 238, 250. (Tex. App.—Fort Worth 2007, pet. denied). "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses" including members of the public who speak at the hearing. *Id*. at 250. Additionally, a party should be allowed an opportunity to re-direct and re-cross. *Id*. at 251.

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.

- Remind the ZBA this is NOT a Variance, so no Hardship is required! ZBA's can get confused and ask about your hardship, even in a special exception.

- 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 physically 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.

- Explain why the Variance is Not Contrary to Public Interest. Show that the variance is the least non-compliance necessary, if possible. Demonstrate that the remaining compliance is still adequate. Argue that neighbor support shows that there must not be any problem.

- 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 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 recorded. Request a copy promptly; just to be sure the record isn't lost. Due to the strong deference upon appeal on fact determinations by the ZBA, an applicant must make its facts before the ZBA, not on appeal.

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 be 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. Attorney Conduct.

An attorney handling a ZBA matter (for the ZBA or the applicant) should consider the following ethical standards:

- A lawyer shall not "seek to influence a tribunal…by means prohibited by law or…rules of practice or procedure…." - Texas Disciplinary Rule 3.05
.
- The client must be identified. - Texas Disciplinary Rule 3.10.

- A lawyer shall not state a "personal opinion as to the justness of a cause, the credibility of a witness.", but may argue based upon the evidence – Texas Disciplinary Rule 3.04.

- A lawyer shall not "assert personal knowledge of facts in issues except when testifying as a witness." - Texas Disciplinary Rule 3.04, but Rule 3.08 says that, generally, a lawyer should not be a witness and an advocate in the same matter.

- A lawyer should inform the ZBA of "adverse authority", under certain circumstances. Texas Disciplinary Rule 3.03(a).

- Ex parte communications are prohibited under certain circumstances, but not clear how it applies to ZBA matters. Texas Disciplinary Rule 3.05.

- A lawyer shall not unlawfully obstruct another's access to evidence. Texas Disciplinary Rule 3.04.

- A lawyer may not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer. Texas Disciplinary Code Section 8.04.

- No one may privately address a "public servant who exercises or will exercise official discretion in an adjudicatory proceeding…with an intent to influence the outcome of the proceeding on the basis of considerations *other than those authorized by law*." Texas Penal Code Section 36.04.

- Threats made to coerce public servants are prohibited. Texas Penal Code Section 36.03.

- Knowingly making a false entry in a government record is prohibited. Texas Penal Code Section 37.10

5. 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.

6. 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. Other ZBA Articles

Several excellent articles cover ZBA issues:

- McNabb, *It Never Hurts to Ask (Or Does It?): Outrageous Land Use Requests*, 2009 UTCLE Land Use Conference.

- Mickelson, *Site Specific Approvals, Differences in and Practical Tips for Approaching Quasi-Judicial and Legislative Approvals*, 2008 UTCLE Land Use Conference.

- Welch, *Basics of Zoning in Texas*, available at www.bhlaw.net

V. Recent ZBA Cases (2006-2016)

The following is a summary of recent cases (all those relating to Boards of Adjustment over the prior 10 years based on a Westlaw search (as of 2/1/17) of "board of adjustment", plus selected earlier cases). The key issues are highlighted at the beginning to assist in review. 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. The following chart lists all the cases in reverse chronological order and the key issues to aid in quickly identifying relevant cases.

Case	Relevant Issues
Trainer v. City of Port Arthur, 2016 WL 3911202 (Tex. App.—Corpus Christi-Edinburg 2016, no pet.)	Validity of Ordinance/Jurisdiction/Exhaustion of Administrative Remedies

City of Baytown v. APTBP, LLC, 2016 WL 3362459 (Tex. App.—Houston [1st Dist.] 2016, no pet.)	Jurisdiction/Exhaustion of Administrative Remedies/Construction Board of Adjustments and Appeals
Sumner v. Bd. of Adjustments of the City of Spring Valley Vill., 2016 WL 2935881 (Tex. App.—Houston [14th Dist.] 2016, pet. denied)	Exhaustion of Administrative Remedies/Abuse of Discretion/Jurisdiction/Immunity/Dismissal for Want of Prosecution
Bd. of Adjustment of the City of San Antonio v. Hayes, 2016 WL 929220, (Tex. App.—San Antonio 2016, no pet.) (mem. op.)	Jurisdiction/Difference in Similar Applications/"Materially Different" Request Required
City of Glen Rose, Texas v. Reinke, 2016 WL 638060 (Tex. App.—Amarillo 2016, no pet.) (mem. op.)	Interpretation/Abuse of Discretion
Sumner v. Bd. of Adjustments of the City of Spring Valley Vill., 2015 WL 6163066 (Tex. App.—Houston 2015, pet. denied) (mem. op.)	Variance/Setback/Issuance Upheld/Adequacy of Evidence/Due Process/Neighbor Has No Vested Property Rights in Ord.
Hill Country Estates Homeowners Ass'n v. Guernsey, 2015 WL 2160510 (Tex. App.—Corpus Christi 2015, no pet.) (mem. op.)	Interpretation/Religious/Exhaustion of Remedies/Ultra Vires Claim
CPM Trust v. City of Plano, 461 S.W.3d 661 (Tex. App.—Dallas 2015, no pet.)	Interpretation/"Destroyed" v. "Dilapidated"/Non-Conforming Sign
Bd. of Adjustment for City of San Antonio v. E. Cent. E. Cent. Indep. Sch. Dist., 2015 WL 1244665 (Tex. App.—San Antonio 2015, pet. denied) (mem. op.)	Permit Issued in Error/No Property Right in Void Permit/No Estoppel Against City
Bd. of Adjustment of City of Univ. Park, Texas v. Legacy Hillcrest Investments, 2014 WL 6871403 (Tex. App.—Dallas 2014, pet. denied) (mem. op.)	Interpretation of "Adjacent"
Nat'l Media Corp. v. City of Austin, 2014 WL 4364815 (Tex. App.—Austin 2014, no pet.) (mem. op.)	Interpretation/Which Ordinance Applies?/"In Pari Materia"
Jabary v. City of Allen, 2014 WL 3051315 (Tex. App.—Dallas 2014, no pet.) (mem. op.)	Exhaustion of Administrative Remedies/Ripeness
Anthony v. Bd. of Adjustment of City of Stephenville, 2014 WL 3398139, (Tex. App.—Eastland 2014, no pet.) (mem. op.)	Jurisdiction/Permanently Unripe/2 Applications were "Essentially the Same"
City of San Antonio Bd. of Adjustment v. Reilly, 429 S.W.3d 707 (Tex. App.—San Antonio 2014, no pet.)	Special Exception/Historic District/Demolition/ZBA Discretion/Proper Evidence
Abbott v. City of Paris, Texas, 429 S.W.3d 99 (Tex. App.—Texarkana 2014, no pet.)	Exhaustion of Administrative Remedies/Permanently Unripe/Prior Non-Confirming Use/Expansion/Failure to Appeal to ZBA/No Use Variances

City of Grapevine v. CBS Outdoor, Inc., 2013 WL 5302713, (Tex. App.—Fort Worth 2013, pet. denied) (mem. op.)	Exhaustion of Administrative Remedies/Permanently Unripe
Bd. of Adjustment of City of Dallas v. Billingsley Family Ltd. P'ship, 442 S.W.3d 471 (Tex. App.—Dallas 2013, no pet.)	Res Judicata/Prior Trial on Similar Issue
Bd. of Adjustment for City of San Antonio v. Kennedy, 410 S.W.3d 31 (Tex. App.—San Antonio 2013, pet. denied)	Interpretation/"College"/Non-Conforming Use
Riner v. City of Hunters Creek, 403 S.W.3d 919 (Tex. App.—Houston 2013, no pet.)	Exhaustion of Administrative Remedies/Ripeness
Town of Bartonville Planning & Zoning Bd. of Adjustments v. Bartonville Water Supply Corp., 410 S.W.3d 23, 24-25 (Tex. App.—San Antonio 2013, pet. denied)	Interpretation/Pre-Emption of Zoning Ord./ZBA Jurisdiction
LIT HW 1, L.P. v. Town of Flower Mound, 2013 WL 362760 (Tex. App.—Ft. Worth 2013, no pet.) (mem. op.)	Interpretation/Burden of Proof/Bad Faith
S. Dev. of Mississippi, Inc. v. Zoning Bd. of City of Marshall, 366 S.W.3d 732 (Tex. App.—Texarkana 2012, no pet.)	Interpretation/Setback/Verification Requirement
Lazarides v. Farris, 367 S.W.3d 788 (Tex. App.—Houston [14th Dist.] 2012, no pet.)	Exhaustion of Administrative Remedies/Ultra Vires/ Constructive Notice of Administrative Decision
Sanchez v. Bd. of Adjustment for City of San Antonio, 387 S.W.3d 745 (Tex. App.—El Paso 2012, pet. denied)	Jurisdiction/Timing for Commencement of 10 Days for Appeal
Larry v. City of Prairie View Bd. of Adjustment & Appeals, 2011 WL 6306666, (Tex. App.—Houston 2011, no pet.) (mem. op.)	Default Judgment
City of Paris, Texas v. Abbott, 360 S.W.3d 567 (Tex. App.—Texarkana 2011, pet. denied)	Exhaustion of Administrative Remedies
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.)	Interpretation/Declaratory Judgment/Standard for Review/Evidence
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.)	Occupancy Permit/Time Limit to Appeal to ZBA
El Hamad v. Commercial Board of Adjustments, 2009 WL 1372955 (Tex.App.—Fort Worth 2009, pet. denied) (mem. op.)	Special Exception/Evidence/Standard for Review
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.)	Demolition Permit/Severance of Claims/Evidence/Experts

Lindig v. City of Johnson City, 2009 WL 3400982 (Tex. App.—Austin 2009, no pet.) (mem. op.)	Jurisdiction/Exhaustion of Administrative Remedies/Proper Parties
Tellez v. City of Socorro, 296 S.W.3d 645 (Tex. App.—El Paso 2009, pet. denied)	Non Conformity/Standard for Review of ZBA Decision
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.)	Variance/Late filed Petition/Notice of Filing of ZBA Decision
Lamar Corp. v. City of Longview, 270 S.W.3d 609 (Tex. App.—Texarkana 2008, no pet.)	Variance/Declaratory Judgment/Impermissible Collateral Attack
Horton v. City of Smithville, 2008 WL 204160 (Tex. App.—Austin 2008, pet. denied) (mem. op.)	Exhaustion of Administrative Remedies/Permanently Unripe
Buffalo Equities, Ltd v. City of Austin, 2008 WL 1990295 (Tex. App.—Austin 2008, no pet.) (mem. op.)	Exhaustion of Administrative Remedies/Permanently Unripe
Tellez v. City of Socorro, 226 S.W.3d 413 (Tex. 2007, no pet.)	Jurisdiction/Proper Parties & Pleadings/Procedural Defects Waived
City of Dallas v. Vanesko, 189 S.W.3d 769 (Tex. 2006, no pet.)	Variance/Erroneous Permit/Hardship/Local Ordinance Limits on ZBA Authority to Grant Variances
City of San Antonio v. El Dorado Amusement Co., 195 S.W.3d 238 (Tex. App.—San Antonio 2006, pet. denied)	Jurisdiction/Declaratory Judgment/Collateral Attack
City of Corpus Christi v. Azoulay, 2006 WL 1172330 (Tex. App.—Corpus Christi 2006, pet. denied) (mem. op.)	Interpretation/Shark as Sign or Art/Additional Evidence Permitted on Appeal
Teague v. City of Jacksboro, 190 S.W.3d 813 (Tex. App.—Fort Worth 2006, pet. denied)	Proper Pleading/Substance Over Form
Bd. of Adjustment of City of Piney Point Vill. v. Solar, 171 S.W.3d 251 (Tex. App.—Houston [14th Dist.] 2005, pet. denied)	Variance/Right to Recreate/Swimming Pool
City Of Alamo Heights v. Boyar, 158 S.W.3d 545 (Tex. App.—San Antonio 2005, no pet.)	Variance/Personal Hardship
Harris v. Board of Adjustment of City of Fort Worth, 2005 WL 32316 (Tex. App.—Fort Worth 2005, no pet.) (mem. op.)	Variance/Abuse of Discretion
Town of S. Padre Island v. Cantu, 52 S.W.3d 287, 288 (Tex. App.—Corpus Christi 2001, no pet.)	Variance/Evidence Supporting Trial Court Reversing Denial

a. *Trainer v. City of Port Arthur*, 2016 WL 3911202 (Tex. App.—Corpus Christi-Edinburg 2016, no pet.).

VALIDITY OF ORDINANCE / JURISDICTION / EXHAUSTION OF ADMINISTRATIVE REMEDIES

A multifamily residential rezoning of land zoned two family residential was approved by a 5-3 vote, after the neighbors filed a protest under Tex. Loc. Gov't Code Sec. 211.006 [triggering a supermajority ¾ vote to approve the protested rezoning]. The protesting neighbors sued the City to invalidate the ordinance for not receiving a ¾ vote. The trial court granted a temporary restraining order enjoining the City from applying the new ordinance or granting any permit allowing the changed use. The City filed a plea to the jurisdiction, arguing: (1) governmental immunity; (2) failure to exhaust administrative remedies; and (3) the suit was not ripe.

To exhaust their administrative remedies, the neighbors sought an interpretation from the City's ZBA that the ordinance was invalid. The City argued that the ZBA had no authority, but the ZBA issued a decision agreeing with the land owners that the ordinance was invalid, and no party appealed such decision.

More than a year later, the developer received a permit to construct duplexes and a community center on the property. The parties disputed whether the project would have been permitted under the original zoning, but the neighbors did not appeal the permit to the ZBA. The City amended its plea to the jurisdiction arguing that: (1) the neighbors' claims are moot because they received administrative relief; (2) failure to exhaust administrative remedies; and (3) the developer was an omitted but necessary party. The neighbors amended their petition (1) adding the developer as a defendant, and (2) asserting a claim that the duplex project was not authorized under the original zoning. The City supplemented its plea contending failure to exhaust administrative remedies as to the new claim. The trial court then granted the City's plea.

The first issue was whether the trial court erred in granting the plea to the jurisdiction on the claim made that ordinance was invalid due to not being approved by a supermajority of the City Council. The appellate court held that claim was not moot. The City continued to consider the rezoning as valid. The ZBA has no authority to determine the validity of an ordinance. Instead, the ZBA's authority is circumscribed by the City Council's ordinances, and its power to review decisions is limited to decisions made by "administrative officials" (citing Tex. Local Gov't Code Ann. § 211.009(a)). The City Council is not an administrative official. Thus, the ZBA decision did not repeal the ordinance. The court cited to multiple Texas Supreme Court cases that recognize that claims challenging the validity of statutes or ordinances are properly brought under the Uniform Declaratory Judgments Act and that sovereign immunity does not apply to such claims. The court distinguished cases when a party sought a declaration of their rights under a statute or ordinance. Thus, the trial court erred in granting the plea to the jurisdiction as to the claim that the ordinance was invalid.

The second issue was whether the trial court erred in granting the plea to the jurisdiction for failure to exhaust administrative remedies with respect to the claim that the building permit

was improperly issued. The court was correct, because the neighbors never brought this issue to the ZBA.

b. *City of Baytown v. APTBP, LLC*, 2016 WL 3362459 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

JURISDICTION / EXHAUSTION OF ADMINISTRATIVE REMEDIES

APTBP sued the City and its officials alleging that the City wrongfully denied electric service to an apartment complex that APTBP was rehabilitating, seeking declaratory and injunctive relief. The City asserted that its Construction Board of Adjustments and Appeals had exclusive jurisdiction and failure to exhaust administrative remedies resulted in the trial court's lack of jurisdiction. The trial court denied the jurisdictional plea. The City's Code of Ordinances provides that building owners and their agents may appeal from the chief building official's decisions to the Construction Board of Adjustments and Appeals if they claim he misinterpreted the building code. The City alleged that the APTBP needed to file with this Board. APTBP responded that the trial court held an evidentiary hearing and that the City failed to secure a record of the hearing, resulting in their waiver of appellate review of the trial court's order denying the plea. The court agreed.

c. *Sumner v. Bd. of Adjustments of the City of Spring Valley Vill.*, 2016 WL 2935881 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

EXHAUSTION OF ADMINISTRATIVE REMEDIES / ABUSE OF DISCRETION / JURISDICTION / IMMUNITY/ DISMISSAL FOR WANT OF PROSECUTION

Sumner and his neighbor Prichard argued over water draining onto Sumner's property. Sumner believed that Prichard's plans would change the natural flow of surface water onto his property in violation of the Spring Valley drainage ordinance as well as Tex. Water Code Ann. § 11.086(a) ("No person may divert or impound the natural flow of surface waters in this state, or permit a diversion or impounding by him to continue, in a manner that damages the property of another by the overflow of the water diverted or impounded."). Sumner also alleged that the City was wrong for issuing permits for the work.

Sumner then filed an application with the Spring Valley ZBA protesting the permit for Prichard's irrigation system and drain based on his argument that the drainage plan would alter the flow of water on his property. The ZBA held a hearing, where both Sumner and Art Flores, the City building official, made presentations to the board. However, Sumner was not allowed to cross-examine Flores. The ZBA unanimously rejected Sumner's protest, and a week later Flores issues a certificate of occupancy for Prichard's construction. Sumner did not protest this decision with the ZBA.

Sumner sued the ZBA, the City, Flores, and Prichard. He included a petition for writ of certiorari appealing the ZBA's decision, asserting many complaints, including issuance of the certificate of occupancy, takings, violation of due process by no right to cross-examine, procedural failures, and conspiracy to violate the Water Code. However, Sumner did not actively

pursue the appeal. Ultimately, the trial court dismissed all claims against Flores, dismissed Sumner's petition for writ of certiorari, and granted summary judgment against Sumner as to the City, the ZBA and Flores, then severed Sumner's claims against Prichard.

On appeal, Sumner lost on all issues.

The court described the process to appeal a ZBA decision. If a trial court grants a writ of certiorari, the ZBA must submit to the trial court the record of its challenged decision, called the "return." The return must state any pertinent and material facts that show the grounds for the decision under appeal. Courts apply a presumption in favor of the ZBA's order, and the attacking party has the burden of proving abuse of discretion by the board. To do so, the contesting party must show that the ZBA acted arbitrarily and unreasonably, without reference to any guiding rules or principles. In this case, the ZBA argued that the petition should be dismissed because (1) Sumner's petition challenged the issuance of the certificate of occupancy; (2) Sumner did not appeal that administrative decision to the ZBA; and (3) Sumner failed to exhaust his administrative remedies, depriving the trial court of jurisdiction. The appellate court agreed, and Sumner should have appealed to the ZBA on that issue.

Next the court considered the trial court's dismissal of Sumner's petition for want of prosecution. A trial court's power to dismiss a case for want of prosecution stems from the Texas Rule of Civil Procedure 165a and the trial court's inherent authority to manage its own docket. Appellate courts review the entire record and reverse a dismissal order only if the trial court abused its discretion. The central issue was whether Sumner exercised due diligence in prosecuting his case. A writ of certiorari was never issued nor served on the ZBA, thus the ZBA did not submit a return to the trial court. Sumner took no steps to obtain evidence to meet his burden of establishing that the ZBA acted illegally. Since Sumner never brought his request to the attention of the court, the court was not required to consider it, and the dismissal was upheld.

Lastly, the court addressed Sumner's claim that appellees were liable for damages because they acted together to violation the Texas Water Code. The trial court granted the motion for summary judgment based on immunity. Sumner alleged ultra vires claims that could support an award for damages and declaratory relief. Unless waived by the Legislature, governmental immunity protects State agencies and political subdivisions, as well as officers and employees acting within their official capacity, from lawsuits for damages. The court ultimately held that Sumner did not properly allege his ultra vires claim, and dismissed the claim for lack of subject matter jurisdiction.

d. *Bd. of Adjustment of the City of San Antonio v. Hayes*, 2016 WL 929220, (Tex. App.—San Antonio 2016, no pet.)(mem. op.).

JURISDICTION / DIFFERENCE IN SIMILAR APPLICATIONS / "MATERIALLY DIFFERENT" REQUEST REQUIRED

Torres hired an unlicensed contractor to construct a stadium-size tennis court in their backyard, without a permit. Hayes, the neighbors, objected and sued. A temporary injunction precluding the use of the court was entered in the Hayes lawsuit and was pending when this suit

was decided. Due to 10-12' difference in elevation, those using the court could see over the Hayes backyard fence.

Later, Torres applied for a general repair permit for a "removable ball containment netting system" designed to prevent tennis balls from entering abutting properties when the tennis court was in use, and a fence (railing and wire mesh) around the court to prevent player from falling over the edge of the court. Initially, the city issued a permit. Hayes appealed to the ZBA, which reversed, holding that the railing and the netting barrier system were in fact fences subject to a minimum 20' setback or a variance. No appeal was taken.

Torres applied for another permit for the same railing, but without the netting system. Again, the city issued a permit, but then revoked it stating that the permit was issued in error because the ZBA previously determined that the railing was subject to a 20' setback. Torres appealed and, additionally, sought a variance. During the ZBA hearing, Torres orally amended the design of the railing to exclude wire mesh, in order to make the request different from the prior design. Then the ZBA determined the request was different, and denied the claim by Hayes that this was the same request as previously decided by the ZBA (and never appealed). The ZBA then reversed the permit decision, so to permit the newly amended "guardrail" design. Apparently, the variance was not considered since the permit was reinstated. Hayes appealed, and there was a dispute if that appeal was timely. In the appeal, Hayes challenged the trial court's jurisdiction due to Torres failing to appeal the 1st ZBA decision, which was for the identical fence (until the oral amendment during the hearing). The trial court agreed with Hayes, and found that the ZBA lacked jurisdiction to consider the Torres appeal on the interpretation. The ZBA appealed and asserted the Hayes appeal was untimely, and that the revised design was different.

The court found that the 10 day filing deadline did not apply to a collateral attack on the Board's decision. Although the pleading was styled as a writ, the court looked to the substance of the pleading, which challenged the Board's power to act. Both claims could be made in the same pleading. *Id*. at *16. A collateral attach is different than a petition for writ of certiorari and is not bound by the 10 day appeal timing. *Id*.

Next, the court found that the amended application excluding the wire mesh presented a different design from the ZBA's prior decision. The court cited *Anthony v. Bd. of Adjustment of City of Stephenville* to show the significance of the amended application. *Anthony v. Bd. of Adjustment of City of Stephenville*, 2014 WL 3398139, (Tex. App.—Eastland 2014) (mem. op.) for its review of the issue. In that case, the issue was whether there was a "meaningful" or "material" difference between the 2 applications for relief to the ZBA, or they were "essentially the same". *Id.* at *2,3-4. The court found that the deletion of the wire mesh by the oral amendment made the 2nd application for a railing, while the 1st was for a fence. Being materially different from the 1st application, the ZBA had jurisdiction to hear the 2nd application for the railing due to the oral amendment accepted by the ZBA during the hearing, as the amended request was the subject of the ZBA vote.

e. *City of Glen Rose, Texas v. Reinke*, 2016 WL 638060 (Tex. App.—Amarillo 2016, no pet.) (mem. op.).

INTERPRETATION / ABUSE OF DISCRETION

The City of Glen Rose, Texas and its ZBA appealed from the summary judgment granted in favor of the Reinkes. The City Administrator denied the Reinkes a certificate of occupancy to operate a drug and alcohol rehabilitation center, interpreting that it was neither a "hospital" nor "convalescent center", each defined terms under the City zoning ordinance. Apparently, the City also denied a requested special use permit, which was not the subject of the case. The interpretation and certificate of occupancy denial was affirmed by the ZBA, and the Reinkes appealed. Upon granting the Reinke's motion for summary judgment, the trial court remanded the cause back to the ZBA for issuance of the certificate of occupancy. The City appealed, arguing that the trial court (1) lacked jurisdiction due to failure to exhaust administrative remedies on the special use permit, and (2) abused its discretion in interpreting the zoning terms.

The City and the ZBA asserted that the Reinkes did not exhaust all administrative remedies because they failed to appeal the denial of the special use permit. The court overruled that argument for the simple reason that the petition for writ of certiorari involved the denial of the certificate of occupancy, not the special use permit.

The City and the ZBA argued that the trial court abused its discretion in not interpreting the use as a "sanitarium," rather than a "hospital" or "convalescent center." The significance is that a sanitarium is prohibited on the Reinke's site (allowed only in an industrial district).

The proposed business had characteristics of a "convalescent center" and a "hospital." Thus, it complied with the existing B-2 zoning designation and the certificate of occupancy should have been issued. There was no defined term for "sanitarium," so the City referred to an online dictionaries. They argued that even though the project satisfied the elements contained in the ordinance's definitions of "hospital" and "convalescent center," a business could also be placed within the undefined label of "sanitarium".

The court stated the following rules for interpreting ordinances:

- The reviewing court may not substitute its own judgment for the ZBA's with respect to the ZBA's factual findings, but legal conclusions made by the ZBA are not entitled to deference because they are reviewed de novo.
- Ordinances are construed under the same rules as statutes.
- Interpretation is a question of law.
- Courts are not bound by the City's interpretation.
- Meaning given one term must be internally consistent with other terms.
- Undefined terms are typically given their ordinary or plain meaning.
- An undefined term may not be given a meaning that is inconsistent with other terms.
- The plain meaning may not be assigned if it would lead to an absurd result.
- Land use ordinances are usually strictly construed against the municipality and in favor of the landowner.

The court held that accepting the City's interpretation of sanitarium would lead to an absurd result, construe an undefined term inconsistently with a defined term, and nullify a like meaning expressly given other words in the ordinance. Thus, the court affirmed the trial court's decision.

f. *Sumner v. Bd. of Adjustments of the City of Spring Valley Vill.*, 2015 WL 6163066 (Tex. App.—Houston 2015, pet. denied) (mem. op.).

VARIANCE / SETBACK / ISSUANCE UPHELD / ADEQUACY OF EVIDENCE / DUE PROCESS / NEIGHBOR HAS NO VESTED PROPERTY RIGHTS IN ORD.

Sumner appealed from the trial court's order granting the plea of jurisdiction and motion for summary judgement filed by the ZBA. The Khans, Sumner's neighbors, received a building permit for a 2nd story addition which Sumner strongly opposed. Sumner suspected setback and height violations. The surveys were conflicted, and ultimately, the addition encroached in a required setback. The ZBA granted a variance, and the trial court upheld that decision.

Sumner advances several issues: (1) insufficient evidence supported the ZBA's decision to grant a variance of a city ordinance to his neighbors; (2) the ZBA abused its discretion in upholding the grant of a Certificate of Occupancy and Compliance to the neighbor; (3) he has a property interest in his neighbor's compliance with City ordinances; (4) he was denied a constitutional right to cross-examination of witnesses at a ZBA hearing; (5) the City's adoption of various ordinances violated his substantive due process rights.

(1) Insufficient Evidence to Support a Variance. Sumner challenged all aspects of the statutory findings required for a variance. The Khans presented evidence of financial, physical and emotional hardship. The variance was held to be consistent with the *McBride* and *Cantu* erroneous permit cases. The court reasoned that substantial completion of construction and property line errors demonstrated that a special condition existed on the Khans' property. The variance was consistent with the public interest due to the minimal extent of encroachment and the limited impact on the public.

(2) Property Interest in Zoning Ord. Enforcement. The court held there is no protected property interest in the enforcement of a zoning ordinance against a neighbor, citing the Federal lawsuit bought by Sumner. *Sumner v. Board of Adjustment of the City of Spring Valley Vill.* 2013 WL 1336604 (U.S. Dist. Ct. – SD TX).

(3) Right to Cross-examine Witnesses. The Texas Local Government Code permits zoning boards to adopt rules of procedure; however, these rules need not follow the formal framework of a civil trial. Sumner failed to request the opportunity to cross-examine any witness, nor did he tender questions to be asked by the ZBA, so he was not denied any legal rights.

g. *Hill Country Estates Homeowners Ass'n v. Guernsey*, 2015 WL 2160510 (Tex. App.—Corpus Christi 2015, no. pet.) (mem. op.).

INTERPRETATION / RELIGIOUS / EXHAUSTION OF REMEDIES / ULTRA VIRES CLAIM

Two Homeowners Associations challenged, over an extended period of time, the zoning uses of an area church; particularly an amphitheater which they assert is inconsistent with the religious assembly use definition. The concern was with non-religious use by 3rd parties who might have access to the amphitheater. The City issued a permit for the amphitheater and the Associations appealed, requesting that the appeal be forwarded to the ZBA. The City responded that the appeal was time-barred. The Associations alleged the City Planning Director Guernsey's actions, including making the "religious assembly use" determination and denying Hill Country's request for appeal, are without legal authority, ultra vires, and/or void. The Associations claimed violation of their procedural due process rights.

The court upheld Guernsey's authority to make the use determinations. The court reversed the summary judgement on the ultra vires claim, concluding that sufficient jurisdictional facts were pled to invoke the trial court's subject matter jurisdiction on Guernsey's failure to forward the appeal to the ZBA. The court further found that the ZBA must first consider that claim before it can be appealed to the trial court. Guernsey was not immune to the ultra vires allegations.

The Associations also brought a vagueness challenge to the City's ordinance as it relates to their "rights to notice, participation, and/or appeal relating to the land use determinations." The court found that the Associations failed to exhaust all available administrative relief before seeking judicial relief, thus depriving the trial court of jurisdiction on that issue.

h. *CPM Trust v. City of Plano*, 461 S.W.3d 661 (Tex. App.—Dallas 2015, no pet.).

INTERPRETATION / "DESTROYED" V. "DILAPIDATED" / NON-CONFORMING SIGN

Owners of a damaged billboard appealed City interpretation that the sign was "destroyed" and must be removed, and sought declaratory judgment, as well as asserted claims that the City violated their vested property rights and a regulatory taking action. The Owners argued the billboard should have been defined as "dilapidated or deteriorated", not "destroyed". The difference is the ability for the billboard to be repaired. The legally, nonconforming billboard had one support pole remaining after it was damaged by a storm.

The court held the ZBA abused its discretion and the billboard was "dilapidated or deteriorated," and therefore, pursuant to the city zoning ordinance, the billboard could be repaired rather than removed.

i. *Bd. of Adjustment for City of San Antonio v. E. Cent. E. Cent. Indep. Sch. Dist.*, 2015 WL 1244665 (Tex. App.—San Antonio 2015, pet. denied) (mem. op.).

PERMIT ISSUED IN ERROR / NO PROPERTY RIGHT IN VOID PERMIT / NO ESTOPPEL AGAINST CITY

Sarosh proposed a convenience store thought to be over 300 feet of a school (so it could sell alcohol). Sarosh applied for a license to sell alcoholic beverages and notified the school's principal of its intentions. Sarosh obtained the license, purchased the property and developed the store. The City issued the certificate of occupancy.

After school complaints, the City re-inspected the property and determined that the distance between the property line of the convenience store and the property line of the school was insufficient. The City then revoked the certificate of occupancy, stating the certificate of occupancy was "issued in error". Sarosh appealed and the ZBA overturned the City's decision. The school district appealed and the trial court overturned the ZBA's decision.

First, the court held that the City followed the proper procedure to revoke the City permit. Then, Sarosh asserted a protected property interest in the certificate of occupancy and the failure to provide it with notice and a hearing before revocation violated its constitutional right to procedural due process. The court followed the precedent of *City of Amarillo v. Stapf. City of Amarillo v. Stapf*, 101 S.W.2d 229 (1937). The certificate of occupancy was void since it was issued in violation of the ordinance. Sarosh couldn't acquire rights under the void permit. Finally, Sarosh claimed the City was estopped from revoking the certificate because of Sarosh's investment in reliance on the certificate of occupancy. The court noted the Texas Supreme Court's holding that a city cannot be estopped from exercising its governmental functions. *City of White Settlement v. Super Wash, Inc.,* 198 S.W.3d 770, 773 (Tex. 2006). The court explained that "the rule derives from our structure of government, in which the interest of the individual must at times yield to the public interest and in which the responsibility for public policy must rest on decisions officially authorized by the government's representatives, rather than on mistakes committed by its agents." *Id.* The court further held that a governmental official's unauthorized acts cannot estop a city's enforcement of zoning ordinances.

j. *Bd. of Adjustment of City of Univ. Park, Texas v. Legacy Hillcrest Investments*, 2014 WL 6871403 (Tex. App.—Dallas 2014, pet. denied) (mem. op.).

INTERPRETATION OF "ADJACENT"

Legacy applied for a permit to construct an above-ground, multi-level parking garage only on the portion of a lot zoned P across the street for a Single-Family District. The zoning ordinance allows only surface parking lots to be located adjacent to Single–Family Districts. The City concluded the lot was not adjacent to a Single-Family District, despite sharing a district boundary line, and approved the permit. An appeal was filed to the ZBA. The ZBA denied the permit. Legacy appealed. The trial court reversed the ZBA's decision, found the ZBA violated the Texas Open Meetings Act, granting a permanent injunction prohibiting future violations of the same; and awarded Legacy attorney's fees.

The City asserted the P-zoned lot is adjacent to a Single-Family District and, therefore, a multi-level parking garage may not be built under the City's zoning ordinance. The ZBA argued it has the power to interpret the zoning ordinance and is not required to defer to staff views or opinions. Legacy countered that the word "adjacent" in the ordinance unambiguously means "contiguous" permitting a multi-level parking lot as long as the parking garage structure itself does not touch the Single-Family District boundary line.

The court relied on the plain and common meaning of adjacent, to be close or near, but does not require touching or contiguity. The court presumed the City selected the language to avoid constructions that lead to absurd results, and that Legacy's interpretation would lead to an absurd result. Section 551.021 of the Texas Government Code provides that meetings of governmental bodies must be open to the public and the governmental body shall prepare and keep minutes or make a recording of each open meeting. Tex. Gov't Code Ann. § 551.002 (West 2012). The record clearly showed the ZBA did not take minutes or otherwise record its work sessions in violation of section 551.021. However, the record also showed the ZBA since corrected the deficiency, so a permanent injunction served no useful purpose.

k. *Nat'l Media Corp. v. City of Austin,* 2014 WL 4364815 (Tex. App.—Austin 2014, no pet.) (mem. op.).

INTERPRETATION / WHICH ORDINANCE APPLIES? / "*IN PARI MATERIA"*

A sign operator tried to register a "non-conforming" billboard, which had been in its current location for almost half a century and met the grandfathering criteria set out in the sign ordinance to be deemed a legal "nonconforming sign." The City refused saying that the zoning ordinance applies instead. After an unsuccessful appeal to the ZBA, the sign operator appealed and the trial court granted the City's motion for summary judgment.

On appeal, the sign operator contended that the ZBA acted arbitrarily or capriciously when it used Zoning Code instead of the Sign Code. The court reasoned that when determining whether an entity has acted arbitrarily or capriciously, the major factor is that parties must be able to know what is expected of them in the administrative process. The court found that the sign operator could not have expected the Zoning Code to apply when neither the language of the Sign Code nor any previous determinations by the City referred to the Zoning Code.

The ZBA relied on the doctrine of *in pari materia*, which deals with different statutes adopted independently, but apply to the same subject matter. The court stated the most important factor in an *in pari materia* analysis is similarity of object or purpose between two statutes that do not reference each other. The court found that the codes at issue were not *in pari materia* because the Zoning Code regulates property use and makes no specific reference to the use and regulation of signs as does the Sign Code. The court found that it was clear that the two codes do not touch upon the same subject, do not have the same general purpose, and do not relate to the same conduct. The court further found that the Zoning Code does not mention signs in any of it provisions. The court held that the ZBA clearly abused its discretion in applying the Zoning Code's abandonment provisions in its denial of the sign registration application.

l. *Jabary v. City of Allen*, 2014 WL 3051315 (Tex. App.—Dallas 2014, no pet.) (mem. op.).

EXHAUSTION OF ADMINISTRATIVE REMEDIES / RIPENESS

Jabary sued the City in federal and state courts alleging both private and public takings after the revocation of his certificate of occupancy. The City filed a motion for summary judgment asserting the trial court lacked subject matter jurisdiction over Jabary's claims because he failed to appeal to the ZBA. After the trial court granted summary judgment in favor of the City, Jabary appealed.

Jabary applied for a commercial certificate of occupancy for a restaurant and submitted an application for a building permit and certificate of occupancy for a restaurant and hookah bar. Jabary was issued a certificate of occupancy for use as a restaurant. The City's chief building official issued a "Notice of Violation" tag on June 9, 2010, once he became aware that Jabary's business was primarily a hookah bar and was not capable of being used as a restaurant. The notice effectively revoked Jabary's certificate of occupancy.

The court relied on the general rule when a party asserts a takings claim based on an allegedly improper administrative determination, he must first appeal that determination and assert his takings claim in that proceeding. *Patel v. City of Everman*, 361 S.W.3d 600, 601 (Tex. 2012) (per curiam). Jabary did not timely file an appeal with the ZBA and alleged that appeal to the ZBA would have been futile, asserting that the ZBA had no authority to change the result. The court found the ZBA is vested with the authority to reverse a previous order, decision, or determination, including the revocation of a certificate of occupancy. The court held the City conclusively established Jabary failed to exhaust his administrative remedies; therefore, the trial court did not err by granting summary judgment in the City's favor.

m. *Anthony v. Bd. of Adjustment of City of Stephenville*, 2014 WL 3398139, (Tex. App. Eastland 2014, no pet.) (mem. op.).

JURISDICTION / PERMANENTLY UNRIPE / 2 APPLICATIONS WERE "ESSENTIALLY THE SAME"

Anthony sought to construct a convenience store with two enclosed drive-through lanes. The proposed use was not a classified use under the zoning ordinance, so was not permitted. A proposed rezoning was unsuccessful. Later, Anthony's general contractor applied for a building permit for "Cowboys Convenience Store" with drive-through service. The city attorney informed Anthony's attorney that the proposed use was not allowed. No appeal was taken. Later, Anthony's wife applied for a building permit for "Cowboy Convenience Store." Again, the city attorney wrote that the use was not allowed. Anthony appealed to the ZBA, which upheld the interpretation that the use is not allowed.

The City took the position that Anthony's second application for a building permit was not materially different from the first application which he did not appeal to the Board; therefore,

he had not exhausted his administrative remedies and the trial court was without jurisdiction. Anthony claimed that the second application was a different application and that he timely appealed that denial to the Board. Anthony argued two material differences in the applications; first, the second application was for a "retail store other than listed," rather than a "convenience store" and second, the "drive-through lanes" on the first application were designated as "covered customer parking" in the second application.

The court found that the second application was essentially the same as the first and did not materially change the nature of the application: same size building, essentially the same business names, and same plans except the drive-through lanes were relabeled as covered customer parking. Because Anthony did not appeal from the denial of the first application, the trial court was without jurisdiction and properly granted the City's plea to the jurisdiction.

n. *City of San Antonio Bd. of Adjustment v. Reilly,* 429 S.W.3d 707 (Tex. App.—San Antonio 2014, no pet.).

SPECIAL EXCEPTION / HISTORIC DISTRICT / DEMOLITION / ZBA DISCRETION / PROPER EVIDENCE

Reilly sought to demolish a home in an historic district and construct a six-unit apartment complex. The ZBA upheld the historic preservation officer's denial. The trial court granted summary judgment in favor of Reilly, holding that the ZBA abused its discretion in denying the demolition request. The ZBA appealed.

The ZBA relied on provisions of the Unified Development Code (the "Code") which governs the demolition of structures in historic districts, specifically section 35–614 which provides an applicant may obtain a demolition certificate if they demonstrate i) unreasonable economic hardship, or ii) significant and irreparable changes, not caused by the owner, which have caused the house to lose the qualities or features which qualified the structure for historic designation.

Reilly presented knowledgeable witnesses who testified to the unsound structure of the home, as well as the architectural merit and history of the home being insignificant. The ZBA heard from city staff and residents to the contrary of Reilly's witnesses. Reilly's primary argument was that the evidence presented by the residents was not relevant or competent because the residents were not experts. Reilly argued the ZBA was required to rely on the opinions of experts to evaluate loss of significance. The court found even though the ZBA is a quasi-judicial body, it is not required to apply strict rules of evidence and it properly considered the evidence presented by the residents. The burden was on Reilly to establish that the ZBA committed a clear abuse of discretion by establishing that the Board could have reasonably made only one decision, and not the decision it made. The court found that based on the evidence presented, the ZBA acted within its discretion. The court concluded that the trial court erred in granting Reilly's summary judgment motion, and in denying the ZBA's summary judgment motion.

o. *Abbott v. City of Paris, Texas*, 429 S.W.3d 99 (Tex. App.—Texarkana 2014, no pet.).

EXHAUSTION OF ADMINISTRATIVE REMEDIES / PERMANENTLY UNRIPE / PRIOR NON-CONFIRMING USE / EXPANSION / FAILURE TO APPEAL TO ZBA / NO USE VARIANCES

Abbott sued the City after being denied a permit to expand a non-conforming use of an existing mobile home park. Abbott's property was zoned commercial. The city manager sent Abbott a letter saying the mobile home park was an "approved non-conforming use." Abbott interpreted the letter to be a contract which allowed the expansion of the mobile park. When a plat application was rejected, Abbott was informed that a zoning change from commercial to single-family dwelling was needed to expand the mobile park. Abbott did not attempt to have the property rezoned.

Believing that the letter was a contract, Abbott sued the City for breach of contract, inverse condemnation, violations of procedural and substantive due process and equal protection, and declaratory relief. The trial court only granted the City's plea to the jurisdiction on Abbott's claims filed under Texas Tort Claims Act. The City appealed and Abbott's lawsuit was dismissed on the grounds that Abbott failed to exhaust all available administrative remedies.

Abbott filed a second lawsuit against the City alleging regulatory taking, denial of due process of law, and denial of equal protection under the law. The trial court agreed with the City that Abbott failed to exhaust administrative remedies or prove that the City waived governmental immunity. On appeal, Abbott asserted federal and state takings claims, due process claims, and equal protection claims.

In lieu of filing the appropriate form for rezoning, Abbott presented the City with a document prepared by his attorney captioned "Application for Extension Confirmation of Existing Non–Conforming Use." The relevant sections of the ordinance favor the elimination of nonconforming uses rather than the expansion of nonconforming uses. The City refused to accept Abbott's form and offered Abbott the City's form for rezoning.

The City's refusal to accept Abbott's application was primarily based on the unavailability of the requested relief under the City's zoning ordinance. The City lacked the power to grant the relief Abbott requested in the application for extension of the nonconforming use.

Abbott attempted to appeal the rejection of the application to the ZBA. The City once again informed Abbott that the change required a zoning change, and rejected the application. The ZBA had no authority to change zoning. The court relied on *Driskell v. Bd. of Adjustment*, 195 S.W.2d 594, 598-9 (Tex. Civ. App. – Fort Worth 1946, writ ref'd n.r.e.), stating "…a board of adjustments is restricted in its decisions to the powers vested in it by… the particular zoning regulation in question." *Abbott*, 429 S.W.3d 99 at 106. Use variances are prohibited. *W. Tex. Water Refiners, Inc. v. S & B Beverage Co.*, 915 S.W.2d 623, 626 (Tex. App. – El Paso 1996, no writ), *Swaim v. Bd. of Adjustments of the City of Univ. Park*, 433 S.W.2d 727, 731-2 (Tex. Civ. App. – Dallas 1968, writ ref'd n.r.e.). Abbott had not requested a variance, and had not appealed the denial of the building permit application, so the rejection of the ZBA application was proper.

Now, the deadline to appeal to the ZBA has passed.

p. *City of Grapevine v. CBS Outdoor, Inc.*, 2013 WL 5302713, (Tex. App.—Fort Worth, Sept. 19, 2014, pet. denied) (mem. op.).

EXHAUSTION OF ADMINISTRATIVE REMEDIES / PERMANENTLY UNRIPE

CBS operated a nonconforming billboard adjacent to a state highway. The State sought to condemn 4 feet of the CBS sign that encroached aerially over a highway expansion. CBS was given by the State the options to either shift the face of the sign or reduce the sign face. Because sign was nonconforming, the sign could not be altered. The City denied CBS's request to shift the face of the sign. The Assistant City Attorney informed CBS in a letter that the sign could not "be moved, altered, or adjusted". CBS did not appeal this interpretation.

Without a permit, CBS removed a four-foot panel on the end of the sign face to remedy the encroachment. The City ordered CBS to remove the sign because CBS illegally modified the sign. CBS appealed to the ZBA and, alternatively, sought a variance. The ZBA denied CBS's appeal of the interpretation and request for a variance, in part due to CBS's failure to challenge the initial written response that the sign could not be altered.

CBS timely sued the City and the ZBA for judicial review, injunctive relief, inverse condemnation in violation of the state and federal constitutions, violation of due process, declaratory relief, and attorneys' fees. The trial court denied the City's plea to the jurisdiction challenging all of CBS's claims. The City filed an interlocutory appeal.

The court found that the trial court lacked jurisdiction over CBS's claim because CBS did not exhaust its administrative remedies when it failed to appeal the City's original decision prohibiting it from altering, moving or adjusting the sign. CBS argued that its appeal of the decision to remove a portion of the sign is separate and different from the original decision. Apparently, the court determined that a partial removal is "altering" or "adjusting". The court found that because CBS failed to challenge the underlying decision, it cannot now challenge the decision under the facade of an appeal to the consequences of violating the original decision. The court stated that CBS' interpretation of the Assistant City Attorney's letter was an "artificially restrictive characterization." If, as CBS stated, it was willing "not to question" and "to accept" the interpretation without appeal, then the court's opinion shows that such decision is at the party's risk. The court held that CBS should have appealed to the ZBA to resolve the meaning of the letter. Further, the court held that just because CBS' request was to "shift" the sign, and the letter went beyond that limited issue, that is was an interpretation which needed to be appealed, not just ignored. *Id*. at *12 Additionally, the court held that a letter from the City Attorney could be an order issued by City staff for the purpose of trigger a requirement to appeal if the City Attorney is responding on behalf of or through the City Attorney. *Id.* at *15

Further, the court found that CBS's claim for declaratory relief was not to invalidate an ordinance, but to attack the validity of the ZBA's decision denying the appeal or supplement its inverse condemnation claim. The court stated, "However, as a general rule, an action for declaratory relief will not be entertained if there is pending action between the same parties that

might resolve the exact issues raised in the declaratory judgment." *Id*. at *24-5. The court held CBS may not bypass that administrative relief with a declaratory judgment claim, and that "CBS's claim for declaratory relief is, therefore, nothing more than a restated claim for judicial review of the Board's decision…." *Id*. at *24-5. Finally, the court stated "CBS may not circumvent [the] administrative remedy scheme by seeking the exact same relief via a declaratory judgment claim." *Id.* at *26.

q. *Bd. of Adjustment of City of Dallas v. Billingsley Family Ltd. P'ship*, 442 S.W.3d 471 (Tex. App.--Dallas 2013, no pet.).

RES JUDICATA/PRIOR TRIAL ON SIMILAR ISSUE

The ZBA appealed the trial court's judgment reversing its decision that upheld the revocation of a certificate of occupancy for an apartment complex owned by Billingsley alleged operated as a hotel. In a previous case ("*Billingsley I*") Billingsley sought a judgment declaring that it was not operating a hotel and enjoining the City from revoking its certificate of occupancy. The City filed a counterclaim for code and zoning violations. The final outcome on appeal was affirmation of the trial court ruling that both parties take nothing by their claims.

While *Billingsley I* was pending, the City revoked Billingsley's certificate of occupancy on the grounds that the trial court in *Billingsley I* had granted the City an injunction ordering Billingsley to cease operation as a residential hotel as well as finding city code provisions, stating a certificate of occupancy shall be revoked if it is issued based on false information, incomplete or incorrect information. Billingsley appealed to the ZBA. At the ZBA hearing, Billingsley argued the Board could not uphold the City's revocation of the certificate of occupancy because the justifications asserted were barred by the trial court's judgment in *Billingsley I*. Billingsley relied on the doctrine of res judicata.

The ZBA disputed Billingsley's reliance on res judicata arguing that Billingsley failed to present sufficient evidence to support a claim of res judicata for failure to introduce the sworn or certified pleadings from the prior lawsuit. The court found that "Section 211.011(e) of the local government code expressly allows the trial court to take additional evidence if 'necessary for the proper disposition of the matter.' *Id*. at 475. The ZBA conceded that the *Billingsley I* pleadings were admitted into evidence before the trial court reversed the Board's determination, and the court found this sufficient.

The ZBA also argued res judicata did not apply because the judgment in *Billingsley I* was not yet final at the time of the Board hearing. The court found the judgment was final for purposes of res judicata at the time the trial court admitted it into evidence. The ZBA cited no legal authority that would preclude the trial court's consideration of the final judgment in *Billingsley I* for res judicata purposes, so this argument failed.

The Board further argued that res judicata did not apply because the trial court expressly denied Billingsley's request for injunctive relief, thus expressly reserving that issue for determination in a subsequent proceeding. The court held "the mere denial of Billingsley's request for injunctive relief, however, is not dispositive for purposes of res judicata." *Id.* at 476.

The court held res judicata precludes a subsequent action by the parties and their privies on claims which arise out of the same subject matter and which might have been litigated in the prior suit. The court found that many of the same facts in *Billingsley I* were relevant to both proceedings and would require significant duplication of effort in the second case. The court held the case was barred by res judicata; therefore, the trial court did not err in concluding the ZBA abused its discretion in upholding the revocation of Billingsley's certification of occupancy.

The ZBA was successful in challenging the trial court's order awarding costs to Billingsley. The court concluded that the trial court improperly assessed costs because there was no evidence to support a finding that the ZBA acted with gross negligence, in bad faith, or with malice.

r. *Bd. of Adjustment for City of San Antonio v. Kennedy,* 410 S.W.3d 31 (Tex. App.—San Antonio 2013, pet. denied).

INTERPRETATION / "COLLEGE" / NON-CONFORMING USE

The ZBA and Trinity University ("Trinity") appealed the trial court's order granting summary judgment and overturning the ZBA's decision which upheld the issuance of certificates of occupancy to Trinity, permitting use of four houses for administrative offices. The City adopted the Unified Development Code (the "Code") which changed the zoning of the entire campus of Trinity to "R-5" Residential which included single-family dwellings and public colleges and universities among the permissible uses, but not private colleges and universities. Trinity is a private university. Trinity asserted it was entitled to nonconforming use rights and development preservation rights with respect to the houses. Nevertheless, Trinity applied to rezone the five homes to "R-5S" Specific Use to allow "private university" uses, so it could use the houses as administrative offices. Area homeowners opposed the application, so Trinity withdrew it, and then applied for certificates of occupancy under its nonconforming use rights. The City issued the certificates of occupancy. The area Homeowners Association and numerous homeowners appealed to the ZBA. The ZBA upheld the City's decision. The trial court overturned that decision.

At the hearing before the ZBA, there was testimony from the area owners that the houses had always been used only as faculty residences. Trinity presented testimony that the houses had also been used as offices, receptions, a conference center and accommodations for students and visitors.

The court found that the ZBA could have decided the issue either way and because the ZBA may base its decision on conflicting evidence, so long as there is evidence supporting its decision, the ZBA did not abuse its discretion here.

The homeowners challenged that the use of the property other than faculty residences was not "lawful" because Trinity did not previously obtain certificates of occupancy. In order to meet the definition of nonconforming use, the use must be a lawful use. The court found that because the ZBA did not overturn the City's decision, it must have believed the testimony that the four houses were being used as faculty residences, not requiring a certificate of occupancy.

The court then addressed whether Trinity's use of the four houses for faculty residences entitled it to nonconforming use rights. The court held that Trinity's use of the houses for faculty residences was a "college" use as used in the zoning ordinances. The court looked to Maryland case law to define "college" use and held that a faculty residence is encompassed within a "college" use of property just as the use of property for college administrative/faculty offices is a "college" use. The court held because the use of the four houses as faculty residences is considered a "college" use, Trinity's use of the houses for this purpose entitled it to nonconforming use rights when the Code was adopted.

The homeowners also argued that Trinity lost its entitlement to nonconforming use rights by failing to register its rights with regard to the four houses. The court relied on the Code's "Certificate of Nonconforming Use" which provided that an owner *may* register and further does not require an owner to register a nonconforming. The court found that Trinity was not required to register the nonconforming use of the houses in order for their "college" use of the houses to be lawful.

The court held the use of the houses as administrative offices would also be a "college" use; therefore, the use would be a continuing use. The court found that Trinity's development preservation rights would permit an expansion of the use of the houses as offices.

The court concluded the Board could have determined that Trinity's use of the four houses as faculty residences in 2001 was a "college" use that did not require a certificate of occupancy or registration in order for the use to be lawful. The court held the Board's order was not illegal and affirmed the Board's decision.

s. Riner v. City of Hunters Creek, 403 S.W.3d 919 (Tex. App.—Houston 2013, no pet.).

EXHAUSTION OF ADMINISTRATIVE REMEDIED / RIPENESS

Riner filed an application for replat. The Planning and Zoning Commission denied the application and issued an order certifying the reasons for its decision. Riner did not appeal the decision to the ZBA, but instead filed suit against the Commission in district court. Riner alleged the Commission disapproved the plat due to the Commission misconstruing applicable ordinances and sought a declaratory judgment construing the ordinance and invalidating the Commission's 14 reasons for disapproving the plat.

The trial court dismissed suit for lack of subject-matter jurisdiction. The appellate court noted that Riner failed to appeal the Commission's decision to seek an interpretation of the application ordinances, and did not request variances. The court held that any injury from the alleged misinterpretation of the ordinance concerning lot size was hypothetical, in part because of no ZBA appeal. *Riner*, 403 S.W.3d 919 at 924. The court held requests for declaratory judgment were not ripe. Further, because Riner failed to pursue the available administrative remedies, there was no basis on which to conclude that it would have been futile to do so. The court held the trial court correctly concluded that the declarations Riner sought could be obtained only in an advisory opinion that the trial court had no jurisdiction to render.

t. *Town of Bartonville Planning & Zoning Bd. of Adjustments v. Bartonville Water Supply Corp.*, 410 S.W.3d 23, 24-25 (Tex. App.—San Antonio 2013, pet. denied).

INTERPRETATION / PRE-EMPTION OF ZONING ORD. / ZBA JURISDICTION

Bartonville Water Supply Corp. ("BWSC"), operating under Texas Water Code Ch. 67, began constructing a water tower within the Town without obtaining a building permit. The Town demanded BWSC to cease construction. BWSC filed a petition for declaratory relief and writ of mandamus in district court and the Town filed a plea to the jurisdiction. Before the plea was heard, BWSC filed an application for a building permit with the Town for the water tower. The permit was denied because the site was zoned RE–2, and the proposed water tower was not an approved use or structure. The Town's zoning ordinance requires a conditional use permit (a type of rezoning) for the construction of a water tower, and BWSC had not been issued a conditional use permit.

BWSC appealed denial of the building permit. BWSC argued that BWSC is not subject the Texas Water Code, which BWSC argued pre-empts the Town's zoning ordinance. The Town's attorney opined that the ZBA had no authority to make such a determination, and that such a question was for a court via declaratory judgment. The ZBA denied BWSC's appeal.

BWSC appealed by petition for writ of certiorari (but not including a request for declaratory judgment), stating that the Texas Water Code makes clear that the Town has no express authority to impose its zoning regulations on BWSC. BWSA contended the Texas Water Code "expressly authorizes retail public utilities, notwithstanding any other law, to extend their services and to construct the facilities necessary for that extension within the corporate limits of towns they serve for the purpose of providing adequate water services to their members." *Town of Bartonville*, 410 S.W.3d at 26. BWSC concluded that the Board abused its discretion because it failed to analyze or apply the law properly. The trial court ruled for BWSC finding zoning was pre-empted as to BWSC's use and granted BWSC's building permit.

On appeal, the ZBA argued that it has limited jurisdiction, without legal authority to determine whether the Town's ordinance is subordinate to the Water Code, stressing that the Board only has authority to ensure the ordinances are followed. The ZBA contended that the trial court exceeded the scope of its limited review in a petition for writ of certiorari appeal by determining that the Town's ordinance is subordinate to the Water Code and finding that BWSC was not subject to the Town's ordinance. The court found that neither the Building Official nor the ZBA had authority to determine whether the Town's ordinance is subordinate to the Texas Water Code and therefore able to decide whether BWSC is subject to the ordinance, but only authority to ensure the ordinances are followed. The court held if the ZBA had determined that BWSC was not subject to the ordinance, that decision would have been illegal. The appellate court held that since it was not within the ZBA's jurisdiction to make such a determination; it was also not within the trial court's jurisdiction. The court held that the trial court exceeded its subject matter jurisdiction since there was no declaratory judgment pleading.

u. *LIT HW 1, L.P. v. Town of Flower Mound*, 2013 WL 362760 (Tex. App.—Ft. Worth 2013) (mem. op.).

INTERPRETATION / BURDEN OF PROOF / BAD FAITH

The International Building Code requires heating systems in interior spaces intended for human occupancy. LIT owns a warehouse not equipped with a heating system. LIT's certificate of occupancy was denied on these grounds. LIT had leased to an electronic waste recycler with six employees who disassemble and sort electronic components. LIT appealed. The ZBA denied the appeal. LIT then filed a petition for certiorari in the trial court.

LIT argued that the ZBA failed to apply its proper standard of review. At the hearing, the Town's attorney claimed LIT had the burden to establish that the interpretation by the building official was incorrect. The court found that the Town's zoning ordinance places no such burden on the appealing party. The court found that the Board's record showed that some Board members applied the incorrect standard. The court held that the Board abused its discretion.

LIT's alleged that the Board's decision was a clear abuse of discretion because (1) a letter from the International Code Council, author of the IBC stated that section 1204 "is not intended to apply to spaces where manufacturing and assembling work is performed" and (2) the IBC does not require mixed-use industrial buildings to be equipped with heating systems that satisfy section 1204.1.

LIT also argued that because the Board applied the wrong standard of review, it acted with gross negligence, in bad faith, or with malice. The court found that the Board's record showed the Board members acted diligently, absent malicious intent.

v. *S. Dev. of Mississippi, Inc. v. Zoning Bd. of City of Marshall*, 366 S.W.3d 732 (Tex. App.--Texarkana 2012, no pet.).

INTERPRETATION / SETBACK / VERIFICATION REQUIREMENT

Southern Development of Mississippi, Inc. (SDM) owns a lot of which the northern part of the lot is zoned "C–2" for retail business and the southern part of the lot is zoned "R–1" for single-family detached residential. After SDM began construction on a retail facility on the C-2 portion, the City issued a stop construction order claiming that the planned structure was being constructed too close to the residential portion of the lot. The City applied the zoning setback to apply to zoning district boundaries, not the property lines. SDM appealed to the ZBA which affirmed the City's decision. SDM filed an application for a writ of certiorari in the district court. The district court affirmed the decision.

SDM appealed. On appeal, for the first time, the ZBA argued the district court lacked jurisdiction because SDM's application was not properly verified. The court held a defect in verification is not a jurisdictional requirement and may be waived. The court reasoned Texas courts have uniformly held defects in verifications in other contexts can be waived. The Board argued that the verification is a statutory prerequisite but the court found that the filing of the

petition with in the requisite time period is the statutory prerequisite. The court held the Board waived any defect in the verification by not objecting in the trial court; thus, it was not necessary to decide whether the verification was defective.

The City's Zoning Ordinance provided for setback requirements based on property lines, not zoning lines. The court found the only reasonable decision that the ZBA could have reached was that a setback was not required from the zoning line. The ordinances clearly stated lot line, not zone line. The court found that only one decision could have been reached which was that the setbacks do not apply. The court held the ZBA decision was illegal and a clear abuse of discretion.

w. *Lazarides v. Farris*, 367 S.W.3d 788 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

EXHAUSTION OF ADMINISTRATIVE REMEDIES / ULTRA VIRES / CONSTRUCTIVE NOTICE OF ADMINISTRATIVE DECISION

Farris claimed that when his neighbor Fink built a new home, landscaped her property, and installed a swimming pool, Fink illegally interrupted the diversion of the flow of water from Farris' property. Before the changes were made to Fink's property, accumulated surface water drained from Farris's backyard across the property line of Farris and Fink into a trench directed to the Spring Branch Creek drainage watershed. Farris asserted that Fink obstructed the natural drainage with pool dirt, fencing, plants, concrete structures, and other materials at and near the boundaries of her property.

Fink obtained permits and a certificate of occupancy from the City. Fink submitted drainage and building plans to the City that complied with building codes and zoning regulations. The City approved an initial drainage plan for Fink's property that specified that "final grading shall be such that this property shall not drain on adjacent properties and existing drainages on adjacent properties is not altered." Farris alleged that the original drainage plan was violated by changes to the building and landscaping plans. After his property flooded, Farris wrote Lazarides, the building official, complaining that the alterations on Fink's property interfered with the preexisting drainage pattern on Farris's property. Allegedly, Lazarides replied that he would ensure Fink's drainage system would accommodate Farris's runoff, and not issue a certificate of occupancy until that goal had been accomplished. Later, a certificate of occupancy was issued to Fink.

Farris filed suit against Lazarides in his official capacity for violating the zoning regulation. Lazarides filed for summary judgement with respect to claims against him in his official capacity and the trial court denied the motion. Lazarides appealed, challenging the trial court's subject-matter jurisdiction. Lazarides argued that the trial court lacked subject-matter jurisdiction because Farris failed to appeal any of Lazarides decisions to the ZBA. The court relied on well-established law that a person aggrieved by zoning regulation and enforcement decisions of an administrative official may appeal to the ZBA in a reasonable time. Local Government Code Section 211 requires administrative remedies must be exhausted before the party seeks judicial review.

Farris' asserted that since he did not receive notice of Lazarides decision, he did not have standing to appeal to the ZBA and he did not have an obligation to appeal because he was not the owner. The court found that Farris could have obtained the information directly from Lazarides, attending a public meeting, or obtaining the City's meeting minutes. The court also held that Farris had standing as an aggrieved person because of the alleged injury to his adjacent property. Having either actual or constructive notice that the certificate of occupancy was issued, Farris was required to exhaust his administrative remedies by appealing to the ZBA. Id. at 799.

The court held that exhaustion of administrative remedies was not required for *ultra vires* claims. An *ultra vires* action is one in which the plaintiff seeks relief in an official-capacity suit against a government official who allegedly has violated statutory or constitutional provisions by acting without legal authority or by failing to perform a purely ministerial act. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73 (Tex.2009). However, the court found that Farris' claims for prospective declaratory and injunctive relief based upon Lazarides' alleged *ultra vires* acts had not been properly pled or stated facts sufficient to demonstrate that those claims were ripe or not moot. The court reversed and remanded those claims to the trial court to allow Farris an opportunity to cure the pleading defects as to his ultra vires claims.

x. *Sanchez v. Bd. of Adjustment for City of San Antonio*, 387 S.W.3d 745 (Tex. App.—El Paso 2012, pet. denied).

JURISDICTION / TIMING FOR COMMENCEMENT OF 10 DAYS FOR APPEAL

Sarosh proposed a convenience store thought to be over 300 feet of a school (so it could sell alcohol). Sarosh obtained the license after the building inspector incorrectly measured the distance between the school and store. Upon completion, the City issued a certificate of occupancy. When the school complained, the City became aware of the error and revoked the certificate of occupancy, stating it was "issued in error". Sarosh appealed and the ZBA overturned the City's decision on October 5, 2009. On October 19, 2009, the ZBA approved the minutes and filed the minutes in the ZBA offices. The City, through its Planning Director, filed suit on October 28, 2009. Sarosh filed a plea to the jurisdiction because the suit was not filed within ten days after the date the decision was filed in the ZBA offices as required by the Texas Local Government Code Section 211.011(b). The trial court granted the plea.

The City appealed and asserted that the ZBA's decision was not filed until written minutes were approved and filed on October 19, 2009. The ZBA asserted that the time began when the ZBA made its decision. The court acknowledged that the deadline is jurisdictional, citing the Texas Supreme Court's ruling in *Tellez v. City of Socorro*, 226 S.W.3d 413,414 (Tex. 2007). The court held that the "decision" by the ZBA, that triggers the ten-day period for petition for judicial review, refers to the ZBA's minutes reflecting a vote and the records related to that decision. *Id.* at 753. The trigger is not when the decision is made or when the draft minutes are transcribed. The ZBA's Articles of Rules and Procedures required that the ZBA approve the minutes before the minutes are treated by the ZBA as a public record of its decision. The court concluded that the minutes are not filed for purposes of Section 211.011(b) until the minutes are approved. *Id*. at 754. For this reason, the court found that the appeal was timely.

y. *Larry v. City of Prairie View Bd. of Adjustment & Appeals,* 2011 WL 6306666, (Tex. App.—Houston 2011, no pet.) (mem. op.).

DEFAULT JUDGMENT

Larry, a pro se litigate, appeals the trial court's failure to award damages in conjunction with a default judgment rendered against the ZBA. Larry claimed that the City did not explain why his building was substandard and improperly denied him the opportunity to repair the building. Larry's prayer for relief asked for an award of damages. Larry filed a motion for and was awarded default judgment when the Board failed to respond and appear in trial court. The trial court granted an injunction against the Board, but did not award Larry any damages. Larry filed a motion for new trial claiming damages for lost profits of at least $4 million. The motion was overruled by operation of law. Larry appealed. The court found that in Larry's motion for default judgment, he did not request an award of damages. He also failed to provide any evidence or supporting affidavits of lost profit damages at the default judgment hearing. The court affirmed the trial court's decision.

z. *City of Paris, Texas v. Abbott,* 360 S.W.3d 567 (Tex. App.—Texarkana 2011, pet. denied).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Abbott sued the City after being denied a permit to expand a non-conforming use of an existing mobile home park. Abbott argued that the denial constituted a breach of contract referencing a letter received from the City Manager which stated the park was a non-conforming use. The City filed A plea to the jurisdiction. It is well established the exhaustion of administrative remedies is a jurisdictional prerequisite. *Lamar Corp. v. City of Longview*, 270 S.W.3d 609, 613 (Tex. App.-Texarkana 2008, no pet.). A claimant must exhaust all administrative remedies before filing a claim in trial court. Abbott must appeal the City's decision with to the ZBA. Abbott did not exhaust all administrative remedies by the failure to appeal to the ZBA. The trial court therefore lacked subject-matter jurisdiction over the breach of contract claim.

aa. *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.).

INTERPRETATION / DECLARATORY JUDGMENT / STANDARD FOR REVIEW / EVIDENCE

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

The court stated the well-known rules for appeal of a ZBA interpretation: The ZBA is 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 ZBA's order. To prove that an order is illegal, the party attacking the order must present a clear showing of abuse of discretion. A ZBA abuses its discretion if it acts without reference to any guiding rules and principles.

The court found that the ZBA 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 upholding the ZBA

Sea Mist's declaratory judgment action was dismissed as it as subsumed by and rendered moot by the decision on the ZBA appeal (which was on the same issue), citing *Lamar Corporation v. City of Longview*, 270 S.W.3d 609, 614 (Tex. App. – Texarkana 2008, no pet.).

bb. *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.).

OCCUPANCY PERMIT / TIME LIMIT TO APPEAL TO ZBA

Sea Mist appealed the ZBA denial of its appeal requesting the revocation of the occupancy permit of a cafe 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.

The owner successfully argued in its motion for summary judgment to the trial court that Sea Mist's appeal was not timely filed. At the time of Sea Mist's appeal, the ZBA did not specify what constituted a "reasonable" time for timely appeal to the ZBA, as provided 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 ZBA as a quasi-judicial authority, held that 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 owner’s right to have its permits finally determined. The failure to timely appeal to the ZBA precluded a further appeal to the courts.

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

SPECIAL EXCEPTION / EVIDENCE / STANDARD FOR REVIEW

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, ZBA denied El Hamad's application for a 2 year extension of the special exception, granting instead a one year extension. In January 2007, the ZBA 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. The ZBA heard evidence of complaints, and that the area around the junk yard was becoming increasingly residential making the junk yard an undesirable use.

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

The court held that the standard of review with regard to a ZBA 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 ZBA order carries the presumption of legality, placing the burden of proving its illegality on the party attacking the decision.

The court held that the ZBA 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 ZBA's objections to El Hamad's affidavit in support of his proposed special exception which cites to other special exceptions as being relevant (apparently, examples of other, similar special exceptions are not relevant).

dd. *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.).

DEMOLITION PERMIT / SEVERANCE OF CLAIMS / EVIDENCE / EXPERTS

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 ZBA which upheld the decision of the Landmark Commission after a public hearing on the issue.

The owners appealed the ZBA's decision to the district court and asserted several constitutional claims including a denial of due process at the ZBA 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 ZBA did not abuse its discretion in upholding the Landmark Commission's decision. The court also granted the ZBA's motion to sever the order affirming the ZBA'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 ZBA was acting in a quasi-judicial role in reviewing the decision of the Landmark Commission, the standard of review was whether or not the ZBA 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 ZBA abused its discretion. Further, the court held the ZBA 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 ZBA could have reached only one decision, not the decision it made. The court found the ZBA had not abused its discretion by basing its decision on conflicting evidence, and there was a legal presumption in favor of the ZBA's order if there was "some evidence of substantive and probative nature" supporting the ZBA's decision. In this case the court held there was such evidence and the ZBA had not abused its discretion.

The court allowed the ZBA 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.

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

JURISDICTION / EXHAUSTION OF ADMINISTRATIVE REMEDIES / PROPER PARTIES

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, the City's request for injunctive relief, and common law claims of fraud, conspiracy and taking, which included a petition for writ of certiorari in county court suing the ZBA and its members in their official capacity. The Lindigs requested relief ranging from illegality of the fee, and 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. The City sought to have all the claims dismissed by plea to the jurisdiction. The court dismissed all claims based on lack of jurisdiction.

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, even though that occurred after the case was originally filed. They cured any jurisdictional defect. The court held that when common law claims are filed, that a party may be given the opportunity to exhaust administrative remedies. Consequently, the Lindigs' taking claims were also ripe. The court also held the individual ZBA members could be sued in their "official" capacity and would be "nominal" parties.

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

NON CONFORMITY / STANDARD FOR REVIEW OF ZBA DECISION

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 ZBA all denied his requests. 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 outlined the following standards for review of a ZBA decision:

- "review of the [ZBA'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.

- "the only question that may be raised by a petition for writ of certiorari is the legality of the [ZBA's] order." *Id*.
- Applicant has the burden of providing evidence that was considered by ZBA
- If there is no record of the board's decision, the reviewing court must presume that the [ZBA's] decision is valid and uphold it.
- Even though there was conflicting evidence before the ZBA, it did not abuse its discretion in this case

gg. *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.).

VARIANCE / LATE FILED PETITION / NOTICE OF FILING OF ZBA DECISION

Boswell filed a petition for writ of certiorari challenging variances to a developer. The ZBA filed a motion to dismiss for lack of jurisdiction, since the petition was filed more than 10 days after the decision. Boswell countered that city officials mislead him as to the date of the decision, and thus, he 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.

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

VARIANCE / DECLARATORY JUDGMENT / IMPERMISSIBLE COLLATERAL ATTACK

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

The court of appeals held that the ZBA is a quasi-judicial body, and as such, the district court sits as a court of review by petition for 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 [ZBA's] decision." *Id*. at 614.

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

ii. *Horton v. City of Smithville,* 2008 WL 204160 (Tex. App.—Austin 2008, pet. denied) (mem. op.).

EXHAUSTION OF ADMINISTRATIVE REMEDIES / PERMANENTLY UNRIPE

The Helmcamps opened a live music venue on their property after the City Manager and Public Works Director determined that the proposed establishment would not violate the zoning ordinances. The decision was not appealed. Horton brought suit against the Helmcamps, her neighbors, and the City of Smithville for nuisance, conspiracy, taking of property and violation of the Open Meetings Act when her neighbors began operating a live music venue. The City filed a plea to the jurisdiction asserting governmental immunity and that Horton failed to exhaust her administrative remedies, and alternatively, summary judgment. The trial court granted the plea to the jurisdiction and summary judgment.

The Court of Appeals affirmed. The court first found that §211.009 allows ZBAs to hear and decide appeals that "allege error in an order, requirement, decision, or determination made by an administrative official in the enforcement of a local zoning ordinance." *Id*. at *4. Second, the court held that plaintiffs must exhaust all administrative remedies prior to seeking judicial relief.

Horton admitted that she did not appeal the City decision to the ZBA. Horton argued that because the city refused to enforce its zoning ordinance, there was no official action, and thus no administrative remedy. The court disagreed and held that the decision made by the City Manager and Public Works Director was appealable to the ZBA. Consequently, the court held that Horton was not entitled to seek judicial relief since she did not first seek relief from the ZBA to exhaust her administrative remedies.

jj. *Buffalo Equities, Ltd v. City of Austin,* 2008 WL 1990295 (Tex. App.—Austin 2008, no pet.) (mem. op.).

EXHAUSTION OF ADMINISTRATIVE REMEDIES / PERMANENTLY UNRIPE

Buffalo sought rezoning for re-development. Part of the proposed re-development consisted of improvements to an easement Buffalo owns that runs across its neighbor's property. The City re-zoned Buffalo's property. Later, the City informed Buffalo by letter that its re-development plans for its easement did not comply with the relevant zoning restrictions on the neighbor's property and, as an easement owner, Buffalo could not file to have its neighbor's property re-zoned. Buffalo sued the City for various declarations and taking of property. The trial court overruled the City's plea to the jurisdiction, dismissed the takings claim and held that Buffalo, as an easement owner, could not initiate re-zoning of the easement.

The Court of Appeals held that the City letter constituted an "appropriate use classification" determination, and as such, the decision was appealable to the ZBA per City code. Additionally, Tex. Loc. Gov't Code Sec. 211.009 also enables an aggrieved party to appeal the decision of administrative official to the ZBA if that decision relates to zoning ordinances. Consequently, the court had no jurisdiction over the case because Buffalo had not exhausted all of its administrative remedies before filing suit. Accordingly, the trial court should have granted the City's plea to the jurisdiction

kk. *Tellez v. City of Socorro,* 226 S.W.3d 413 (Tex. 2007, no pet.).

JURISDICTION / PROPER PARTIES & PLEADINGS / PROCEDURAL DEFECTS WAIVED

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 ZBA and his petition did not assert how the ZBA'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.

ll. *City of Dallas v. Vanesko,* 189 S.W.3d 769 (Tex. 2006, no pet.).

VARIANCE / ERRONEOUS PERMIT / HARDSHIP / LOCAL ORDINANCE LIMITS ON ZBA AUTHORITY TO GRANT VARIANCES

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 ZBA which denied the request. Dallas limited variances more than state law, as follows:

- The variance must be necessary to permit development such that the land could not be otherwise be developed.
- Self-created or personal hardships are not sufficient.
- Financial reasons alone are not sufficient.
- A variance may not grant a development privilege not available to others on similar sized lots.

- The site must differ from other parcels in the same zoning classification due to area, shape or slope.

The Vaneskos appealed by petition for writ of certiorari.

The Texas Supreme Court outlined the following rules when reviewing a ZBA decision:

- ZBA decisions are reviewable by application for a writ of certiaria under Tex. Loc. Gov't Code Sec. 211.011(a).

- The court sits only as a court of review, only considering the illegality of the ZBA's order.

- To prove illegality, the complaining party must clearly show that the ZBA abused its discretion.

- A ZBA abuses its discretion when it acts without reference to any guiding rules or principles or fails to analyze or apply the law correctly.

- A reviewing court may not substitute its own judgment for that of the ZBA.
- The complaining party must establish that the ZBA could only reasonably have reached on decision.

- The abuse of discretion review is less deferential when considering any legal conclusions and is similar in nature to a de novo review. *Id*. at 771.

The court enforced the restrictions in the Dallas ordinance. The court found that the ZBA 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. The personal nature of the hardship under the Dallas ordinance was due to the decision the Vaneskos made in designing their house as opposed to the nature or configuration of their lot. Further, the city's issuance of a building permit did not estop the city from enforcing its zoning ordinances. Interestingly, the court qualified its statement on this point, and did not overrule *Bd. of Adjustment v. McBride*, 676 S.W.2d 705 (Tex. App. – Corpus Christi 1984, no writ) or *Town of S. Padre Island v. Cantu*, 52 S.W.3d 287 (Tex. App. – Corpus Christi 2001, no pet.), though given the opportunity to do so.

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

JURISDICTION / DECLARATORY JUDGMENT / COLLATERAL ATTACK

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

On appeal, the city argued that El Dorado was required to attack the ZBA's decision by writ of certiorari. Conversely, El Dorado asserted that "it has the right to collaterally attack the [ZBA's] refusal to grant it a non-conforming use permit because the board's decision flowed from a void ordinance. *Id.* at 250.

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

nn. *City of Corpus Christi v. Azoulay*, 2006 WL 1172330 (Tex. App.—Corpus Christi 2006, pet. denied) (mem. op.).

INTERPRETATION / SHARK AS SIGN OR ART / ADDITIONAL EVIDENCE PERMITTED ON APPEAL

Azoulay was denied a permit to build a three dimensional shark in front of his store because the City determined that the shark was a sign and, therefore, violated the zoning ordinance. Azoulay appealed the decision to the ZBA which affirmed. Azoulay then appealed to the district court by petition for writ of certiorari which held that the shark was not a sign and did not violate the zoning ordinance.

First, the Court of Appeals agreed that the shark was not a sign. The trial court's role is to review the legality of the ZBA's decision and must determine if the ZBA abused its discretion. To find an abuse of discretion, a reviewing court must conclude that the Board acted without reference to any guiding principles of law. The court found that the ordinance at issue was unambiguous and the shark clearly did not fall within the meaning of a sign as contemplated by the ordinance. Therefore, the court found that the trial court did not abuse its discretion when it reversed the ZBA's decision.

Second, the court determined that it was not error for the trial court to hear new evidence that was not presented to the ZBA. Section 211.011 allows the trial court to hear new evidence if "the court determines that testimony is necessary for the proper disposition of the matter." *Id.* at *3.

oo. *Teague v. City of Jacksboro*, 190 S.W.3d 813 (Tex. App.—Fort Worth 2006, pet. denied).

PROPER PLEADING / SUBSTANCE OVER FORM

The City Council required Teague to demolish a structure unless he ceased "all unhealthy an unsafe conditions" within thirty days. Instead, Teague filed suit against the city seeking a declaration that the order was arbitrary, the zoning ordinances were unconstitutional, and injunction relief. The City filed a plea to the jurisdiction asserting that Teague failed to file a

petition for writ for certiorari within thirty days of receiving the demolition order. The trial court granted the plea and dismissed the case.

On appeal, Teague asserted that because his lawsuit was filed within thirty days, the trial court had subject matter jurisdiction even though he did not file the petition writ of certiorari within the thirty day period.

The court of appeals agreed. The court stated that "certiorari is a procedural mechanism by which a reviewing court can demand of an inferior court or body that it send up the record of the proceedings" to determine legality and "whether the lower court or body had acted within its proper jurisdiction." *Id*. at 818. Even though Teague's petition did not specifically request certiorari, in substance, the pleading did the same thing as a writ of certiorari—assert the illegality of the council's actions.

pp. *Board of Adjustment of Piney Point Village v. Solar*, 171 S.W.3d 251 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

VARIANCE / RIGHT TO RECREATE / SWIMMING POOL

Solar sought a variance from the ZBA to build a swimming pool in his side yard. Solar presented evidence to the ZBA that building the pool in his backyard was cost prohibitive if not physically impossible because of certain characteristics of Solar's backyard. After the ZBA denied the variance, Solar filed a petition for writ of certiorari. The trial court found for Solar on summary judgment and reversed the ZBA's decision.

The court of appeals affirmed. The court stated that a ZBA abuses its discretion when undisputed evidence shows that a requested variance would not adversely affect other interests and that failure to do so would result in an unnecessary hardship. The ZBA asserted that Solar only presented a financial hardship which is an insufficient "unnecessary hardship." The court disagreed since there was evidence that Solar would not be able to build a pool in his backyard regardless of how much money it would take to build. Consequently, by denying the variance, Solar lost the right to recreate which the court concluded is a sufficient unnecessary hardship.

The city also asserted the broad rule that variances are justified only if the zoning ordinance, if literally enforced, would not permit any reasonable use of the property, but the court differentiated the cited cases as all commercial while this property was residential. Id. at 256. Further, the court stated that those cases related to variances sought to earn a higher profit. Id. Under the city's interpretation so long as any habitable building could be built, then no variance would be permitted. Instead, the court cited *Currey v. Kimple*, 577 S.W.2d 508, 513 (Tex. Civ. App. – Texarkana 1978, writ ref'd n.r.e.), "The [appellees] are entitled to use their property to the fullest as it related to a family dwelling and place for family recreation, limited only by the provisions of valid statutes and ordinances."

In footnotes, the court stated two other relevant holdings:

- Additional evidence tendered to the trial court could be considered, even without an affirmative finding that evidence was necessary, as such finding was implicit.

- Whether hardship exists is an issue of law for the court.

qq. *City of Alamo Heights v. Boyar*, 158 S.W.3d 545 (Tex. App.—San Antonio 2005, no pet.).

VARIANCE / PERSONAL HARDSHIP

Without a building permit, the Boyars erected screens around their backyard to exclude insects, debris, and rodents from their neighbors' property. The Boyars later sought a building permit, which was denied for violating zoning regulations. They then sought a variance from the ZBA which was also denied. Consequently, the Boyars filed a writ of certiorari. The trial court found the ZBA abused its discretion in denying the variance because enforcement of the zoning ordinances would result in an unnecessary hardship on the Boyars, particularly Mrs. Boyar, for health reasons. Mrs. Boyar has sun and insect allergies. Further, the Boyars alleged that they spent $17,000 to build the structure and it would cost them $10,000 to demolish it, which financial loss they asserted as an element of their hardship.

Initially, the Court of Appeals interpreted the term "structure" so to determine if, in fact, the Boyar's screened area was a structure. The court held it was. Note: there is no evidence of an appeal to the ZBA of the city interpretation on this point.

Next, the Court of Appeals held that the Boyars would not suffer an unnecessary hardship. A ZBA may grant a variance if enforcement of the ordinance would create an unnecessary hardship on the applicant and the granting of the variance would not adversely affect other interests. A hardship cannot be self-imposed, personal in nature, or financial only. Further, the hardship must relate to a unique condition of the property for which variance is sought. The court found that while the Boyars would suffer a hardship, it would be personal to Mrs. Boyar or financial in nature and would not relate to any unique conditions of the property.

rr. *Harris v. Board of Adjustment of City of Fort Worth*, 2005 WL 32316 (Tex. App.—Fort Worth 2005, no pet.) (mem. op.).

VARIANCE / ABUSE OF DISCRETION

Wanting to build a garage in his side yard, Harris sought a variance from the Fort Worth ZBA which was denied. Despite the denial, Harris built the garage and requested another variance after it was completed which was also denied. The trial court granted the ZBA's motion for summary judgment and found that as a matter of law, the ZBA did not abuse its discretion.

The court of appeals affirmed. A ZBA abuses its discretion when its acts arbitrarily without reference to any guiding rules or principles. However, a ZBA does not abuse its discretion when it bases its decision on conflicting evidence. During the ZBA hearing, there was evidence presented that granting the variance would cause safety concerns because Harris' property was located on a curve of a busy street. Consequently, the court of appeals found that there was probative and substantive evidence for the ZBA to base its decision on.

ss. *Town of S. Padre Island v. Cantu*, 52 S.W.3d 287, 288 (Tex. App.—Corpus Christi 2001, no pet.).

VARIANCE / EVIDENCE SUPPORTING TRIAL COURT REVERSING DENIAL

Cantu received a building permit for their house. Their plans showed an encroachment into a required setback and the Town failed to object. When almost 80% complete, the building inspector said that the upper part of the house was 22 inches into the setback. Cantu timely filed for a variance. The neighbors supported the variance. The ZBA denied the variance since only 3 (not the required 4) commissioners voted in favor). The trail court overturned the decision and the Town appealed.

The court found that the following evidence in support of the variance:

- the encroachment is 22 inches
- the encroachment was shown on the plans
- the Town issued a permit
- Cantu relied on the permit and spent money to build the house
- compliance would cost tens of thousands of dollars
- compliance would substantially change the appearance, making both the house and the area less aesthetically pleasing
- the Town's acquiescence to the building plans then later barring completion *subjected the property to a unique and oppressive condition*
- the nature of the property was altered when substantial improvements were made with the Town's knowledge and under its supervision
- the variance was not contrary to the public interest., as the house was over 10 feet from the nearest utility line
- no evidence of safety or health risk
- neighbor support of the variance proved that the variance would not adversely affect public interest
- (The court rejected the Town's contention that any encroachment violates public interest. Id. at 291 fn.2)

Despite conflicting evidence, the ZBA could have reached only one decision, which was that a hardship did exist and the variance would not affect public interest, citing *Board of Adjustment, City of Corpus Christi v. McBride*, 676 S.W.2d 705 (Tex. App. – Corpus Christi 1984 no writ) (which held that if there is undisputed evidence of a hardship and no adverse public effect, then the ZBA must approve a variance). The ZBA abused its discretion by failing to grant the variance, even with disputed evidence. The court held the trial court did not improperly substitute its decision for the Board's decision.

VI. Chart of Variance Cases (1965-2016)

Attached is a chart listing all ZBA cases where variances were requested and considered covering the prior 50 years. The chart is provided to aid in legal research on variances cases. The chart shows the case cite, the nature of the requested variance, whether approved at each

level, elements relied upon by the appellate court in deciding whether or not the variance in questions was appropriate, as well as appropriate comments.

Case	Variance Requested	Approved? X if yes	Elements cited by CCA	Comments
Sumner v. Bd. of Adjustments of the City of Spring Valley Vill., 2015 WL 6163066 (Tex. App.—Houston 2015, no pet.) (mem. op.)	Residential Setback	ZBA- X Trial Ct- X CCA- X	HARDSHIP: ▪ Reliance on 3rd party professionals ▪ Repeated error by many professionals ▪ Inadvertence ▪ Undiscovered until sub. completion ▪ Minimal extent of variance ▪Significant setback remains ▪ Owner testified to financial, physical and emotional hardships SPECIAL CIRCUMSTANCES: ▪ Substantial completion ▪ Substantial setback remains ▪ Cause was repeated errors by 3rd party professionals PUBLIC INTEREST/SPIRIT OF ORDINANCE: ▪ Inadvertence ▪ Minimal extent ▪ Limited impact ▪ Limitation in ZBA's grant, such as to existing house CONSISTENCY OF VARIANCE WITH OTHER CASES: ▪ *McBride* ▪ *Cantu*	Memorandum opinion Rare case when variance granted and uniformly upheld. **Good listing of examples of evidence supporting a variance by type of required finding.**

Case	Variance Requested	Approved? X if yes	Elements cited by CCA	Comments
City of Dallas v. Vanesko, 189 S.W.3d 769 (Tex. 2006, no pet.)	Residential Height	ZBA- Trial Ct- X CCA- X SC-	▪ The court provided an **outline of standards for a variance review** on appeal. ▪Homeowners did not hire a general contractor, architect or engineer ▪ Zoning code was more restrictive than state law ▪ Hardship was not related to the "area, shape, or slope" of the land as required by zoning code ▪ Hardship was self-imposed/personal as it came from owner design decisions ▪ Local ordinance can establish factors to consider in granting a variance or may limited permissible variances	**Texas Supreme Court** ▪**Limited applicability** due to the unusually restrictive nature of Dallas variance provisions ▪ Court considered but did not overrule *McBride* and *Cantu.* ▪ Court held the reliance on erroneous permit does not entitle an owner to a variance "in every case". ▪ The court noted that an equitable estoppel claim was made, then severed and not before the court. In a footnote, the court stated that is expressed no opinion on validity of any estoppel claim.
Bd. of Adjustment of City of Piney Point Vill. v. Solar, 171 S.W.3d 251 (Tex. App.— Houston [14th Dist.] 2005, pet. denied)	Residential Swimming Pool	ZBA- Trial Ct- X CCA- X	▪ No evidence of any harm ▪ Deprivation of ability to swim on owner's property ▪ Lost of the **right to recreate** constitutes an unnecessary hardship ▪ Property's characteristics may have made it impossible to build swimming pool in compliance with zoning laws ▪ Increased cost & need to destroy existing trees & structures would have prevented owner from building pool.	▪Whether an alleged hardship qualifies as an "**unnecessary hardship**," is an **issue of law** for the courts to decide. ▪ Variance not limited to situations where no reasonable use is permitted. ▪ Residential variances differentiated from Commercial variances.

Case	Variance Requested	Approved? X if yes	Elements cited by CCA	Comments
City Of Alamo Heights v. Boyar, 158 S.W.3d 545 (Tex. App.—San Antonio 2005, no pet.)	Residential Lot Coverage	ZBA- Trial Ct- X CCA-	▪ Allergy to insects & sun is a **personal hardship** not related to the configuration or uniqueness of property ▪ Deprivation of homeowners enjoyment and use of their backyard is not a hardship ▪ Cost to demolish and lost value of structure if financial hardship only	Violation of the ordinance is insufficient to justify a variance.
Ferris v. City of Austin, 150 S.W.3d 514 (Tex. App.—Austin 2004, no pet.)	Low Income Housing Project Lot Width, Size & Shape	ZBA- X Trial Ct- X CCA- X	SELF IMPOSED HARDSHIP: ▪ Existing lots incompatible with zoning laws and denying the owner a reasonable use of the property supports a variance and is not self-imposed simply due to the owner's desired use. ▪ **Lack of deliberate conduct of the applicate is relevant**. FINANCIAL HARDSHIP: ▪ "Economies of Scale" is financial only. ▪ Acceptable non-economic hardship evidence: Irregular, small lots Lots subdivided before city min. lot-size requirements Large trees Topographical restraints	Unusual circumstance where City sought variance for low income housing.

Case	Variance Requested	Approved? X if yes	Elements cited by CCA	Comments
Town of S. Padre Island Texas ex rel. Bd. of Adjustment v. Cantu, 52 S.W.3d 287 (Tex. App.—Corpus Christi 2001, no pet.)	Residential Setback	ZBA- Trial Ct- X CCA- X	HARDSHIP: ▪ **Erroneously approved plans** ▪ Substantial improvements based on approved plans ▪ Sizable cost to literally comply ▪ Compliance would make house and area less aesthetically pleasing. PUBLIC INTEREST: ▪ Substantial setback remains ▪ No health/safety issues ▪Neighbor support ▪ Without variance, the house and area would be less attractive	Important case which extends *McBride,* and has **broad list of factors which support a variance.** Has elements of reliance/estoppel **Extends *McBride* to cases with conflicting evidence**.
Blackman v. Bd. of Adjustment, City of Dallas, 2000 WL 1239981 (Tex. App.—Dallas 2000, pet. denied) (mem. op.)	Apartments "Reverse" Setback	ZBA- X Trial Ct- X CCA- X	UNNECESSARY HARDSHIP: ▪ Irregularly shaped lot ▪ **Loss of large, mature trees** ▪ New project could not be built consistent with similar developments in the area ▪ More aesthetic SELF IMPOSED HARDSHIP: ▪ **Fact that other reasonable uses permitted does not preclude variance** ▪ **Desire to build Apts. on tract does not make variance self-imposed**	Pro se litigant Focus on tree preservation

Case	Variance Requested	Approved? X if yes	Elements cited by CCA	Comments
Hagood v. City of Houston Zoning Bd. of Adjustment, 2000 WL 730660 (Tex. App.—Houston [1st Dist.] 2000, no pet.)	Residential Setback	ZBA- X Trial Ct- CCA- X	UNNECESSARY HARDSHIP: ▪ **Erroneous permit issued** ▪ Construction underway ▪ Expense to comply ▪ BOA set conditions which were met by the developer	City of Houston case dealing with special TIRZ zoning
Zoning Bd. of Adjustment for City of Lubbock v. Tri-Star Investments, 1997 WL 331735, (Tex. App.—Amarillo 1997, writ denied)	Commercial Sign Setback & Height	ZBA- Trial Ct- X CCA-	PUBLIC INTEREST ▪ **Neighbor input is relevant**. Here, all but one written comment was in opposition ▪ BOA staff phone calls from neighbors complaining of the lack of aesthetic appeal of the sign ▪ Review text of city ordinance ESTOPPEL: ▪ Enjoining the City from revoking an erroneous permits is not an issue before the court	Lists as 3 distinct element to grant a variance: • Not contrary to **public interest** • Due to special conditions, literal enforcement will cause an **unnecessary hardship** • **Spirit of the ordinance** is observed and substantial justice done
Bd. of Adjustment of City of Corpus Christi v. Flores, 860 S.W.2d 622 (Tex. App.—Corpus Christi 1993, writ denied)	Commercial Parking	ZBA- Trial Ct- X CCA-	APPEALS W/ CONFLICTING EVIDENCE: ▪ Legal presumption favors ZBA decision ▪ ZBA is fact finder ▪ ZBA is quasi-judicial body, so district court sits only as court of review ▪ District court can't simply disagree with ZBA decision and substitute its	**Reported Writ Denied case** Well written opinion. **Reviews the law applicable to ZBA appeals**, particularly the Abuse of Discretion standard and the conflict with cases continuing to apply the Substantial Evidence rule.

Case	Variance Requested	Approved? X if yes	Elements cited by CCA	Comments
			discretion for the ZBA's EVIDENCE SUPPORTING DENIAL: ▪ Off-site parking by oral (not written) agreements ▪ Significant additional space added ▪ Difficulty using proposed parking ▪ Current overflow parking situation	
Southland Addition Homeowner's Ass'n v. Bd. of Adjustments, City of Wichita Falls, 710 S.W.2d 194 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.)	Setback	ZBA- X Trial Ct- X CCA- X	▪ Preservation of existing trees is a **special condition** ▪ Lost of trees is a hardship, which is not financial	**Tree Protection**
Battles v. Bd. of Adjustment & Appeals of City of Irving, 711 S.W.2d 297 (Tex. App.—Dallas 1986, no pet.)	Lot Developer Setback & Width	ZBA- X Trial Ct- X CCA-	HARDSHIP ▪ Limitation on possible lots in new residential lot project is merely financial hardship, not a special condition of the parcel ▪ Reduction in no. of permitted lots was only evidence of hardship ▪ Requested rezoning was denied and the variance was just another way to achieve the greater density desired by the developer	**Important case: Financial hardship is not a special condition contemplated by State Variance law.**

Case	Variance Requested	Approved? X if yes	Elements cited by CCA	Comments
Bd. of Adjustment, City of Corpus Christi v. McBride, 676 S.W.2d 705, 706 (Tex. App.—Corpus Christi 1984, no pet.)	Residential Setback	ZBA- Trial Ct- X CCA- X	HARDSHIP: ▪ Similar lots had a lesser setback ▪ Building permit was issued (erroneously) ▪ City inspector inspected ▪ House was substantially completed before violation noticed ▪ House was built in substantial compliance with original site plan ▪ Violation was shown on plans ▪ Violation was inadvertent ▪ Compliance required structural modification and significant expense ▪ Compliance would render the house unsightly UNCHALLENGED FINDINGS OF FACTS: ▪ Hardship existed ▪ No adverse effect on the public interest	**Significant** for considering mitigating circumstances which, in fact, frequently occur: erroneous permit, mistakes by city and owner, substantial completion before discovery and substantial compliance. Dealt with unique situation of **undisputed evidence** favoring variance
Reiter v. City of Keene, 601 S.W.2d 547 (Tex. Civ. App.—Waco 1980, writ denied)	Commercial Setback	ZBA- TrialCt- CCA-	▪ No evidence that 50 ft. setback was unnecessary hardship ▪ Proposed setback was 8 ft. ▪ Applicant moved existing building to the site, creating the encroachment ▪ No evidence in the record supporting hardship	Pro Se litigant No evidence in the record on hardship. Variance is not to accommodate "Highest and Best Use". Unless compliance "would destroy any

Case	Variance Requested	Approved? X if yes	Elements cited by CCA	Comments
				reasonable use of his property", the ZBA denial will be upheld
Currey v. Kimple, 577 S.W.2d 508 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.)	Setback Tennis court	ZBA- X Trial Ct- X CCA- X	HARDSHIP: ▪ Irregular, pie shape ▪ Not self-created hardship just because owner wants a tennis court ▪ Configuration was hardship REASONABLE USE: ▪ Fact that owner already has "reasonable use" of the lot does not preclude variance ▪ Owner is entitled to "fullest" use, limited by applicable law	Prototype Variance situation, plus recreational purpose **Doesn't limit variance to only where no reasonable use is permitted** Owner entitled to use their land and such use doesn't cause a self-created hardship
City of Dallas v. Gaechter, 524 S.W.2d 400 (Tex. Civ. App.—Dallas 1975, writ dismissed)	Sign Height	ZBA- Trial Ct- X CCA-	DISTRICT COURT GRANTED INJUNCTION EQUIVALENT TO VARIANCE: ▪ Advertising sign's height violated city airport zoning ordinance ▪ Location was not a hazard, danger or public nuisance	**Important case: Courts lack independent power to grant a variance.** Only ZBA may grant variance, and reviewing **courts do not have "de novo" authority**, but only limited review authority. They may not substitute their judgment. Follows *City of San Angelo v. Boehme Bakery*, 190 S.W.2d 67 (Tex. 1945)

Case	Variance Requested	Approved? X if yes	Elements cited by CCA	Comments
Bd. of Adjustment of City of San Antonio v. Willie, 511 S.W.2d 591 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.)	Commercial Height	ZBA- X Trial Ct- CCA-	HARDSHIP: ▪ Tower was highest and best use of the property ▪ Highest and best use analysis does not support unnecessary hardship ▪ Other uses possible: food service centers, filling station, discount stores, franchise stores	Highest and best use analysis relates to financial, not the site.
City of Lufkin v. McVicker, 510 S.W.2d 141, 143 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.)	Residential Side Yard	ZBA- X Trial Ct- CCA-	▪ Simple majority approved variance ▪ Grant of variance required concurrence of four members ▪ Order granting variance was void ▪ Collateral attach permitted on void ZBA action ▪ No estoppel based on history of ZBA using majority votes	Math problem- must have 4 affirmative votes for a ZBA to act.
Swain v. Bd. of Adjustment of City of Univ. Park, 433 S.W.2d 727 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.)	Gas Station	ZBA- X Trial Ct- CCA-	▪ Prior ZBA variance permitting gas station use in zoning district which did not permit that use was void. ▪ "Power to vary conditions of zoning ordinances should be sparingly exercised, and such power should be exercised only for the benefit of the public and with due regard for the preservation of rights of others acquired under the original	Important case with full discussion of ZBAs and their powers and limits, and reviewing historic Texas ZBA case law. Use variances are prohibited- ZBA permitting a business in a residential area amounted to a legislative decision changing the basic purpose and intent of the zoning ordinance,

Case	Variance Requested	Approved? X if yes	Elements cited by CCA	Comments
			zoning ordinances." ▪ ZBA powers "is expressly limited to such variances and exceptions are consistent or are in harmony with, or not in derogation of, the spirit, intent, purpose or general plan of the regulation." ▪	which is outside ZBA authority.
Zoning Bd. of Adjustment of City of San Antonio v. Marshall, 387 S.W.2d 714 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.)	Radio Tower	ZBA- Trial Ct- X CCA-	▪Neighbor opposition ▪Prior tower fell ▪Hazard ▪Could use another tower instead of having his own	Not clear if applicant filed for variance, but his request was treated as variance on appeal.