THE BASICS OF LAND USE LAW

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AMBER L. SLAYTON
JOE J. GORFIDA

NICHOLS, JACKSON, DILLARD,
HAGER & SMITH, L.L.P.
1800 Lincoln Plaza
500 N. Akard
Dallas, Texas 75201
(214) 965-9900
(214) 965-0010 – fax
aslayton@njdhs.com
jgorfida@njdhs.com

AMBER L. SLAYTON

NICHOLS, JACKSON, DILLARD, HAGER, & SMITH, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201
(214) 965-9900
www. njdhs.com

aslayton@njdhs.com

Amber L. Slayton is a senior associate in the Dallas law firm of Nichols, Jackson, Dillard, Hager & Smith, L.L.P. She obtained her bachelor's degree with highest honors in speech communication and political science at Southwest Baptist University in Bolivar, Missouri in 1997. Ms. Slayton pursued her legal education at Baylor University School of Law and successfully competed nationally in the moot court program, earning membership in the Order of the Barristers. She obtained her Juris Doctorate in February 2000.

Ms. Slayton's and the firm's primary area of practice is the representation of municipalities and political subdivisions in all matters, and the firm currently represents more than two dozen political subdivisions. In addition to general matters arising in municipalities, Ms. Slayton's practice focuses on all aspects of litigation and appellate work, including land use, ad valorem taxation, constitutional law and deprivation of civil rights, election matters, and claims arising under the Texas Tort Claims Act and the Civil Service Act.

Ms. Slayton serves as an adjunct instructor for Texas A&M University – Commerce, teaching undergraduate and graduate-level law classes. She also sits as a member of the advisory board of the paralegal program at the university; serves on the board of directors for Operation Kindness, North Texas' largest no-kill animal shelter; and is a member of the Pro Bono College of the State Bar of Texas.

JOSEPH J. GORFIDA, JR.
NICHOLS, JACKSON, DILLARD, HAGER, & SMITH, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201
(214) 965-9900
www. njdhs.com

jgorfida@njdhs.com

Joe Gorfida, Jr. is a partner with the law firm of Nichols, Jackson, Dillard, Hager & Smith, a Dallas-based full service firm specializing in municipal law. The firm was initially formed in 1895, making it one of the oldest and most respected law firms in Texas. The firm serves as counsel for municipalities, political subdivisions and appraisal districts throughout the state. The firm's primary area of focus has been on the representation of Texas municipalities and political subdivisions on all matters.

For more than ten years, Mr. Gorfida has represented cities in all types of matters including zoning, land use, employment law, contract negotiations and police legal advisor. Mr. Gorfida currently serves as General Counsel for the Denton County Transportation Authority and as the City Attorney for the Cities of DeSoto and Hutchins and also provides legal counsel for the Cities of Allen, Richardson, and Sachse. Prior to joining the firm of Nichols, Jackson, Dillard, Hager and Smith Mr. Gorfida served as an assistant city attorney for the City of Plano.

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Municipalities may adopt rules governing plats and subdivisions in order to promote "the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality." TEX. LOC. GOV'T CODE § 212.002.

A subdivision is the division of a tract of land into two or more lots to lay out a subdivision of the tract, to lay out building or lot lines, or to lay out streets, alleys, parks and other areas to be dedicated to the public. TEX. LOC. GOV'T CODE § 212.004. Unless an ordinance dictates otherwise, the division of a part of any one lot into two or more parts, whether by a metes and bounds description or by a deed conveying ownership of a part of one singular lot, constitutes a subdivision for which a plat may be required. *Id.* A city's subdivision regulations should dictate the formalities which must be met before a plat can be approved.

A. Plat Requirements

Generally, a plat establishes lot lines and dimensions, shows the locations of streets and alleys, identifies utility easements, and sets aside and dedicates parks and other public property. Local subdivision regulations often require additional details to be shown on plats, such as topographical lines at specified intervals, building set-back lines, street construction details, inset maps showing the overall location of the subdivision, the names of adjacent property owners, and a variety of other detailed items. Each city's regulations establish the level of required detail. In order to be recorded with county records, the plat must:

(1) describe the subdivision in metes and bounds;
(2) locate the subdivision with respect to a corner of the survey or tract;
(3) identify the dimensions of the subdivision and each street, alley, park, and other portion to be dedicated to the public use or to abutting property owners; and
(4) must contain a jurat or acknowledgement similar to a deed.

TEX. LOC. GOV'T CODE § 212.010.

B. The Platting Process

The plat approval process involves the submission and approval of a preliminary plat, followed by submission and approval of a final plat. In some cities, the final authority to review and approve plats is vested in the city's planning and zoning commission; in others, the commission has the role of reviewing plat applications and making recommendations to approve or deny to the city council, and the council is the final authority responsible for approving plats. The approval of a preliminary plat entitles a developer to submit a final plat application in compliance with the approved elements of the preliminary plat. Once approved, the plat must be filed and recorded with the county clerk of the county in which the tract is located. TEX. LOC. GOV'T CODE § 212.004(d).

1. Administrative Approval

Certain types of plats need not be approved by the city's plan commission or council. A city may by ordinance delegate to a city official the final responsibility to approve amended plats and, if the tract is adequately served by existing streets and city facilities, replats and minor plats involving less than five lots. TEX. LOC. GOV'T CODE § 212.0065. The official, often the city's director of planning, may for any reason choose to present the plat application to the planning commission or city council. *Id.* However, the designated official cannot deny the plat; if the official seeks to disapprove the application, the application must be submitted to the planning commission or city council within thirty days of its filing. *Id.*

2. The Thirty-Day Rule

If a plat application is not denied within thirty days after the date the plat is filed, the plat is automatically approved by operation of law. TEX. LOC. GOV'T CODE § 212.009. Once a plat is approved, it must be endorsed with a certificate of approval. If the plat is approved by inaction, the planning commission or council must, on request, issue a certificate stating the date the plat was filed and that the authority failed to act on the plat within the period. If a plat is denied, the property owner may request that the city issue a certification stating the reasons for its actions taken on the application. *Id.*

3. Standards for Approval

A city must approve a plat if it satisfies all applicable regulations. TEX. LOC. GOV'T CODE § 212.005. A plat shall be approved if:

(1) it conforms to the city's general plan and its current and future streets, alleys, parks, playgrounds and public utility facilities;
(2) it conforms to the general plan for the extension of the municipality and its roads, streets, and public highways, taking into account access to and extension of sewer and water mains and the instrumentalities of public utilities; and
(3) it complies with the city's subdivision and other regulations.

TEX. LOC. GOV'T CODE § 212.010. The meaning of the word *shall* is clear; if the standards imposed by law are satisfied, the city has no choice but to approve the plat. Thus, the review of an application is a ministerial, not discretionary, duty. Since a public official's immunity from personal liability is grounded on the official's exercise of discretion, an official does not enjoy immunity from the failure to perform a ministerial duty. Thus, the members of the governing body may subject themselves to personal liability for wrongfully denying a plat application. *See Bartlett v. Cinemark USA, Inc.*, 908 S.W.2d 229 (Tex. App.—Dallas 1995, no writ).[1]

[1] In analyzing the extent to which members of a city council may enjoy immunity when denying a development plan, the *Bartlett* court acknowledged that absolute legislative immunity is not available when local legislators address a specific situation and specific individuals. Second, the court affirmed that public officials enjoy qualified immunity only when performing discretionary functions, meaning functions that require personal deliberation, decision, and judgment on the part of an official. A discretionary function is to be distinguished from a "ministerial" function, which simply requires obedience to orders or the performance of a duty to which the actor has no choice.

II. ZONING ORDINANCES

A zoning ordinance must bear a substantial relationship to the public health, safety, morals or general welfare and must not be arbitrary or unreasonable. The Texas Supreme Court has established four basic criteria that should be used in reviewing zoning ordinances:

(1) respect for the approved comprehensive plan;
(2) the nature and degree of adverse impact on neighboring properties;
(3) the suitability of the tract as presently zoned; and
(4) the existence of a substantial relationship between the ordinance and the public health, safety, morals or general welfare.

Pharr v. Tippett, 616 S.W.2d 173, 176 (Tex. 1981). "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), *citing Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

Despite the discretion afforded to zoning authorities, the application of a zoning regulation to specific property must at least substantially advance legitimate state interests and must not deprive the owner of all economically viable uses of the land. *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Zoning ordinances carry a strong presumption of validity; the burden of establishing the invalidity of a zoning ordinance falls on the party contesting its validity, and the burden is a high one. *Pharr*, 616 S.W.2d at 173. Since zoning decisions are an exercise of a city council's legislative authority, public officials involved in the zoning process possess legislative immunity for zoning decisions.

A. The Comprehensive Plan

Zoning decisions are guided by a city's comprehensive plan. Comprehensive plans establish long-range development goals for the city and should contain provisions relating to land use, transportation and public facilities. TEX. LOC. GOV'T CODE § 213.002. The plan does not establish or contain zoning regulations nor does it establish zoning district boundaries. A comprehensive plan may be amended following public hearing and planning commission review. TEX. LOC. GOV'T CODE § 213.003.

B. The Comprehensive Zoning Ordinance

A city's complete set of zoning regulations is typically referred to as the city's comprehensive zoning ordinance. The regulations contained in a comprehensive zoning ordinance include an enumeration of uses by right permissible within zoning districts, minimum lot sizes, front, side and rear yard set-back requirements, minimum square footage of primary structures, height restrictions, accessory structure limitations, and floor area ratio limitations. *See* TEX. LOC. GOV'T CODE § 211.003. The comprehensive zoning ordinance typically also:

(1) enumerates the requirements and available uses for special use permits;

(2) provides for the creation and empowerment of a planning commission and a board of adjustment;
(3) sets forth the process for property owners to apply for zoning changes; and
(4) addresses nonconforming uses and structures.

Zoning regulations must be adopted in accordance with the comprehensive plan and must be designed to:

(1) lessen congestion in the streets;
(2) secure safety from fire, panic, and other dangers;
(3) promote health and the general welfare;
(4) provide adequate light and air;
(5) prevent the overcrowding of land;
(6) avoid undue concentration of population; or
(7) facilitate the adequate provision of transportation, water, sewers, schools, parks and other public requirements.

TEX. LOC. GOV'T CODE § 211.004. The comprehensive zoning ordinance typically provides for zoning classifications, including agricultural, residential (generally single-family residential), multi-family (including structures intended for habitation that range from duplex dwellings to apartment complexes), retail, commercial, industrial or manufacturing, and planned developments.

C. Zoning Regulation within Extraterritorial Jurisdiction

The extraterritorial jurisdiction of a city is an area surrounding the territorial boundary of a city on all sides. TEX. LOC. GOV'T CODE § 42.021. Its distance from city limits is determined by the city's population. *Id.* Although a city may extend its subdivision regulations into its extraterritorial jurisdiction, it may not extend its zoning regulations. Section 212.003 of the Local Government Code prohibits a city from regulating the use of buildings or property, the bulk, height and number of buildings on a tract of land, building sizes and floor-area ratios, residential density, and the construction of certain water and wastewater facilities within its extraterritorial jurisdiction. Cities may also extend and enforce building codes in their extraterritorial jurisdiction. *Lucas v. North Tex. Mun. Water Dist*., 724 S.W.2d 811 (Tex. App.—Dallas 1986, no writ). Although Chapter 212 does not expressly authorize such regulation, the *Lucas* court provided that building construction regulation is necessarily and fairly implied from the express grants of authority to control subdivision development. A city is not entitled to enforce subdivision regulations within its extraterritorial jurisdiction by criminal penalties; rather, a city must resort to civil enforcement. *See* TEX. LOC. GOV'T CODE § 54.012, *et seq.*

D. Specific Zoning Issues

The number, shape and size of zoning districts may be set by municipalities based on that which the governing body considers best for carrying out the underlying purposes of zoning. But zoning changes are often problematic. The rezoning of a specific tract of property or of larger areas of land may be initiated by the owner of the property or by the city itself, on its own initiative. A zoning change does not require the consent of the property owner.

1. Specific Use Permits

A comprehensive zoning ordinance will authorize specific (or special) use permits. A specific use permit is not actually a "permit"; it is a zoning change which, when granted, is not a right held by the property owner but is instead a zoning regulation applicable to the tract or lot in question. A specific use permit zoning change typically constitutes an overlay which exists over some predesignated zoning district. In theory, the granting of a specific use permit will allow the property to be put to an additional specified use while enabling the municipality to impose specific additional conditions on that use on a case-by-case basis. For example, an in-home day care center operation authorized in a residential district only by specific use permit would enable the governing body to impose specific conditions on the operation of the business, such as days and hours of operation, limitations on the number of children, and parking requirements. Since specific use permits are in fact zoning changes, the requisite formalities associated with zoning changes must be followed.

2. Planned Developments

A planned development is generally authorized as a specific zoning category. Often, planned developments are designed to allow developments that combine mixed uses within a single district and to allow retail or commercial uses within or among a residential area. Master planned communities, golf course communities, and mixed retail and apartment complex areas are good examples. Planned developments may also be used for developments seeking architectural uniqueness or consistency that vary in certain aspects from base zoning regulations (for example, masonry exterior requirements may prohibit the use of wood siding; a planned development would enable a developer to design a development that has a rustic or western setting using wood siding).

The planned development concept has also been used to bend the rules in a comprehensive zoning ordinance. For example, zoning regulations typically contain minimum square footage requirements for residential dwellings and minimum lot size requirements. A developer seeking to build homes that are less than the minimum square footage established by the base zoning or to plat the subdivision with lots that are smaller than the minimums may request planned development zoning for the subdivision. If the planned development enabling ordinance does not set forth structure and lot size minimums, an application for planned development zoning may be used to obtain approval from the city to build what would otherwise be a nonconforming and illegal development. For obvious reasons, this may constitute an abuse of the zoning process. But in some circumstances it can be justified if there is some substantial relationship between the planned development zoning and a legitimate state interest.

A comprehensive zoning ordinance should contain provisions that establish broad standards for planned development zoning. These regulations should typically require that an application for planned development zoning be accompanied with a concept or development plan detailing certain aspects of the proposed development. Upon approval of the application, a set of development regulations are adopted which essentially constitute a comprehensive set of zoning regulations applicable within the planned development district. Following the granting of the application and the zoning change to planned development, the developer submits plat applications prior to actual construction.

III. PROCEDURES FOR ADOPTION/AMENDMENT OF ZONING ORDINANCES

A. Commission and Council Review

Planning and zoning commissions participate in the development of comprehensive plans, recommend zoning changes to the city council, and review plat applications. TEX. LOC. GOV'T CODE § 211.007.[2] A planning and zoning commission typically possesses the authority to recommend that a rezoning application be approved or denied and to recommend adoption or amendment of zoning regulations. The city council has the ultimate authority to adopt, amend, grant or deny zoning changes. Even though a commission may only have the authority to recommend matters to the city council, the provisions of the Texas Open Meetings Act apply. *Id.*; *see also* TEX. GOV'T CODE ch. 551.

Public hearings must be held when the planning commission and city council consider zoning changes. Notice of the public hearing must be sent to the property owners of the property that is subject to the zoning change and to all owners of real property within 200 feet of the property subject to the zoning change.[3] This notice must be sent at least eleven (11) days before the public hearing. TEX. LOC. GOV'T CODE § 211.007(c). Mailing by regular first class mail satisfies the notice requirement and notice is deemed complete when deposited in the mail.[4]

Following the public hearing by the commission, the commission submits a report to the council detailing its recommendation as to whether a zoning change application or regulation should be approved or denied. The council may not hold a hearing until the commission's recommendation is made. A public hearing must then be held by the council. Notice of the council's public hearing must be published in the city's official newspaper or in a newspaper of general circulation in the area at least sixteen (16) days before the hearing. TEX. LOC. GOV'T CODE § 211.006(a).

Since the Open Meetings Act applies to both the commission and the council, the public hearings must be posted on the agenda at least seventy-two (72) hours before the date of the hearing. *See* TEX. LOC. GOV'T CODE § 211.0075. Typically, an agenda should identify the public hearing as a specific item preceding a consideration and action item on the zoning matter. Since public hearings involve administrative expense and overhead, commissions and councils should avoid tabling a public hearing. If the hearing is not officially closed, then notice of the rescheduled hearing must then either be sent or published, as appropriate. If the process was properly followed and if additional time for consideration is needed, it is advisable to open the public hearing, receive testimony, and formally close the hearing. The action item on the agenda may then be tabled to a later meeting without incurring the burden of mailing or publishing additional notices.

[2] A home rule city must have a zoning commission. A general law city may, but need not, create one.

[3] The identity and address of the owners should be obtained from the city's tax rolls. The 200-foot radius includes streets and public rights-of-way.

[4] The City need not prove that the property owners received the requisite notice, but that the notice was sent properly.

B. Protests

Property owners may protest a zoning change, triggering a more stringent approval process. A supermajority vote is required for approval of a zoning change when a written protest is signed by at least twenty percent of the owners of either:

(1) the property covered by the proposed change; or
(2) the land within 200 feet of the subject property.

TEX. LOC. GOV'T CODE § 211.006(d). If a proper protest is submitted, then the zoning change must be approved by at least a three-fourths majority vote of all members of the council.[5] The statutes provide no deadline by which the protest must be filed. Assuming a protest is filed at or on the day of the public hearing, little time is afforded the city to verify the validity of the petition. Presumably, in the absence of an ordinance specifying such a deadline, the public hearing may still be opened and closed and the council may then table the consideration and action item to a later date to enable verification of the signatures. This would avoid the administrative burden of republishing notice of the hearing as well as avoiding the possibility that approval of the zoning change by less than a supermajority would be later invalidated.

C. The Board of Adjustment

The Zoning Board of Adjustment is a citizen-comprised board having quasi-judicial authority over certain zoning-related matters. TEX. LOC. GOV'T CODE § 211.008. The board oversees the permitting process by hearing appeals from decisions of administrative officials and authorizes variances when strict application of setback, side yard, area, and height limits would cause individual property owners unnecessary hardship. TEX. LOC. GOV'T CODE § 211.009. The board also has the authority to grant special exceptions when authorized to do so by specific ordinances. The board may:

(1) hear and decide an appeal that alleges error in an order, requirement, decision, or determination made by an administrative official in the enforcement of this subchapter or an ordinance adopted under this subchapter;
(2) hear and decide special exceptions to the terms of a zoning ordinance when the ordinance requires the board to do so;
(3) 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; and
(4) hear and decide other matters authorized by an ordinance adopted under this subchapter.

TEX. LOC. GOV'T CODE § 211.009(a).

[5] Note that the requirement is three-fourths of "all members," not three-fourths of those present at the meeting.

1. Administrative Decisions

The board reviews city staff's administrative decisions to ensure that staff properly interpreted the zoning ordinances. TEX. LOC. GOV'T CODE § 211.010(a). The board may hear and decide appeals of such decisions when an error is alleged in an order, requirement, decision, or determination by an administrative official in the enforcement of a zoning ordinance.

Without the board, persons complaining about the granting or denial of permits would have no vehicle for appeal except to the city council or to a court of proper jurisdiction. The council would be tempted to grant relief by ordinance and thereby amend the basic zoning in an ad hoc manner. On appeal, the only question for the board is whether the administrative official correctly applied the ordinance and its regulations.

Appeals to the board may be made by any person aggrieved or by any officer, department, board, or bureau of the city affected by any decision of the administrative officer. Nearby landowners constitute "persons aggrieved." Cities may also file appeals, even though their own official granted a contested permit.

To appeal an administrative official's determination, a party must file a notice with the administrative officer from whose decision the appeal is taken and with the board of adjustment. TEX. LOC. GOV'T CODE § 211.010(b). The notice must state the grounds for the appeal. When notice is filed, the administrative officer must immediately transmit to the board all papers constituting the record on which the action appealed from was taken. The appeal stays all proceedings unless the administrative officer whose decision has been appealed certifies after notice of appeal that a stay would in his opinion cause imminent peril to life or property. If this written statement is filed, then the administrative proceedings can be stayed only by a restraining order granted by the board or by a court. If no appeal is taken, the permit officer's decision to issue or deny a permit becomes incontestable as to a matter within the officer's jurisdiction. The board may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and make it as it ought to be made. The board has all of the powers of the officer from whom the appeal is taken to accomplish that proper end.

2. Special Exceptions

A comprehensive zoning ordinance may authorize a board of adjustment to hear and decide special exceptions to certain ordinances. TEX. LOC. GOV'T CODE § 211.009(a)(2).[6] A special exception refers to uses that a zoning ordinance permits, but that are specially reviewed and approved by the board for situational suitability. Unlike variances, special exceptions do not require a showing of hardship**.** A special exception differs from a variance in that the former is a use expressly authorized under the zoning ordinance under the conditions specified in the ordinance and the latter is a suspension of the literal enforcement of the ordinance. *West Tex. Water Refiners, Inc. v. S&B Beverage Co., Inc*., 915 S.W.2d 623 (Tex. App.—El Paso 1996, no writ).

[6] Section 211.009(a)(2) of the Code is simply an enabling provision which allows cities to create special exceptions; in the absence of an ordinance that establishes and delineates the parameters for special exceptions, a board has no inherent authority to consider it.

3. Variances

A variance is permission to depart from the literal requirements of a zoning ordinance by virtue of an unnecessary hardship due to special circumstances inherent to the property. *See* TEX. LOC. GOV'T CODE § 211.009(a)(3). An administrative official of a city cannot approve a variance; only the board of adjustment holds that authority. Variances relate to technical zoning matters such as area, setback, and height regulations.

Variances are permissible only if strict application of the zoning ordinance would cause unnecessary hardship. When considering applications for variances, the board should require some evidence of hardship unique to property-related conditions. A variance is not authorized merely to accommodate the highest and best use of property.

Financial hardship is insufficient as a matter of law to justify granting a variance. An unnecessary hardship must be one that is not personal to the property owner or self-created; it relates to a condition associated with the topography or shape of the lot. It is insufficient as a matter of law for a developer, for example, to seek a variance from a zoning ordinance's minimum lot size requirement on the basis that it would not be economically feasible to develop the property in compliance with the zoning ordinance. *See Currey v. Kimple*, 577 S.W.2d 508 (Tex. Civ. App.—Dallas 1978, writ ref'd, n.r.e.).[7]

4. Board Membership and Voting Procedures

A board of adjustment consists of five members, each appointed for a term of two years. TEX. LOC. GOV'T CODE § 211.008. Alternate members may also be appointed to serve when one or more regular members are absent. Members may be removed for cause, on written charges, after hearing; vacancies will be filled for the unexpired term of the vacant member. All cases must be heard by a minimum of four members (seventy-five percent of the members). The concurring vote of at least four members is required to reverse administrative decisions, grant special exceptions, authorize variances, and take any other action authorized by the ordinance.

Chapter 211 of the Local Government Code requires that the board adopt rules in accordance with the zoning ordinance. Meetings are held at the call of the chairman or as the board determines. The chairman or acting chairman can administer oaths and compel attendance of witnesses. All meetings must be open to the public. The board must keep minutes of its proceedings, showing the vote of each member of its examinations and other official actions and maintain them as a public record in the board's office. When deciding appeals the board must fix a reasonable time for hearing, give notice to the public and the parties, and decide the appealed matter within a reasonable time. Parties may appear in person or by agent or attorney.

[7] The unnecessary hardship in this case arose from the property owner's desire to build a tennis court on a pie-shaped residential lot. The construction and placement of the tennis court could not be accomplished in compliance with the City of Dallas' building setback requirements applicable within that residential district. The fact that the owner wanted to build a tennis court on an irregularly shaped lot did not constitute a self-created or personal hardship warranting a denial of the requested variance from the setback requirements; the configuration of the lot created the hardship and the evidence did not reveal that the owners wanted the variance for personal reasons not connected with the configuration of the lot.

5. Appeal of Board's Decision

An appeal of an adverse determination by the board is by petition for writ of certiorari which must be filed in an appropriate district court within ten (10) days of the board's decision. TEX. LOC. GOV'T CODE § 211.011. Since the decisions of a board are final, the plaintiff's burden of proof in district court is whether the board's decision was illegal. *Id.* The court may reverse or affirm, in whole or in part, or modify the decision of the board. *Id.*