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**Zoning Boards of Adjustment:
 Pitfalls to Avoid**

A Presentation to the
 TCAA 2011 Summer Conference
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Zoning Boards of Adjustment

- Topics Overview
 - What is a Zoning Board of Adjustment?
 - Difficult Cases and Issues
 - Practical Tips for Avoiding Unsuccessful Litigation

Zoning Boards of Adjustment

- Authorized by Section 211.008 of the TLGC:
 - BOARD OF ADJUSTMENT. (a) The governing body of a municipality may provide for the appointment of a board of adjustment. 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.

Zoning Boards of Adjustment

- ZBAs have the power to:
 - Hear and decide appeals that allege an error in an order, requirement, decision, or determination made by the Administrative Officer or other zoning administrator in the enforcement of the Zoning Ordinance
 - Hear and decide special exceptions as specified by the Zoning Ordinance
 - Hear and decide variances to the terms of the Zoning Ordinance
 - Hear and decide other matters authorized by the Zoning Ordinance
- Local Government Code § 211.009

Zoning Boards of Adjustment

- The only way to challenge a ruling of the ZBA is to file suit in district court, county court or county court at law. (TLGC § 211.011(a))
- Suit must be filed within 10 days of the date the written decision of the board is filed in the board's office. (TLGC § 211.011(b))
- Suit may be filed by any person who is aggrieved by a decision of the board. (TLGC § 211.011(a))

Zoning Boards of Adjustment

- Why would anyone want to file suit to challenge a decision of the board?

Zoning Boards of Adjustment

- Because we live in a litigious society?



Zoning Boards of Adjustment

- Because they don't like to be told "NO!"
- Because they think the decision is "UNFAIR!"
- Because being told "No" will cost them "MONEY!"



Zoning Boards of Adjustment

- Difficult Cases:
 - *City of Dallas v. Vanesko*, 189 S.W.3d 769 (Tex. 2006)
 - The Vaneskos were the architect and general contractor of their own home.
 - The Vaneskos submitted plans to the City of Dallas for a building permit and paid an extra review fee to ensure that their plans complied with all city codes.
 - The city approved the plans and issued the permit.
 - The city inspectors made frequent visits to the site over the next year without complaint.
 - After the roof was framed in, a city inspector informed the Vaneskos that the structure exceeded the city's height limit but advised them to complete the construction and request a variance.

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- Difficult Cases:
 - *City of Dallas v. Vanesko*
 - City staff supported the variance
 - 80% of surrounding property supported the variance
 - No one opposed the variance
 - Board denied variance request
 - District court reversed and remanded
 - Appellate court affirmed

Zoning Boards of Adjustment

- Difficult Cases:
 - *City of Dallas v. Vanesko*
 - Texas Supreme Court reversed
 - City ordinance prohibited Board from granting a variance:
 - » unless the variance was “necessary” to permit development that could not otherwise be developed in accordance with the City’s ordinance due to the area, shape or slope of the land;
 - » for a hardship that is only self-created or personal;
 - » based on financial reasons alone; and
 - » when the variance offers a development privilege not available to other developers in similarly-zoned lots.

Zoning Boards of Adjustment

- Difficult Cases:
 - *City of Dallas v. Vanesko*
 - The Texas Supreme Court held:
 - The violation of the height restriction has nothing to do with the “area, shape, or slope” of the land;
 - The hardship is personal and self-created in nature because it arose from the decisions of the Vaneskos in designing their home;
 - The Board did not abuse its discretion by not considering the fact that the building permit was issued in error.

Zoning Boards of Adjustment

- Difficult Cases:
 - Lessons from *City of Dallas v. Vanesko*:
 - Check the language of the city's ordinance. Is the language so restrictive that it would be nearly impossible to obtain a variance?
 - Consider adding a waiver provision: "The Zoning Board of Adjustment may approve a waiver of up to 15 percent of any required yard area or setback or other restriction when the violation of such setback or restriction is due to a surveying or construction error in the placement of the original foundation or the construction of the site improvement."

Zoning Boards of Adjustment

- Difficult Cases:
 - *First Texas Homes v. City of Mansfield* (unpublished)
 - Homebuilder simultaneously built two adjacent 3,500 square foot homes on a cul-de-sac
 - Both homes were under contract
 - After both homes were completed, the fencing contractor noticed that something was wrong



Zoning Boards of Adjustment

- Difficult Cases:
 - *First Texas Homes v. City of Mansfield* (unpublished)
 - FTH sought three variances from the City’s side-yard and front-yard setbacks
 - FTH admitted at the hearing that the mistakes were due to a surveying error by FTH’s surveyor/subcontractor
 - FTH did not submit any evidence as to drainage or other problems with the land at the hearing
 - Board denied all three variance requests

Zoning Boards of Adjustment

- Difficult Cases:
 - *First Texas Homes v. City of Mansfield* (unpublished)
 - FTH argued at trial that the homes were constructed in the location where they were constructed because of a drainage issue and requested for the case to be remanded to the board to consider this “new” information.
 - City objected and argued that this information was not presented to the board and that the court did not have jurisdiction to order a remand.
 - The trial court ordered the case to be remanded to the Board.
 - City filed a writ of mandamus with the Fort Worth Court of Appeals.
 - Court of Appeals issued a preliminary order agreeing with the City that the trial court was likely without authority to order the case to be remanded to the Board and set the case for oral argument.
 - Trial court reconsidered and granted the City’s Motion for Summary Judgment.

Zoning Boards of Adjustment

- Difficult Cases:
 - *City of Mansfield v. Mansfield Zoning Board of Adjustment* (unpublished)
 - Mansfield ISD requested a variance from the City’s parapet wall requirements related to the proposed construction of a new elementary school.
 - On the night of the hearing, a huge thunderstorm came through and briefly knocked out the power.
 - The Board quickly granted the request without significant discussion.

Zoning Boards of Adjustment

- Difficult Cases:
 - *City of Mansfield v. Mansfield Zoning Board of Adjustment* (unpublished)
 - The City Council was informed of the decision and of the school district’s intention to make a similar request with respect to the proposed construction of five additional school buildings.
 - The City then decided to sue its own Board.
 - The City promptly settled the case.
 - This settlement lead to the school district requesting an opinion from the Texas Attorney General on whether a home rule city has the authority to regulate the aesthetic appearance of its school buildings. See Tex. Atty. Gen. Op. GA-0697 (2009).

Zoning Boards of Adjustment

- Practical Tips for Avoiding Unsuccessful Litigation:
 - Make sure that the Zoning Director immediately files a written decision of the Board in the Board’s Office and mails a copy of the decision to the applicant.
 - Make sure that the hearing before the ZBA complies with the Texas Open Meetings Act.
 - Have your Board adopt Rules of Procedures—make sure they are enforced and followed.

Zoning Boards of Adjustment

- Practical Tips for Avoiding Unsuccessful Litigation:
 - Make sure your ZBA members are properly trained and understand the requirements of the zoning ordinance.
 - Make sure the decisions are consistent, unbiased and based on the evidence presented in the hearing.
 - Have the requirements for granting the applicant’s request read out loud or put up on an overhead projector so that everyone at the hearing, including the Board and the applicant, understands what must be demonstrated by the applicant in order for the Board to grant the request.

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