

ZONING BOARDS OF ADJUSTMENT: PITFALLS TO AVOID

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I. Introduction.

A zoning board of adjustment (“ZBA”) is a board created by a municipality pursuant to Chapter 211 of the Texas Local Government Code (“TLGC”). The purpose of a ZBA is “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.” Tex. Loc. Gov’t Code Ann. § 211.008. In other words, the ZBA exists to decide if in a particular case an exception to the rules should be made or if the rules should be enforced as written. A ZBA is a quasi-judicial body whose decisions are subject to appeal before a state district, county court or county court at law. *Id.* § 211.011. Any person who is aggrieved by a decision of a ZBA is permitted to challenge the decision by filing a writ of certiorari with the applicable court within ten days of the date the written decision of the board is filed in the board’s office. *Id.* § 211.011(a) & (b). Filing suit against the ZBA under Chapter 211 of the TLGC is the only permissible way to challenge a decision of the ZBA. Thus, it is important to understand that the decisions of a ZBA can and often do lead to instantaneous litigation. For this reason, cities should take steps to avoid the potential pitfalls and traps that are commensurate with ZBAs. The focus of this paper is to help cities do precisely that.

II. ZBA Authority.

Under state law, a ZBA has the authority to: (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. *Id.* § 211.009(a). Thus, a city has the authority to adopt an ordinance that expands or limits the authority of a ZBA to grant exceptions to the city’s ordinance requirements. At least four out of the five members of the ZBA must vote in favor of an applicant’s request for a reversal of a decision of an administrative official or for a variance. *Id.* § 211.009(c). If an applicant fails to receive at least four concurring votes of the ZBA members, the applicant’s request is deemed denied.

III. Difficult Cases and Issues.

City of Dallas v. Vanesko, 189 S.W.3d 769 (Tex. 2009). The Vaneskos decided they wanted a larger home. *Vanesko*, 189 S.W. at 770. Instead of hiring an architect and general contractor, the Vaneskos decided that they would design and build the home themselves. *Id.* They submitted their plans to the City of Dallas and paid an extra “review fee” to ensure that their plans complied with all applicable city ordinances. *Id.* The city approved the plans and

issued a building permit. *Id.* After a year of frequent visits to the construction site by the city inspector without complaint, and after the roof of the home was framed in, the inspector informed the Vaneskos that the structure exceeded the city's height restrictions for that district. *Id.* at 770-71. Instead of ordering the work to be stopped, the inspector advised the Vaneskos to complete the construction of the home and to seek a variance. *Id.* at 771. At the hearing before the board, the city staff as well as eighty percent of the surrounding property owners supported the variance request. *Id.* No one opposed the request. *Id.* Nonetheless, the board denied the Vaneskos' request for a variance. *Id.*

On appeal, the trial court reversed the board's decision. *Id.* A divided panel of the court of appeals affirmed. *Id.* The Texas Supreme Court granted the city's petition for review and reversed. *Id.* at 774. The court noted that the board's ability to grant a request for a variance was governed by state law and by the city's ordinance requirements. *Id.* at 772. The city's ordinance permitted the board to grant a variance from the city's height regulations if the variance would

not be contrary to the public interest when, owing to special conditions, a literal enforcement of this chapter would result in unnecessary hardship, and so that the spirit of the ordinance will be observed and substantial justice done. The variance must be necessary to permit development of a specific parcel of land which differs from other parcels of land by being of such a restrictive area, shape, or slope that it cannot be developed in a manner commensurate with the development upon other parcels of land in districts with the same zoning classification. A variance may not be granted to relieve a self created or personal hardship, nor for financial reasons only, nor may a variance be granted to permit any person a privilege in developing a parcel of land not permitted by this chapter to other parcels of land in districts with the same zoning classification.

Id. at 772. The court then observed that a height restriction violation is not in any way related to the "area, shape or slope" of the land. *Id.* at 773. The court held that the Vaneskos' hardship was personal in nature and "self-created" because it arose from their decision to design their home, as opposed to nature and configuration of the land. *Id.* Finally, the court dismissed the argument that the board clearly abused its discretion when, in reaching its decision to deny the Vaneskos' variance request, it failed to consider the fact that the city issued a building permit in error. *Id.* at 774. "The mere issuance of a building permit does not render a city's zoning ordinance unenforceable, nor does the fact that a permit was issued in error entitle the property owner to a variance in every case." *Id.*

Sea Mist Council of Owners v. Bd. of Adjustment for the Town of S. Padre Island, No. 13-10-011-CV, 2010 WL 2891580 (Tex. App.—Corpus Christi, July 22, 2010, no pet.) (mem. op., not designated for publication). Sea Mist Council of Owners ("Sea Mist") filed suit against the Town's board of adjustment alleging that the board should have revoked an building permit and an occupancy permit that was issued to the Palms Investment Group

(“Palms”) by the town’s building inspector. *Id.* at *1. Sea Mist argued that the town’s building inspector failed to determine the number and dimensions of parking spaces that would be required for the proposed construction of Palms’ resort condominiums. *Id.* Palms filed a motion for summary judgment, alleging that Sea Mist failed to timely appeal the decision of the building inspector to the Town’s board of adjustment. *Id.* At the time of the appeal, however, the board had not adopted any rules prescribing the time in which to file an appeal from the building inspector’s decision. *Id.* at *2. The building permit was issued to Palms in May 2006 and the occupancy permit was issued in September 2006. Sea Mist did not file its appeal to the board until January 2007. *Id.* at *3. The trial court held that such appeal was not timely as a matter of law and granted Palms’ motion for summary judgment. *Id.* at *2. The court of appeals affirmed, reasoning that the issue of timeliness was to be resolved pursuant to common law principles (since the board had not adopted any rules governing the matter at the time). *Id.* at *3. The court noted that under TLGC § 211.010(b), an appeal from the decision of the zoning official must be brought within a “reasonable time.” *Id.* at *2. The court held, in agreement with *Zoning Bd. of Adjustment of the City of Lubbock v. Graham & Assocs., Inc.*, 664 S.W.2d 430, 434 (Tex. App.—Amarillo 1983, no writ), that a delay of more than six months is per se unreasonable. *Id.* at *3.

***Boswell v. Bd. Of Adjustment and Appeals of the Town of S. Padre Island*, No. 13-09-601-CV, 2009 WL 2058914 (Tex. App.—Corpus Christi July 16, 2009, no pet.) (mem. op. not designated for publication).** Appellants appealed an order of the trial court dismissing their suit against the Town’s board of adjustment because appellants failed to file the appeal within ten days from the date the board’s written decision was filed in its office, as required by section 211.011(b) of the TLGC. *Id.* at *1. Appellants argued that the board should be equitably estopped from relying on such provision of the TLGC because the town employees intentionally mislead them as to the date when the board’s written decision was filed in its office. *Id.* Appellants argued that they never received notice of the date that the board’s written decision was filed in its office. *Id.* Additionally, appellants argued that the attorney contacted the board’s office on several occasions and was informed by the town’s director of planning and the assistant director of planning that as of July 7, 2008, no written decision of the board had been filed in the board’s office. *Id.* The board attached to its motion for summary judgment an affidavit signed by its chairman who stated that the written decision of the board was filed in the board’s office on June 25, 2008. *Id.* The court of appeals affirmed, holding that the timely filing of a writ of certiorari was a jurisdictional requirement and that a court cannot acquire subject-matter jurisdiction through estoppel. *Id.* at *2-3.

***Harris v. Bd. of Adjustment of the City of Fort Worth*, No. 2-04-061-CV, 2005 WL 32316 (Tex. App.—Fort Worth Jan. 6, 2005, no pet.) (mem. op., not designated for publication).** In March 2000, Ivan Harris (“Harris”) filed an application for a variance from a zoning ordinance that requires a ten-foot side yard so that he could add an enclosed garage to his home. *Id.* at *1. The garage, as originally presented, would have encroached six feet into the setback,

leaving only a four foot side yard on a lot that is exposed to the public on a side street. *Id.* After a hearing, the city's board of adjustment denied Harris's request. *Id.* In spite of this denial, Harris constructed the garage anyway. *Id.* In early 2001, Harris filed another request for a variance so that he could continue to use his garage which, as constructed, encroached four feet, nine inches into the side yard setback. *Id.* After a second hearing, the board denied his request. *Id.* Harris appealed this denial to the county court at law. *Id.* The trial court granted summary judgment in favor of the board. *Id.* The appellate court noted that the board members' concerns regarding the safety issues that were created by the lack of space between the garage and the side street, as well as the fact that Harris was fully aware of the setback requirement at the time he constructed the garage, constituted probative and substantive evidence to support the board's decision to deny Harris's second request for a variance. *Id.* at *2-3. The court dismissed Harris's arguments that the trial court failed to consider his constitutional arguments (due process and equal protection) as being without merit. *Id.* at *3-4.

Bd. of Adjustment of the City of Piney Point Village v. Solar, 171 S.W.3d 251 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Michael Solar ("Solar") sought a variance from the city's board of adjustment so that he could install a swimming pool in his side yard in contravention to the city's ordinance which required that all swimming pools be at least ten feet from the nearest lot line. *Id.* at 253. Solar argued to the board that it was not feasible to install the pool in his back yard because of the steep slope of the yard and the existing structures and trees. *Id.* No one objected to the variance request at the hearing and there was no evidence presented as to the harm to any interest that would be caused by the granting of the variance. *Id.* Solar presented evidence by the testimony of his pool contractor that it would cost three to four times more to build the pool in the back yard as opposed to the side yard, and he was not even sure if it was feasible to build the pool in the back yard. *Id.* No oral or documentary evidence was presented to contradict any of Solar's evidence. *Id.* at 254. Nonetheless, the board denied Solar's request. *Id.* Solar filed suit in district court appealing the board's decision. *Id.* The trial court denied the board's motion for summary judgment and granted Solar's motion for summary judgment, and the board appealed. *Id.* The board argued on appeal that Solar's hardship was not "unnecessary" because it was merely financial. *Id.* at 255. The court disagreed, reasoning that the undisputed evidence showed that the hardship was created by the unusual characteristics of Solar's property. *Id.* The court noted that the board's denial of the variance request denied Solar and his family of the "right to recreate" which constituted an unnecessary hardship. *Id.*

IV. Practical Tips for Avoiding Pitfalls

Tip No. 1: Have the board secretary file a written decision of the board in the board's office as soon as possible after the decision has been rendered. You would be surprised at how many boards of adjustments do not file a written decision in the boards' office. Many boards instead rely on the approval of the minutes of the meeting as the board's written decision. This is a huge mistake! Section 211.011 of the TLGC provides that the filing of the board's written

decision in its office begins the running of a ten-day statute of limitations. As the *Boswell* case demonstrates, the filing of a lawsuit challenging a decision of the board within the ten-day period is a jurisdictional prerequisite to suit. The trial court is without jurisdiction to hear the case if the suit is not timely filed! Therefore, there is no excuse for not immediately filing something in writing in the board's office to document the decision of the board. For purposes of example only, I have provided two forms that may be used to document the decision of the board—the first form is an example of a written decision granting a request (attached hereto as Exhibit "A") and the second form is for a written decision denying a request (attached hereto as Exhibit "B"). As a matter of good practice, a copy of these forms should be sent to the applicant on the same day or as soon as possible after the date the decision is filed in the board's office.

Tip No. 2: Make sure the meetings of the board comply with the Texas Open Meetings Act. The meetings of a board of adjustment must comply with TOMA. Tex. Loc. Gov't Code Ann § 211.0075. TOMA requires that an agenda of each meeting be posted at least seventy-two hours in advance of the meeting stating the date, hour and place of the meeting and the general subjects which will be discussed at the meeting. Tex. Gov't Code Ann. § 551.041. Every citizen of the city, including, in most cases, the applicant, has standing to challenge a decision of the board of adjustment under TOMA. *Id.* at § 551.142. If the challenge is successful, the board's decision may be rendered void and vacated. *Id.* at § 551.141. There may be almost nothing worse from the board's perspective than finding out that although the board's hearing was conducted in accordance with Chapter 211 of the TLGC and the city's ordinances, due to a TOMA violation, the case must be set for a rehearing!

Tip No. 3: Have the board adopt rules of procedure. Section 211.008(e) of the TLGC permits ZBAs to adopt rules of procedure. Such rules should govern the structure, roles and duties of the members of the board and their relationship to the city staff, as well as the application and hearing processes. The board's rules of procedure can also address issues like: "In what timeframe must an appeal of an administrative official be filed with the board?" "What must be included with an applicant's application form?" "What procedures must be followed at a hearing before the board?" "When can an applicant withdraw his or her application?" "How long after a variance request is denied may the applicant reapply for a variance?" Having rules in place to govern these questions will help prevent claims that the applicant's due process rights have been violated or that the applicant was treated differently than other applicants. Of course, to be effective, the rules must be interpreted and applied consistently and equally in all cases. An example of what a board's rules of procedures might look like is attached hereto as Exhibit "C."

Tip No. 4: Make sure your board members are properly trained! In addition to the open government training required by the Texas Government Code, all board members should be properly trained on what their duties and responsibilities are under state law, the city's zoning ordinance and any rules of procedure adopted by the board. I cannot tell you how many times I have heard a board member say, "I just don't see the hardship." This tells me that the board

member lack understanding as to the nature of a variance request. If there were no hardship, the applicant would not have made a request for a variance. The “hardship” is the fact that the applicant cannot take some course of action because of some requirement contained in the zoning ordinance. The question that the board must decide is whether the applicant’s hardship is “unnecessary.” A hardship is deemed to be “unnecessary” if all of the factors listed in the city’s zoning ordinance for granting a variance weigh in the applicant’s favor. All board members must understand the criteria that they must base their decisions on, which are usually set forth in the zoning ordinance, and they must understand the limits of their authority. In addition, board members must be taught to look beyond the case before them and consider how their decision in one case may impact their decisions in future cases. Finally, board members must be educated as to the legal consequences of their actions. The goal of the board is not to avoid lawsuits, but to ensure that the board’s decisions, and the processes leading up to those decisions, are in accordance with the applicable statutes, ordinances, rules and regulations. The best way to ensure this result is through proper training.

EXHIBIT “A”

[Cut and paste onto ZBA or City letterhead]

DECISION OF THE BOARD OF ADJUSTMENT

RE: [Insert ZBA reference #]

[Insert Name of Applicant]
[Insert Address of Applicant]

SUBJECT:

The above-reference request was granted by the [Insert name of city] Zoning Board of Adjustment (“Board”) on [Insert date of decision] by a vote of _____ in favor and _____ against with _____ abstaining. On this date, the Board found that the request met the conditions set forth in section [Insert section number] of the City of [Insert name of city] Zoning Ordinance.

Any interested person wishing to appeal this decision is required to file a petition for Writ of Certiorari in a district court, county court or county court at law within ten (10) days of the date this decision is filed in the Board’s office in accordance with section 211.011 of the Texas Local Government Code. This decision was filed in the Board’s office on [Insert Date].

[Print Name]

Chairman, Board of Adjustment

Date

[Print Name]

Secretary of the Board of Adjustment

EXHIBIT “B”

[Cut and paste onto ZBA or City letterhead]

DECISION OF THE BOARD OF ADJUSTMENT

RE: [Insert ZBA reference #]
[Insert Name of Applicant]
[Insert Address of Applicant]

SUBJECT:

The above-reference request was denied by the [Insert name of city] Zoning Board of Adjustment (“Board”) on [Insert Date] by a vote of ____ in favor and ____ against with ____ abstaining. Section [Insert section number] of the City of [Insert name of city] Zoning Ordinance (“Zoning Ordinance”) requires the concurring vote of 4 members of the Board to grant a request for a variance. On this date, the Board found that the request did not meet the conditions set forth in section [Insert section number] of the Zoning Ordinance.

Any interested person wishing to appeal this decision is required to file a petition for Writ of Certiorari in a district court, county court or county court at law within ten (10) days of the date this decision is filed in the Board’s office in accordance with section 211.011 of the Texas Local Government Code. This decision was filed in the Board’s office on [Insert Date].

[Print Name]
Chairman, Board of Adjustment

Date

[Print Name]
Executive Secretary, Board of Adjustment

EXHIBIT “C”

**THE BOARD OF ADJUSTMENT
OF THE CITY OF _____
RULES OF PROCEDURE**

Adopted _____, 20____

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BOARD OF ADJUSTMENT

RULES OF PROCEDURE

SECTION 1. ORGANIZATION, OFFICERS, AND STAFF

1.1 Organization

The Board of Adjustment (“Board”) shall consist of members appointed by the City Council and shall be organized under the laws of the State of Texas and the Zoning Ordinance No. _____, as amended (“Zoning Ordinance”), of the City of _____ (“City”).

1.2 Officers

A Chair and Vice-Chairman shall be appointed in accordance with the Zoning Ordinance _____, as amended. The City Manager shall designate a representative to serve the Board as Secretary.

1.3 Duties

- a. The Chairman, or in his absence the Vice-Chairman, shall preside at all meetings, shall decide all points of order or procedure, and shall swear in witnesses and, when necessary, compel their attendance.
- b. In the absence of both the Chairman and the Vice-Chairman, the Acting Chairman shall preside. The Acting Chairman shall be a regular member (or if no regular member is present then an alternate member) whose last name is closest to the beginning of the alphabet.
- c. The Secretary shall be custodian of the minutes and other official records, shall attend to the correspondence of the Board, and shall cause notices to be given as are required and in the manner prescribed by law.

1.4 Rules of Order

Robert’s Rules of Order Newly Revised shall be the Board’s final authority on all questions of procedures and parliamentary law not covered by these Rules of Procedure. A failure to strictly adhere to the procedures set forth in Robert’s Rules of Order shall not constitute grounds for the invalidation of any motion or order made by the Board.

1.5 Administrative Official

The Administrative Official, or designee, shall perform the duties authorized under the Zoning Ordinance of the City of _____ and shall provide assistance to the Board as directed by the City Manager. The Official shall make interpretations of the provisions of the Comprehensive Zoning Ordinance No. _____, as amended, and shall present to the City Council any revisions to the Zoning Ordinance recommended by the Board. The Administrative Official

shall set the agenda for the Board's meetings and shall maintain all permanent records of the Board (including the official minutes).

1.6 Recording Secretary

The Recording Secretary shall keep an accurate record of all the meetings of the Board, shall file the final actions of the Board with the Office of the Board within twenty-four hours of the Board's meeting, shall prepare and submit minutes of all meetings of the Board in a timely manner, and shall support the Board in the manner directed by the City Manager.

1.7 City Attorney

The City Attorney may provide to the Board an oral or written opinion regarding any question of law, interpretation or application of these rules of procedure, or parliamentarian rules, and shall review as to law any amendment to these rules of procedure prior to the amendment becoming effective.

SECTION 2. MEETINGS

2.1 Quorum

A quorum shall consist of four (4) Members present. No proxies shall be allowed to establish a quorum or to transact business of the Board. In the absence of a quorum, the following persons (in the noted order) shall call the meeting to order. The Chairman, the Vice-Chairman, the Acting Chairman, or (if no Member is present) a Staff member may call the meeting to order, announce the absence of a quorum, and announce the adjournment of the meeting until a specific date, time, and place when the scheduled agenda items / public hearings would be resumed.

Should the absence of a quorum be known in advance of a scheduled meeting, the Chairman authorizes the Administrative Official, or other Staff member, to preside at the meeting by rescheduling the hearing to a date certain.

2.2 Agenda

An agenda shall be prepared by the Secretary for each meeting of the Board. The agenda shall include appeals and other matters scheduled for consideration by the Board. There shall be attached to the agenda a list of matters pending action by the Board. The agenda shall be posted on the official bulletin boards at City Hall, [Insert address of city hall], pursuant to the Texas Government Code, Chapter 551.

2.3 Board Meetings

- a. Regular Meetings - Regular meetings shall be held on the _____ of each month at 6:30 p.m. in the City Council Chambers at City Hall unless otherwise posted. Should no matters be scheduled for consideration by the Board, no meeting shall be held except as directed by the Chairman of the Board.
- b. Special Meetings - Special meetings may be called at any time by the Chairman or the Administrative Official and shall be subject to the Open Meetings Act. The Administrative Official shall cause notice of the special meeting to be sent to each Board Member and shall provide any information necessary for consideration of the Board. Any case requiring a public hearing and being considered in a special meeting shall meet the notice requirements set forth in the state statutes and in the Zoning Ordinance of the City of _____.
- c. Work Sessions - The Board may schedule work sessions to address administrative matters or proposed ordinance revisions. These sessions are for discussion purposes only. No decisions on case-related matters shall be made.
- d. Executive Sessions (Closed Meetings). The Board may convene into executive session pursuant to Section 551.071 to seek the advice of the City Attorney about pending or contemplated litigation or to seek or receive the attorney's advice with regard to legal issues relative to a case pending the Board's consideration.

2.4 Public Meetings

All meetings shall be held in full compliance with the provisions of state law, the Zoning Ordinance of the City and these Rules of Procedure.

SECTION 3. OFFICIAL RECORDS

3.1 Definition

The official records shall include these Rules of Procedure, and the minutes of the Board together with all findings, decisions, and other official actions. Stenographic notes of the Secretary and tape recordings of proceedings and discussions shall not constitute the official record of the Board.

3.2 Recording of Vote

The minutes of the Board's proceedings shall show the vote of each member on each decision of the Board, or if absent or failing to vote shall indicate that fact.

3.3 Public Records

All requests and other matters coming before the Board shall be filed in the City's records and be available for public inspection during normal business hours. Original papers of all appeals shall be retained along with other special matters as the Secretary deems essential for permanent record.

3.4 Board Office

The Office of the Planning and Zoning Department shall be designated as the Board's office.

3.5 Written Decision

All decisions of the Board shall be in writing, shall indicate the decision of the Board and shall be filed in the Board's Office no later than the following business day after such decision has been made. However, the failure to timely file the decision in the Board's Office shall not have any effect on the validity of the decision.

SECTION 4. APPLICATION PROCEDURES

4.1 Types of Requests

The Board shall only consider requests authorized under section 211.009 of the Texas Local Government Code, as amended, and under the Zoning Ordinance.

4.2 Application Required

Every request for action of the Board shall be filed in the Board's Office on the application forms provided by the City, shall be accompanied by the prescribed fee, and shall be complete in all respects before being accepted for filing. The application shall bear the signature of the owner of the property which is the subject of the request or shall be accompanied by a letter of authorization from such owner. An incomplete application or a communication purporting to be an application and not made in the form prescribed shall be regarded only as a notice of intent to appeal, and shall not be considered or acted upon by the Board.

4.3 Deadline for Filing Application

Every application for an appeal of a decision of the Administrative Official must be filed in accordance with these rules no later than thirty days from the date the decision was made.

4.4 Guidelines for Application and Decision

Every application shall include a letter and site plan or other graphics explaining the applicant's request, along with the required non-refundable application fee. Where two or more different types of requests are included in the same application, each set of regulations established by the Zoning Ordinance shall apply to the consideration of the requests.

4.5 Notice

The Board of Adjustment shall hold a public hearing on all requests made to it and written notice of such public hearing shall be sent in accordance with the provisions of state law and the Zoning Ordinance.

4.6 Consideration of Evidence

Decisions of the Board may be based on any credible evidence, including a member's own familiarity with a site. However, members of the Board should refrain from conducting independent investigations into any application and should consider only the evidence and testimony introduced at the meeting through the public hearing process and the background information presented by City staff through the information packet. Where deemed necessary, the Board may request City staff to obtain any additional relevant information for the Board's consideration.

4.7 Withdrawal of Request

Any request may be withdrawn by an applicant upon written notice to the Secretary, but no request shall be withdrawn after public notice has been given without formal consent of the Board.

SECTION 5. HEARINGS AND DECISIONS

5.1 Public Hearings

Hearings on all matters on which a decision of the Board is required by law shall be open to the public. Any party in interest may appear on his own behalf or be represented by legal counsel or agent.

5.2 Order of Business

The Chairman shall call the meeting to order, and the Secretary shall record the members present and absent. The Chairman shall publicly advise those present of the procedures followed in the hearing and disposition of cases. Unless the Board suspends the rules pertaining to the order of business, the Chairman shall call each case in the order listed on the agenda.

5.3 Procedures for Hearing

- a. After opening the public hearing, the Chairman shall first call upon the applicant, if present, to present the applicant's case and all evidence supporting the applicant's request. A true and correct copy of all written evidence, documents, photographs, and audio or videographic evidence presented at the hearing shall be included in the record of the case.

- b. The Chairman shall then call upon those members of the public who wish to express their support for the granting of the applicant's request. The Chairman shall next call on those members of the public who wish to express their opposition to the granting of the applicant's request. Each person who wishes to speak shall state their name and address for the record. Each person

who is called on to speak shall first swear that the testimony the person shall give shall be the whole truth and nothing but the truth. The Chairman may establish reasonable time-limits for the members of the public as deemed necessary by the Chairman.

- c. The applicant shall then be given the opportunity to rebut the arguments presented by those in opposition.
- d. Each person speaking shall proceed without interruption by any other person, and all arguments and pleadings shall be addressed to the Board. It shall be the responsibility of the Chairman, or Vice Chairman in the Chairman's absence, or the Acting Chairman in the Vice Chairman's absence, to maintain order and proper decorum during the hearing. No questioning or arguments between individual witnesses will be permitted. During the hearing, no member shall argue an issue with the applicant, nor indicate the member's final vote on the applicant's request until such time as the vote is called. Nothing herein shall be construed to prohibit a member from expressing his or her opinion as to the merits of the applicant's request or as to the existence of any hardship.
- e. Following the applicant's rebuttal, the Chairman shall order the public hearing closed. After the hearing is closed, the members may deliberate regarding the merits of the applicant's request and may vote on a motion made and seconded with respect to the disposition of the request.
- f. The Board may act on any request for which the applicant fails to appear after conducting the pre-scheduled public hearing.

5.4 Board Review

The Chairman may direct any question to the applicant or any persons speaking in order to bring out all relevant facts, circumstances and conditions affecting the request, and may call for questions from other members of the Board and from the City staff. At any time prior to the time a vote is called for, the Board may call back any applicant or speaker or staff member for clarification of fact presented by him in the hearing or to answer one or more questions of the members of the Board.

5.5 Suspension of Rules

Any provision of these rules not governed by other law may be temporarily suspended by the affirmative votes of four members or by unanimous consent.

5.6 Disposition of Cases

The Board may unconditionally grant, conditionally grant, or deny an applicant's request. The Board may also defer action on any request in response to the applicant's request for deferral of the action or whenever it concludes that additional evidence is needed or that alternate solutions need further study. An

applicant's request may be dismissed when the Board finds that the request has been improperly filed or, upon notification by the City, that permits have been issued for a conforming use or development of the property.

5.7 **Participation in Deliberations and Voting**

All members present may participate in the deliberations of each case and may directly question the applicant/agent or Staff members.

Only the five regular members shall vote on the case unless absence or conflict of interest prevents their participation. Should any regular member be unable to vote, the alternate members shall be selected by the Chairman, in numerical order beginning with Alternate Member #1 and ending with Alternate Member #4, to vote in the regular members' absence.

Should any member be unable to vote on any matter before the Board, he or she shall clearly acknowledge this for the record prior to the vote, and the Presiding Officer shall clearly designate, for the record and for the audience, which of the alternate members will be voting.

5.8 **Vote Required**

The concurring vote of four members shall be necessary to grant, or to grant conditionally, any request made to the Board. When a motion to approve a request fails to receive four affirmative votes, the request is denied. A motion to deny a request shall pass on the vote of a simple majority of the members. Should a motion to deny fail to receive a majority vote, another motion must be made (e.g., "motion to approve", "motion to postpone", etc.) to dispose of the case. A simple majority vote of the members shall be required to approve any motion other than a motion to approve a request. All motions must receive a second to be considered by the Board.

SECTION 6. REAPPLICATION

6.1 **Reapplication for Denied Request**

No application for a request which has been denied shall be again filed earlier than one year from the date of original denial unless other property in the immediate vicinity has, within the one-year period, been changed or acted on by the Board or City Council so as to alter the facts and conditions on which the previous Board action was based. Such change of circumstances shall permit the rehearing of a request by the Board prior to the expiration of one-year period, but such conditions shall in no way have any force in law to compel the Board, after a hearing, to grant an applicant's subsequent request. Such subsequent request shall be considered entirely on its merits and the peculiar and specific conditions related to the property on which the request is brought.

SECTION 7. EXPIRATION OF GRANTED REQUEST

7.1 Expiration of Granted Request

Any special exception or variance granted or authorized by the Board shall authorize the issuance of a building permit and/or a Certificate of Occupancy, as the case may be, for a period of one year from the date of the favorable action of the Board unless said Board shall have in its action approved a different period of time and has so shown such specific period of time in the minutes of its action. If the building permit and/or Certificate of Occupancy shall not have been applied for within said one-year period or such extended period as the Board may have specifically granted, then the special exception or variance shall be deemed to have been waived and all rights thereunder terminated. All applications for a request which have been denied shall be deemed to be denied with prejudice unless stated otherwise in the Board's written decision.

SECTION 8. CERTIFICATION AND AMENDMENTS

8.1 Certified Copy

A certified copy of these Rules of Procedure and of any amendments thereto will be placed on record in the office of the City Secretary within ten days following their date of adoption.

8.2 Repealing Clause

All previously adopted Rules of Procedure of the Board shall be and the same are hereby expressly repealed.

8.3 Amendment Procedure

Amendments to these Rules of Procedure may be made by the Board at any meeting upon the affirmative vote of four members, provided any such amendment is proposed at a preceding meeting and recorded on the minutes of such meeting. By unanimous consent of five members present, amendments may be adopted at the meeting at which they are introduced but such amendments shall not become effective until the next regular meeting.

8.4 Informal Advice

The Board or its individual members shall not consider a request (formal or informal) for advice on theoretical or actual situations that potentially may come before the Board in the future as an appeal or application.

ADOPTED this _____ day of _____, 20____

Chairman, Board of Adjustment

ATTESTED:

Board Secretary

Filed in the Office of the City Secretary this _____ day of _____, 20____.
_____, City Secretary, City of _____, Texas