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What's Your Damage!! Standing in ZBA Appeals

Introduction:

Recently the City of Georgetown handled an appeal of a use determination in a rezoning case to the city's Zoning Board of Adjustment. Of particular interest in the case was the issue of litigant standing in the Zoning Board context, i.e. who has the right to participate in the proceedings? Our research produced limited materials with few definitive answers regarding Texas caselaw on standing, so this paper provides a short primer for analyzing the issue of party standing in front of a Zoning Board of Adjustment, using our case as a framework. The names of parties have been changed, but the fact-pattern is quite similar. In addition to the case study, this paper discusses of a number of cases from Texas and around the country which may provide some insight into unique or creative arguments that may pop up from time to time.

(Throughout this paper, I will use the terms "Zoning Board of Adjustment" "Board of Adjustment" "ZBA" "Zoning Board" or "the Board" interchangeably, regardless of what a particular city has decided to call their Zoning Board of Adjustment.)

The Case Background:[1]

Will There be Oil?

A crude oil pipeline company owned by Daniel Plainview ("Plainview Pipeline") purchased a 10 acre tract of land (the "Plainview Tract" or "Tract") situated on the edge of town. When Plainview Pipeline purchased this property, it was zoned as an Agriculture Zoning District ("AG"). After the purchase, the Plainview Pipeline filed an application to rezone the property to a Business Park ("BP"). Ultimately Daniel Plainview plans to construct a crude oil pump station on the Plainview Tract.

Eli Sunday and his family own a tract of land (the "Sunday Ranch" or "Ranch") immediately to the east of the Plainview Tract, but outside of the city limits. Sunday and his family do not live on the Sunday Ranch but have owned and used it for the past two decades for hunting and relaxation. At the time Plainview Pipeline purchased the Plainview Tract, there was already a pipeline easement running through the Sunday Ranch, and Plainview purchased additional easement rights through the Ranch after buying his tract.

[1] With some narrative license.

In Georgetown, a rezoning ordinance requires two readings.[2] At the first reading of the ordinance to discuss the rezoning of the Plainview Tract, Eli Sunday appeared and made a statement urging the City Council not to approve a "pipeline permit" for the Tract. Because Mr. Sunday raised his issue, City Council tabled the item at that meeting to allow for further city staff preparation and more in-depth discussion of all the issues surrounding the rezone at the next Council meeting. At that Council meeting the City Council heard testimony from experts in municipal regulation of Texas oil producers as well as members of the public. The City's planning director (the "Director") again presented the ordinance to rezone the Plainview Tract from AG to BP, saying that, "Construction and operation of a crude oil pump station is a use allowed under the Business Park zoning classification" (the "Use Determination") and recommended approval to the Council. Eli Sunday again spoke in opposition to the "permit." The Council approved the first reading. Before the second reading of the rezoning ordinance, Mr. Sunday filed an application to appeal the Director's Use Determination to the Zoning Board of Adjustment (the "Appeal"). Mr. Sunday simultaneously filed in State District Court a Petition for Declaratory Judgment praying that the Court construe the meaning of a particular city ordinance and asking for an order enjoining the City Council from taking up the Second Reading of the ordinance to rezone the Plainview Tract. The Court took up the Petition at a hearing the day before the City Council meeting and declined to enjoin City Council's future legislative action. With the Appeal pending, Council approved the Rezone Application on its second reading, rezoning the Pipeline Tract from AG to BP.

The ZBA set a hearing date, published notice to the public, and notified Eli Sunday and the City directly. After reviewing Mr. Sunday's application to appeal the Director's Use Determination, the City submitted a Plea to the Jurisdiction challenging Mr. Sunday's standing to bring the Appeal. Plainview Pipeline filed a Notice of Intervention along with their own Plea to the Jurisdiction challenging Sunday's standing. Sunday filed responses to the Pleas, and the ZBA hearing went forward. At the hearing the ZBA took up the standing issue before reaching the merits of the Appeal. The City, Plainview Pipeline and Mr. Sunday all presented arguments, and after a brief deliberation, the ZBA ruled that Mr. Sunday had failed to establish standing, and the case was dismissed accordingly. Mr. Sunday did not appeal the ZBA's decision, and, Mr. Sunday also dismissed his Petition in District Court.

[2] In order for the Pipeline Tract to be rezoned from AG to BP, the Georgetown City Council must pass an ordinance in an open meeting, and before the Council can vote on the ordinance, the ordinance must be presented in two open meetings. Members of the public are also able to speak on matters before the Council in open meetings. This two-part Council discussion with the public of an ordinance is referred to informally as the "first reading" and "second reading" of an ordinance.

Ultimately the Appeal was disposed of relatively quickly, but it raised a number of interesting questions that will be discusses below including: Who has standing to appeal a decision to the Zoning Board? Do neighbors always have standing? Can a landowner, whose property is at issue before a ZBA, be denied standing when a neighbor makes the appeal? And if an appellant is denied satisfaction at the ZBA, are there other mechanisms to press the issue, even if the purpose is simply to delay the inevitable?

Common Law and Statutory Standing:

Cast your mind back to that first semester of law school when you were introduced to the idea of legal "Standing." It is an idea fundamental to our legal system which originated in the common law. Black's Law Dictionary defines "Standing" as a "party's right to make a legal claim or seek judicial enforcement of a duty or right."[3] Litigant standing is an indispensable component of subject matter jurisdiction[4] – without litigant standing, a court or judicial body does not have subject matter jurisdiction to hear the case.[5] Subject matter jurisdiction and standing are not presumed to be present, and cannot be waived.[6] To bring a case, a party must "allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause."[7] Courts in Texas have no authority to issue opinions or orders in cases over which they have no jurisdiction, because to do so would violate the Separation of Powers doctrine found in the Texas Constitution.[8] Because standing is a component of subject matter jurisdiction, and subject matter jurisdiction cannot be waived by parties, challenges to standing can be brought for the first time on appeal.[9] In addition to the Constitutional requirements for establishing standing, the Third Court of Appeals offered some practical reasoning for requiring a standing inquiry at the ZBA in the *Austin Neighborhoods Council, Inc. v. Board of Adjustment of City of Austin* case:

> We are of the opinion that in this era when agencies are besieged with innumerable complaints by innumerable parties, the agencies, when empowered by statute, should demand a party to show his standing to bring the complaint. This is not to deny any party any substantive right of access to the agency, but it merely guarantees the efficient opportunity of exercising the right. ... An agency can not waive what the legislature has demanded.[10]

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[3] *Black's Law Dictionary,* (10th ed. 2014).

[4] "Subject Matter Jurisdiction" is defined as a court's power to exercise authority and make judgments over the nature of the case and the type of relief sought. *Id.*

[5] *Texas Ass'n. of Business v. Texas Air Control Board*, 852 S.W.2d 440, 443 (Tex. 1993).

[6] *Id. at* 443-444.

[7] *Id*. at 446.

[8] *Id.* at 444.

[9] *Id.* at 443.

[10] *Austin Neighborhoods Council, Inc. v. Board of Adjustment of Austin*, 644 S.W.2d 560, 566 (Tex.App. – Austin, 1982 writ ref'd, n.r.e.)*; see also Citizens Against Overhead Power Line Construction v. Connecticut Siting Council*, 139 Conn.App. 565, 590, 57 A.3d 765 (2012) (the court states the standing inquiry as: "[T]o demonstrate standing, one need

So whether it is for constitutional reasons or to promote judicial efficiency, demanding parties establish their standing to bring cases is a critical aspect of any appeal before a Zoning Board.

In addition to the common law requirement that a party before a tribunal allege and prove facts sufficient to establish its standing to bring a case, legislative bodies have the power to determine exactly what sort of facts must be alleged and proven in a particular judicial context. The Texas Legislature did just that with regard to party standing before a ZBA which is found in Section 211.010(a) of the Texas Local Government Code.[11] The only two classes of people who can appeal administrative decisions of municipal officials to the ZBA include: (1) a person who has been *aggrieved* by the decision (emphasis added), and (2) any officer, department, board, or bureau of the municipality affected by the decision.[12] Taking these two subsections in reverse, determining whether a litigant is an "officer, department, board or bureau of the municipality affected by the decision" appears on its fact to be a rather simple inquiry and is not discussed in this paper. The first subsection regarding an appeal brought by "a person who has been aggrieved" by a decision is much more complicated, because that is not a plain term, and it is not defined in the statute.[13]

The Aggrieved Person:

The Texas Supreme Court has defined what it means to be "a person aggrieved" for the purposes of standing in front of a Zoning Board of Adjustment. To show "aggrievement" and have standing to make an appeal of an administrative decision to a ZBA, a party must prove that it has been "injured or damaged other than as a member of the general public."[14] Put another way, to be aggrieved, one must suffer a unique damage not suffered by the public at large. In Texas, one does not qualify as "a person aggrieved" for the purpose of appealing to a Zoning Board simply by suffering the same damage as everyone else in the community. As concise as the aggrievement test is, that definition of "aggrieved" creates new questions: How much damage is enough? Are there some types of damage that are not sufficient? How uniquely felt must the damage be to give rise to standing? The *Scott* case which

not prove his case on the merits. Rather, standing entails a consideration of whether there is a possibility that some legally protected interest of the person asserting a claim has been adversely affected by the actions of the defendant.").

[11]Tex. Loc. Gov't Code Ann. § 211.010(a) reads in pertinent part as follows: [A]ny of the following persons may appeal to the board of adjustment a decision made by an administrative official: (1) a person aggrieved by the decision; or (2) any officer, department, board, or bureau of the municipality affected by the decision.

[12]Tex. Loc. Gov't Code Ann. § 211.010(a) (West 1997)

[13]In addition to the State of Texas, municipalities that choose to create a Zoning Board of Adjustment can potentially expand the class of individuals who have standing by ordinance. *See* Texas Local Government Code §§ 211.009(a)(4) (West 1999) and 211.010

[14]*Scott v. Board of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966).

established that definition came down in 1966, and since that time very few Texas appellate cases have applied that rule to interesting fact patterns which could give guidance to practitioners in unique situations.

The word "aggrieved" creates additional problems for non-attorney litigants, because it does not mean the same thing in the legal context that it means in colloquial conversation. For example, *Webster's Unabridged Dictionary* defines "aggrieved" as follows: 1. wronged; offended; injured. 2. *Law*. deprived of legal rights or claims. 3. troubled; worried; disturbed; unhappy.[15] Attorneys, being familiar with legal process and custom, discount dictionary definitions as being incomplete and incorrect, since they are general in nature and not specific to the fact pattern or controversy. Unfortunately, not every litigant before a Zoning Board is an attorney, and they are liable to bring with them their own colloquial understanding of what it means to be "aggrieved" thinking that should be sufficient. This very thing happened in the Plainview Pipeline Appeal. Representing himself in front of the Board, Eli made clear that he felt "aggrieved" simply because his brother had been "threatened" by Plainview. While the ZBA was not moved by that argument in this case, it illustrates the point that *pro se* litigants are likely to throw everything at the ZBA if there is any question of "aggrievement." They're not likely to be silenced by legal custom or practice, so our advice is to be prepared to respond quickly to aggrievement claims that may seem entirely irrelevant.[16]

While Texas caselaw applying ZBA standing rules to different fact patterns is limited, an expanded search reveals several common factors courts in Texas and across the country look at – sometimes explicitly and sometimes implicitly – when deciding whether a party has standing to make an appeal to the ZBA. The cases discussed below are either from Texas or from states that have identical or nearly identical Zoning Board creation statutes. From these cases, the most important issues when faced with a question of standing seem to be:

1. Proximity of the property at issue to the appellant's location,

2. Whether the appellant is the owner of the property at issue, and

3. Whether the damage alleged by the appellant has a connection to the administrative decision being appealed. Additionally, below there are brief discussions of types of alleged damages which have supported or failed to support appellant standing before a ZBA.

[15] *Webster's Unabridged Dictionary* (2nd ed. 2001).

[16] Also, it is likely that many of the individuals serving on your city's Zoning Board of Adjustment are also not attorneys and are unfamiliar with court room practices. It is best to be mindful of your audience, speak in language understandable to all, do not assume a high level of familiarity with the law or judicial terms and procedure, and tailor craft arguments with the goal of being understandable by a layperson.

1. **Proximity and Aggrievement:**

As part of his standing case before the Georgetown ZBA, Eli Sunday asserted that the Sunday Ranch's proximity to the Pipeline Tract – they share a property line - is enough to give Sunday status to appeal, but as appellate courts of Texas have made clear, *in Texas* mere proximity does not impart "aggrieved person" status under the law. In *Lazarides v. Farris*, a case relied upon by Mr. Sunday in his appeal to the ZBA, Mr. Farris was appealing a city official's decision to issue a certificate of occupancy to Mr. Farris' neighbor who had constructed improvements to the neighboring property.[17] These improvements altered the flow of water across the neighbor's property and caused flooding Mr. Farris' home in particular – *actual damage* unique to Mr. Farris as a result of the new construction.[18] The Court ultimately determined that Mr. Farris was "aggrieved" other than as a member of the general public *not* because he was adjacent landowner, but because Mr. Farris suffered actual damages caused by a neighbor's actions.[19] *Lazarides* stands for the idea that if a land owner alters his property as a result of an administrative decision, and that alteration has a damaging effect on a neighbor, that neighbor has standing to seek redress.[20]

Likewise, in the *Galveston Historical Foundation* case, the Court considered a challenge to standing of an appellant complaining of a property just down the street.[21] The Galveston Historical Foundation ("GHF") rented a mansion which they used as an event facility in Galveston's historic "Broadway Overlay Zone"[22] A pharmacy across the street and down a block from the Historical Foundation was planning to install non-conforming signs.[23] These parties were not next-door neighbors but were fairly close, but like in *Lazarides*, the court did not make its standing ruling on the fact that these properties were close to one another. That the properties' shared "membership" within the special historic Broadway Overlay Zone was the basis for deciding that the GHF was "aggrieved" for the purposes of standing.[24] The Court held that a deviation by one property owner from the rules of the Broadway Overlay Zone created a unique impact on each of the other property owners *within the Zone* distinguishable from the public generally.[25] In the case of the Plainview Pipeline, Sunday Ranch and

[17] *Lazarides v. Farris*, 367 S.W.3d 788, 794-795 (Tex.App.Ct. – Houston [14 th Dist.], 2012).

[18] *Id.* at 794-795.

[19] *Id.* at 799-800.

[20] In the actual case of *Lazarides*, Mr. Farris was attempting to reverse a city building official's decision to issue a certificate of occupancy, which put Mr. Farris in front of a Zoning Board. But in another context – tort potentially – it seems Mr. Farris would also have standing to sue based on those same, actual damages.

[21] *Galveston Historical Foundation v. Zoning Board of Adjustment of the City of Galveston*, 17 S.W.3d 414 (Tex.App.Ct. – Houston [1 st Dist.], 2000).

[22] *Id.* at 418. The Court explains that the Broadway Overlay Zone was created by city ordinance as is a defined section of Galveston subject to more restrictive zoning standards.

[23] *Id.* at 418-419.

[24] *Id.*

[25] *Id.*

Plainview Tract are not located in a common special zone of any sort, and they have no special relationship to one another. They are merely neighbors, which does not by itself impart aggrievement in Texas.

If the rule in Texas was that proximity creates aggrievement, the opinion in the *Lazarides* case of next-door neighbors would have been one paragraph long and probably not worth reading. Likewise, the *Galveston Historical Society* case would most likely have contained some sort of sliding scale calculus to determine how far one must get from the offending property before being declared too far. That did not happen. These cases were decided on other grounds. While proximity is a very important factor in the "aggrievement calculus," it is simply that: a factor considered by the court when weighing all the facts to determine in totality whether a party has been damaged in a unique manner other than as a member of the general public.

The lack of a bright rule, or really, any direct discussion of the impact proximity has on aggrievement analysis in Texas jurisprudence leaves the issue open and provides a likely avenue for a neighbor to argue aggreivement. Courts in Maryland provide another aggrievement framework for persuasive and creative litigants to fill that space and potentially talk a Zoning Board into granting standing. In Maryland, the closer the appellant's property is to the offending property, the stronger the appellant's claim to standing. In *A Guy Named Moe, LLC v. Chipotle*, a case between two battling burrito companies, the court states the Maryland "aggrievement" precedent that, "… an adjoining, confronting or nearby property owner is deemed, *prima facie,* to be specially damaged and, therefore, a person aggrieved."[26] The *Guy Named Moe* decision is interesting because it contains a good discussion of the aggrievement analysis Maryland courts undertake. In Maryland the rule is that proximity to the offending property is the most important factor to be considered, and after proximity the courts look at other "plus factors" on a sliding scale – the farther apart the properties are from one another, the larger the plus factors need to be.[27] While "...proximity is the most important factor to be considered, there is no bright line rule for exactly how close a property must be in order to show special aggrievement," but "...once sufficient proximity is shown, some typical allegations of harm acquire legal significance that would otherwise be discounted."[28] And "…in the absence of proximity, much more is needed."[29] In the *Guy Named Moe* case, the Court ruled that the appellant failed to establish standing, because the properties were not neighbors, and there was no direct line of sight between the two establishments.[30]

[26]*A Guy Named Moe, LLC v. Chipotle Mexican Grill of Colorado, LLC,* 447 Md. 425, 451 (MD Ct.App. 2016) *citing Bryniasrski v. Montgomery County Board of Appeals,* 247 Md. 137, 145 (1967).
[27]*Id.* at 452.
[28]*Id.* at 451.
[29]*Id. citing Ray v. Mayor & City Council of Baltimore,* 430 Md. 74, 82-85 (2103)
[30]*Id*. at 452.

Lacking "close proximity," the Court found appellants claims of increased traffic and competition "insufficient to prove special aggrievement."[31]

The logic of the Maryland rule makes a lot of sense. If "aggrievement" is ultimately achieved by alleging damage that is more uniquely felt on one tract of land as opposed to all tracts of land, then proximity to the offending tract arguably *should* be considered as a foundational component in the analysis. Texas courts have not adopted this rule, but the idea that proximity analysis should be the starting point, with the distance between the properties being inversely related to the height of the bar for standing, appeals to feelings of common sense or even fairness.

In Texas we can argue that mere proximity is not enough to confer standing. We can further argue that proximity is, in fact, not even a primary factor, because proximity does not equal damage, and we can win with that argument. In the Plainview Pipeline case, I believe applying the Maryland rule to Eli's Sunday's claims would have resulted in a ruling in Mr. Sunday's favor with regard to standing. The Sunday Ranch borders the Plainview Tract, and Mr. Sunday's access to his property is via an easement across Plainview's property. Mr. Sunday also alleged damages based on noise and heightened safety concerns, which, as a neighbor to a pump station, is understandable. These two tracts are intimately related geographically, so under a Maryland view, Eli Sunday need only allege very slight damage to meet the standing requirements for aggrievement.[32] Had Mr. Sunday strongly argued for the supreme importance of proximity and a sliding scale of aggrievement factors, I am not convinced he would have been denied standing.

As we can see, when arguing aggrievement, proximity is something that has to be addressed – whether we argue it is *prima facie* evidence of standing, a factor on a sliding scale of aggrievement, or as an element to show the uniqueness of damage. In Texas, proximity helps show how property is uniquely damaged, but other damage factors are required in order to show "aggrievement."

2. **<u>Landowner Status and Aggrievement:</u>**

In other states, Connecticut being one example, the simple fact that a party owns the property at issue in an appeal before a Board of Adjustment is sufficient to impart standing on that party. In *Bossert v. City or Norwalk*, an appeal of a zoning decision, the Connecticut Supreme Court held that, "As the owner of the tract in issue, the plaintiff was certainly aggrieved by the action of the [zoning

[31] *Id.* at 453.

[32] One important factor in Georgetown ZBA's ruling against Mr. Sunday was his lack of credible evidence to support his damage claims. All his allegations were speculative, so there is the possibility that even with the Maryland Rule in place, the ZBA would still have found Mr. Sunday's "plus factors" unsupported by evidence and, therefore, not to be considered.

board]."[33] Simply owning the tract of land at issue was sufficient to satisfy "aggrievement" requirements for standing. While the rule is not this explicit rule in Texas, it would seem to be very difficult to defeat a property owner's claim to standing in front of a Zoning Board taking up a case affecting the owner's property. An owner would have a pecuniary interest in the controversy absolutely unique from the public at large, since a decision of the ZBA contrary to the owner's interest would directly affect the owner's use of his property in particular. It seems that a conventional aggrievement analysis would support landowner standing.

That said, I would not be surprised if a party before the ZBA objected to the standing of a landowner who has not yet been aggrieved by a city decision. Take the Plainview case as an example. In this case, Daniel Plainview applied for a rezoning, and the Director made a use determination in Mr. Plainview's favor. Plainview, so far, *had not* been aggrieved (in any sense of the word) by the decision of the Director. Eli Sunday, opposed to the Director's use determination, appealed it to the Zoning Board. At the point of filing the Appeal, Sunday and the City were the two parties in the case. Having a duty set a reasonable hearing date and give "due notice" to parties in interest, the Board of Adjustment set the hearing date and notified Mr. Sunday, the Director, and the City legal department. Plainview Pipeline Company, the property owner, hearing about the pending appeal, filed a Motion to Intervene in the case. The City filed a Plea in Abatement objecting to Mr. Sunday's standing, and Plainview followed suit, filing their own Plea in support of the City's position and requesting the same relief. Suppose, hypothetically, that Mr. Sunday, seeing all the objections to *his* standing, tried a good-ole "if you're gonna object to my standing I'm gonna object to your standing!!" routine and files a Plea in Abatement objecting to Plainview Pipeline's standing. Could Plainview be kicked out on standing grounds? I think the argument would go like this: Even though Mr. Plainview is the owner of a piece of property that could be affected by the appeal, the controversy is between the City and Mr. Sunday – it is a decision of the City that is at issue, and Plainview is not a necessary party for the cause to be tried to completion. Like all parties, Plainview Pipeline must have standing to participate before the ZBA. To have standing as an intervenor, Mr. Plainview must show that he had standing to bring the case originally.[34] Because Mr. Plainview has not been injured or damaged in any way by the decision at issue in the appeal, if he were the appellant, he would not be able to show aggrievement and consequently not have standing. Furthermore, one cannot appeal an administrative decision where that

[33] *Bossert Corp. v. Norwalk*, 157 Conn. 279, 285 (1968). The bulk of the Court's opinion deals with jurisdictional issues unrelated to a question of standing, but with regard to any question of "aggrievement" the holding is clear that property ownership is sufficient to impart standing to bring an appeal.

[34] *See In Re Union Carbide Corp.*, 273 S.W.3d 152 (Tex.2008) (In order to intervene in a matter, the intervenor must have a "judicable interest." To constitute a "justiciable interest," the intervenor's interest must be such that if the original action had not been brought, the intervenor could recover in his own name the interest being sought.).

appealing party received the relief that party originally requested, as Plainview did in this case with the rezoning application.[35] Daniel Plainview requested and received the change in zoning and the use determination he wanted. Because he received the relief requested, claiming to be aggrieved by that same decision is an untenable position, and if he cannot make a case for aggrievement, he would not have standing to bring the Appeal and likewise not have standing to intervene. Under this theory, Daniel Plainview, as the owner of the property at issue in the Appeal would not be able to participate in the appeal process. Whether a ZBA would be able and willing to follow this argument and grant a motion to remove a land owner on standing grounds is unclear to me and feels like one of those situations the outcome of which will have as much to do with the sophistication of the members of the Board and the charms of the person making the case as with the argument itself.

Ultimately, Texas does not have the bright line rule that the owner of the land at issue in an appeal before a Zoning Board is automatically considered to be "a person aggrieved" for the purposes of standing, which creates room for creative (off the wall?) arguments about whether a landowner technically qualifies to participate before the ZBA.

3. <u>Damages and Aggrievement:</u>

When Eli Sunday filed his application to appeal the decision allowing a pump station to be constructed on the Plainview Tract, he alleged the following damage, which he believed made them legally aggrieved: (1) the value of the Sunday Ranch will decrease; (2) Mr. Sunday's access to his property through an existing easement over the Plainview Tract will be impaired by the crude oil pump station; (3) increased noise from the pump station is harmful; and (4) the mere existence of the pump station creates perpetual threats to health and safety. At the hearing, Eli argued that each of these types of damages created aggrievement sufficient to impart standing. The only evidence provided by Mr. Sunday was his own testimony. He brought no additional witnesses or documentation and provided no experts with regard to any of his damage grounds. The City argued that (1) the damage alleged by Mr. Sunday was at best speculative; (2) Mr. Sunday's failure to provide any evidence other than his own lay opinions was insufficient to prove his claims; (3) the claims regarding noise, safety and value, if true, were not uniquely felt by Mr. Sunday; and (4) Mr. Sunday's claim regarding easement access had no logical connection to the Use Decision, i.e. even if Mr. Sunday's access *were* impaired, the Use Decision would not have been the cause. Daniel Plainview's attorneys also argued that Mr. Sunday

[35] *See City of Galveston v. Flagship Hotel, Ltd.*, 319 S.W.3d 948, 952 (Tex.App.Austin 2010)(In this case Flagship appealed an administrative decision of the Texas Commission on Environmental Quality, where TCEQ had granted the relief requested by Flagship in the administrative hearing. Because TCEQ had granted Flagship's requested relief, the Court held that Flagship could not be aggrieved by TCEQ's final decision and had no standing to appeal that decision.).

failed to prove his case, and they additionally provided expert testimony and affidavits that Sunday's assertions were not true. At the end of the hearing on standing, the ZBA dismissed the case entirely, holding that Eli Sunday had failed to establish his right to bring the appeal.

The one issue where Plainview's attorneys took with the City's case was the City's assertion that the bar for standing is a very low one. Uncontested evidence of aggrievement described "at best" as "very weak" can be sufficient to confer standing in front of a ZBA.[36] Our belief was that Mr. Sunday needed *some* evidence of damage to get over the bar, and the fact that he provided *no* evidence was why he failed to clear the bar. My question after the case concluded is whether Sunday could have gotten over the standing bar with the same claims if he had simply provided *some* evidence to back up the allegations. An affidavit from a real estate agent with regard to the negative effect pump stations have on the value of neighboring property could have been enough to satisfy the ZBA for standing purposes. Regardless of Mr. Sunday's personal evidentiary failures that day at the hearing, to establish appellant standing in a ZBA appeal, the appellant must (1) allege and prove damage or detrimental effect that (2) appellant suffers other than as a member of the general public, and, we believe, (3) there must be a logical connection between the proven damage and the administrative decision being appealed.

Damage or Effect

Damage sufficient to establish standing to appeal a decision to a Zoning Board is not necessarily akin to damages in a tort setting (i.e. Mike Tyson punching a person in the face) or a contract setting (i.e. losses directly attributable to a breach). In the *Lazarides* case, the damage giving rise to the appeal is about as clear as one can hope for: physical flooding of a person's home. With clear fact patterns involving actual damage which has already occurred, the analysis is simpler than in cases where effects are more theoretical or speculative. In the *Galveston Historical Foundation* case, for example, at the time the appeal was filed with the Zoning Board, the offending signs had not been built, so there was no possibility that the Foundation could have been suffering any tangible harm. Regardless, the Court held that to have standing, the Historical Foundation, "...did not have to show that legal harm had already occurred" only "that its business would be affected other than as a member of the general public if the non-conforming sign were permitted."[37] So even in the absence of an

[36] *See Texans to Save the Capitol, Inc. v. Board of Adjustment of Austin,* 647 S.W.2d 773, 775 (Tex.App.Austin 1983) (In this case, appellants challenged the issuance of a building permit. The opinion does not detail the exact evidence proffered by the appellants to demonstrate the unique damage they suffered due to the issuance of the permit, but out of an "abundance of caution" held it to be sufficient in order to rule on the merits of the case).

[37] *Galveston Historical Foundation,* 17 S.W.3d 419.

obvious, perfectly linear cause-and-effect relationship between the decision being appealed and very clear, tangible damage, parties can get in front of a Board of Adjustment.[38]

The Damage or Effect Must be Unique[39]

The rule in Texas is that a party must prove that it has been "injured or damaged other than as a member of the general public."[40] The simplest cases are the ones like the oft-cited *Lazrides* case where the damage complained of (flooding) affected one property only. The damage in a case like that is obviously experienced in a manner other than as a member of the general public. Of more interest is the *Galveston Historical Foundation* offending sign case, where the fact that the Historical Foundation was physically located in the Broadway Overlay Zone, the Foundation, "... had an interest peculiar to itself in preserving the historical nature of the neighborhood."[41] While the Foundation's interest was not 100% unique to itself – presumably *anyone* located in the Broadway Overlay Zone has the same "peculiar" interest in preserving its historical nature – the effects are not shared by the general public, and, therefore, satisfy this uniqueness component of standing. Caselaw from Ohio describes their "directly-affected" requirement that a "...property owner show some unique harm that is distinct from the harm suffered by the community at large."[42] The parties must show an affect that is "unique to himself" and not something that simply affects "...the character of the community (internal quotes removed)."[43] In all the cases cited herein where a party survived a challenge to standing, they could always articulate a way in which their situation was unique from that of the general public.[44]

Applying this "uniqueness" rule to Eli Sunday's alleged damages, one sees that even if he had been able to prove that he would be affected by the appealed decision, the affects were not unique to Mr. Sunday. Mr. Sunday's allegations related to the negative impacts of Plainview's pump station on the value of the Sunday Ranch along with the increased noise and safety risks are not affects, even if proven, that Mr. Sunday would have felt alone. The *magnitude* or *degree* of the impact might be different for different members of the public, but everyone in the community would be affected – and that defeats Sunday's claim to standing.[45]

[38]The Appendix to this paper contains short summaries and citations to cases from around the country where different types of damages or affects have been discussed in the context of standing to make an appeal to a Zoning Board.

[39]"Unique" may not be 100% accurate, but it succinctly captures the idea that suffering an effect in concert with everyone else does support standing.

[40]*Scott*, 405 S.W.2d at 56.

[41]*Galveston Historical Foundation, at* 17 S.W.3d at419.

[42]*Alesi v. Warren City Board of Commissioners*, 24 N.E.3d 667, 674 (Oh.App. 2014).

[43]*Id.*

[44]The Appendix to this paper also contains short summaries and citations to cases from around the country where different types of damages or affects have been discussed in the context of standing to make an appeal to a Zoning Board.

[45]This analysis is similar to the "Special Annoyance" analysis used for public nuisance claims. A lengthy discussion of those lines of cases is beyond the scope of this paper, but they could provide useful arguments for defeating a claim of

Damage or Effect Must Have Causal Connection to Appealed Decision

For a party to have standing before a Board of Adjustment, the administrative decision being appealed *must* be the reason for the injury suffered by appellant. Because Texas appellate courts have not wrestled with this concept explicitly, I am using a case from Alabama as an example and following up with how this "nexus" idea exists in the Texas cases.

I mentioned *Brown v. Jefferson* briefly above. In that case, the issues of traffic congestion began in 2005 with the expansion of a dance studio.[46] The traffic and congestion situation continued until 2012 when the Board of Adjustment for Huntsville granted the studio a variance from the parking ordinance.[47] The neighbors appealed the decision to grant the variance, and the dance studio objected to their standing on the grounds that the traffic issues complained of were not caused by the decision to grant the variance – they had been on-going for *seven years* after all![48] If there is no nexus between the administrative decision or variance being complained of and the damage being caused, the party being damaged has no standing to appeal. The court held that even though the parking situation had been unchanged for the seven years between the renovations and the granting of the variance, because the neighbors were in theory protected for those seven years by the city ordinance regulating parking spaces, not until the Board of Adjustment *actually* granted the variance permitting the studio to avoid its obligations did the neighbors lose the protection of the city ordinances and have to seek redress in the courts.[49] Even though the practical damage had been occurring for seven years, it was the "loss of protection [that] occurred with the granting of the variance and not before" which created the legal nexus between the administrative decision and the damage sufficient to impart standing on the neighbors.[50]

Even though no Texas court has explicitly stated this requirement, one can see it at work in the reported cases. In the *Galveston Historical Foundation* case, the decision being challenged was a decision to grant a permit for a pharmacy to construct two large monument signs within Galveston's historic Broadway Overlay Zone.[51] The injury the Historical Foundation claimed was simply that by allowing the construction of these large, modern signs, the historic nature of the Broadway Overlay Zone would be damaged, which would negatively impact the Foundation's historic attraction to its

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unique injury.

[46]*Brown v. Jefferson*, 203 So.3d 1213, 1215 (Ala.Civ.App. 2014).

[47]*Id.* at 1216.

[48]*Id.* at 1219.

[49]*Id.*

[50]*Id.*

[51]*Galveston Historical Foundation*, 17 S.W.3d at 416.

clients and customers who were attracted to the charm of the area.[52] One can see the nexus here between the decision to allow sign construction and the damage alleged by the existence of the signs. Likewise, in the *Lazarides* case, the decision being appealed was a decision by the city's building official to issue a certificate of occupancy for a residence before requiring certain drainage improvements to be completed.[53] The damage complained of was from the owner of abutting property whose home was flooded.[54] Again, the connection between the appealed decision is obvious here: drainage improvements which were neglected leading to flooding.

In fact, Daniel Plainview's attorneys made this same argument in the case against Eli Sunday's standing. Applying this nexus idea to Sunday's appeal reveals that there is some connection between Sunday's alleged damages and the administrative decision being appealed, but the nexus does not exist for every damage claimed. Mr. Sunday was appealing the Director's determination that a crude oil pump station was a permitted use on the Plainview Tract and claiming damages related to access, noise, safety and property value. With regard to access, the use decision allowing a pump station has no connection to whether Plainview impairs Sunday's access – no nexus. With regard to safety, noise and property value however, a nexus can be seen. Allowing a pump station *could* lead to heightened safety risks, greater noise and have an impact on property values.

Conclusion: There Will Be Oil!

We hope that this brief article and case study has illuminated at least a few of the issues surrounding establishing or objecting to a party's standing in front a municipal Zoning Board of Adjustment. Good Luck!

[52] *Id.* at 418.
[53] *Lazarides, 367 S.W.3d at* 795.
[54] *Id.*

Appendix: Quick Hits

Circumstances Which Have Survived (or not) a Challenge to Standing at the ZBA

Actual Property Damage: Actual property damage caused by or connected to an administrative decision, such as the flooding of a neighbor's property after a certificate of occupancy was wrongfully awarded in the *Lazarides* case, is the clearest path to aggrievement.[55]

Location Within a Special Zone: In the *Galveston Historical Foundation* case, the Galveston Historical Foundation's property location within the historic Broadway Overlay Zone was key to the Foundation's aggrievement argument.[56] Potentially being located within the 200 foot notice zone for zoning changes can create a special zone.

Group Membership: Membership in a group dedicated to a cause can be a factor in the aggrievement calculus, when the decision being appealed is a decision that negatively impact's the group's stated goal.[57]

Traffic Impacts: In *Brown v. Jefferson*, the negative consequences to neighbors of increased traffic congestion caused by a dance studio's expansion was sufficient to establish aggrievement.[58] Increased traffic is usually suffered by the public equally and is therefore not a sufficient ground to establish standing; however, when the increased traffic is coupled with evidence of loss of property value due to an administrative decision, it can rise to a level sufficient to support standing.[59]

Artistic Inspiration: In a case from New York, an artist was found to have standing to appeal a development decision based on the fact that she had a history of working near the property and that redevelopment would "eliminate a prominent source of inspiration for the creativity at the heart of her

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[55] *Id.* at 794-795.

[56] *Galveston Historical Foundation*, 17 S.W.3d at 416.

[57] *Shinnecock Neighbors v. Southampton*, 53 Misc.3d 874, 876 (N.Y. Sup. Ct. 2016).

[58] *Brown*, 203 So.3d at 1219.

[59] *Safest Neighborhood Assc. v. Athens Board of Zoning Appeals*, 5 N.E.3d 694, 702 (Oh. Ct. App. 4th Dist. 2013).

work."[60] There's no evidence in the opinion that she was a land owner in the vicinity or owned real estate that would be adversely impacted by the development – standing appears to be based solely on the impact to her art inspiration.

Quashing Competition: Trying to quash competition from moving into the neighborhood was found *not* to be an injury which could confer standing.[61]

Reduction in Property Value: Reduction in property value *by itself* is insufficient to support standing.[62]

Due Process Considerations at the ZBA Hearing

Due Process - Lack of Notice

In *City of Dallas v. Fifley*, Archie Fifley, one of the Appellees in the case before the Dallas Court of Appeals, had not participated in the hearing at the ZBA level.[63] He claimed in his motion for a rehearing of the district court case that, because he had not participated at the ZBA level, its decision, which was contrary to his interests, constituted a taking of his property without due process of law. The appellate court dismissed this argument based on the record before the Court which reflected Mr. Fifley's receipt of notice of the ZBA hearing.[64] This raises the question of whether lack of proper notice to "parties in interest" could give rise to a takings claim.[65]

Procedural Due Process – Lack of Ability to Cross Examine Witnesses

In *Richardson v. City of Pasadena*, a different administrative context, the Supreme Court of Texas ordered a new trial in state district court, allowing for a full evidentiary hearing – not simply a review of the previous Commission hearing findings, after an appellant in a Civil Service context alleged procedural due process violations.[66] In this case, the Civil Service Commission had accepted affidavits from three witnesses adverse to appellant *6 days* after the close of the evidentiary hearing without giving Appellant opportunity to cross-examine or object to the affidavits.[67] The Court stated that, "when a decision is influenced by evidence of which one party has no knowledge or has no chance

[60] *Shinnecock Neighbors*, 53 Misc.3d at 876.
[61] *A Guy Named Moe,* 447 Md. at 451, *see also Hannaford Bros. Co. v. Town of Bedford,* 164 N.H. 764, 769 (NH. Sup. Ct. 2013)
[62] *Cherry v. Weisner*, 781 S.E.2d 871, 877 (NC. App. Ct. 2016).
[63] *City of Dallas v. Fifley,* 359 S.W.2d 177, 183 (Tex.App.Dallas 1962).
[64] *Id.* at 183.
[65] Tex. Loc. Gov't. Code § 211.010(d): The board shall set a reasonable time for the appeal hearing and shall give public notice of the hearing and due notice to the parties in interest.
[66] *Richardson v. City of Pasadena*, 512 S.W.2d 1, 3-4 (1974).
[67] *Id.* at 3.

to confront and explain that a due process problem arises."[68] While this example is from a different administrative context, an appellant who just lost his case in front of the City's ZBA could argue that he was denied the right to confont witnesses. How much can a city circumscribe the hearing? If the city goes too far, the city runs the risk of opening up due process liability.

In *Sumner v. Board of Adjustments of the City of Spring Valley Village*, the Texas Appellate Court followed the *Richardson* precedent, stating that, "In administrative hearings, due process requires that parties be accorded a full and fair hearing, including the right to cross-examine adverse witnesses and to present and rebut evidence on disputed fact issues."[69] However, "[d]ue process does not require that every administrative proceeding contain the full procedural framework of a civil trial."[70] To satifsy due process requirements, the city needs to adopt rules of procedure pursuant to the the Texas Local Government Code and follow those rules. In the instant case, the city had adopted rules for its ZBA, and the ZBA had followed its rules. Mr. Sumner failed to make proper requests under the rules. He argued that by "rolling his eyes to the back in [his] head and looking at the ceiling and acting like the hearing is a joke" and by "walking in the front door" he evidenced his desire to speak.[71] The Court was unmoved by Sumner's body language and held that because Mr. Sumner failed to formally or informally make a request to the Board to cross examine witnesses as allowed by the Board's adopted rules, his failure to cross examine witnesses was his own and not a due process violation by the Board.[72]

The Tip: (1) Adopt Board Rules which guarantee a right (if just a limited right) for party participation in the Board hearings.

(2) Follow the rules!

[68] *Id.* at 4.
[69] *Sumner v. Board of Adjustments of the City of Spring Valley Village*, 2015 WL 6163066. 01-14-00888-CV, October 20, 2015.
[70] *Id.* quoting *Bexar Cnty. Sheriff's Civil Serv. Comm'n v. Davis*, 802 S.W.2d 659, 664 (Tex.1990).
[71] *Id.*
[72] *Id.*

Considerations for Post-ZBA Court Intervention

Zoning Boards of Adjustment Decisions are Presumed Legal

Decisions made by a Zoning Board of Adjustment are presumed to be legal and "should be upheld upon any possible theory of law, regardless of the reasons assigned by the Board in rendering its decision."[73]

Exhaustion of Administrative Remedies Required before Court Intervention

In cases involving challenges to zoning, an appealing party must exhaust all its administrative avenues for redress before a controversy would be ripe for judicial intervention.[74]

Declaratory Judgment Suit

A party displeased with the outcome of a ZBA hearing could file an action in state district court seeking a declaratory judgment of his rights pursuant to a city ordinance. Assuming ripeness and genuine controversy, this type of case could be a successful collateral attack or, at the very least, be a thorn in the side of the City or other parties involved in the case.[75]

Creative Pleading / Request

Fincher v. Board of Adjustment of City of Hunters Creek Village, involved a homeowner who was denied a building permit to construct a carport and covered porch in the spring of 1995.[76] In April of the following year, the city building inspector discovered that the homeowner had started construction anyway, and the inspector told the homeowner to stop.[77] Because the homeowner was 13 months removed from the administrative decision which had aggrieved him, instead of appealing the decision not to grant the building permit, the homeowner requested the city's Board of Adjustment to interpret the zoning ordinance in a way to make it inapplicable to the homeowner's structure.[78] The Board discussed the matter, but took no action.[79] Homeowner appealed this "decision" to the District

[73] *Fifley*, 359 S.W.2d at 182.

[74] *See Thomas v. City of San Marcos*, 477 S.W.2d 322 (Tex.App.Austin 1972). The appellant in this case filed a declaratory judgment action seeking judicial review of the City of San Marcos' zoning ordinances with regard to appellant's right to operate a mobile home park. The case was dismissed from the trial court for lack of jurisdiction due to appellant's failure to take his grievance through the City zoning process before filing his lawsuit, and the Court of Appeals affirmed this decision stating that "Appellant … failed to make use of the administrative remedies available to him, and the trial court properly dismissed the suit."

[75] *Id.*

[76] *Fincher v. Board of Adjustment of Hunters Creek Village*, 56 S.W. 3d 815, 816 (Tex.App.Houston 2001).

[77] *Id.*

[78] *Id.*

[79] *Id.*

Court, where the case was dismissed for lack of subject-matter jurisdiction, because the Finchers "failed to pursue and exhaust their administrative remedies under Chapter 211 of the Texas Local Government Code and the zoning ordinance of the City of Hunters Creek."[80] The appellate court, held that, although the trial court should not have treated the error as jurisdictional, the Finchers failed to establish their right under the code and the ordinance to go forward with their suit.[81] The lesson here is to watch out for that creative landowner who, even though barred by the short timeframes created by statute and ordinance, tries to find another way to challenge the city.

[80] *Id.* at 816-817.

[81] *Id.* at 817. The appellate court discussed in brief the precedent created by the then-recently decided Texas Supreme Court case *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex.2000).