

## Board of Adjustment Applicant Information

The Board of Adjustment (BOA) is a quasi-judicial board. In the City of Austin process, it is a sovereign board and the decision of the BOA is final. Its decisions can only be appealed in District Court. The board is composed of seven regular members that serve at the pleasure of city council (appointed alternates also serve in the absence of regular members on an as-needed basis). A quorum consists of six members.

The BOA operates under a set of **Bylaws** and a set of **Rules and Procedures**.

Both should be reviewed prior to your case:

They are on the city website: <http://www.ci.austin.tx.us/neighborhood/process.htm>

The city Land Development Code is also online: [http://www.amlegal.com/austin\\_tx/](http://www.amlegal.com/austin_tx/)

Since the BOA is a quasi-judicial body, **individual board members cannot be contacted directly or lobbied regarding a case**. All information must be submitted directly to the staff liaison, and they will pass it on to all board members.

A variance request is dealt with in a hearing style format. Each side is allowed a **TOTAL of 5 MINUTES** for their presentation. **Each side must SHARE their 5 minutes between ALL SPEAKERS**. Prior to the hearing, it is a good idea to practice your presentation by allocating this time between your lead speaker and any additional speaker(s). Often, a lead speaker will make the entire presentation and can then ask all those in support to stand and be recognized. Five minutes can go by very fast – organization of key points is essential. After each side makes their 5-minute presentation, only the applicant receives an additional two-minute rebuttal period.

The board may then ask questions of either side for clarification or to gain additional information or insight into the case. Next, the board will make a motion to grant, deny, or postpone.

For a motion to APPROVE an appeal (variance), 6 out of 7 YES votes are required in order for it to be granted. In other words, two or more NO votes will cause the variance to be denied. The corollary to this is the motion to DENY: If a motion to DENY is made, only 2 YES votes are needed to deny the variance.

A motion to DENY requires no findings but any motion to GRANT does require “findings”.

What are “findings”? This is the section of the application where the applicant explains the hardship unique to that property and explains how it will not affect the area character of its surroundings.

The key ingredient of findings is **HARDSHIP**. This is often the hardest to understand. The BOA statute and the City Code do not define “unnecessary hardship.” It is somewhat of a fluid concept. Hardships have been dealt with in state case law through the years. Whether there is a hardship is a determination for the BOA members to make on a case-by-case basis.

Hardships are something related to the particular property that prohibit the owner from having a reasonable “conforming use,” if he/she is required to comply with the city's development regulations. The application of the city's regulations to the particular property, when taking into account its configuration, topography, the surrounding property, etc., create the typical hardship. Examples are pie-shaped lots, lot size, lots with slope problems, lots where every other house on the street is already benefiting from the condition being sought in this variance request, all of which MAY justify area, setback or height variances. Trying to save trees has also been accepted as a hardship by at least one Texas appellate court. The preceding list not intended to list every example of a situation that could

create a hardship. Please note, a hardship should not be self-imposed. i.e., if you subdivide your own property into weirdly shaped lots and thereby make it difficult to build a normal size house on one of those lots, you may have a self-imposed hardship and may not be granted the variance.

A hardship cannot be merely an economic hardship: the sole basis for a variance request should not be "if you grant me this variance, I can make more money (or save money) or I can build a bigger structure". Hardships are conditions that are unique to the applicant's property – not conditions that are unique to the applicants themselves. Health issues, age, mobility, the desire to improve the property by building it a certain way, built without a permit, etc. .... these do not qualify as BOA hardships. The desire to have an extra room, a deck, a carport, etc. are all very reasonable but it is also reasonable to build within existing city codes without the need of a variance.

If a person can solve his development problem with a zoning change, then generally speaking, he should seek that zoning change instead of a variance. The BOA does not grant variances which amount to a zoning change.

The BOA generally looks at hardships as condition that relate to issues like topography, safety, trees, drainage easements, flooding, pre-existing conditions that might be "grandfathered": construction prior to current code or annexation, etc. It is impossible for this document to give anything other than general guidance, as each property is unique and is in its own unique surroundings.

Effective presentations should include legible site plans, drawings, surveys, photographs, and topo maps. **Evidence should be provided to support your claim of hardship.** Just saying you have a slope on your lot, an easement issue or your structure was built prior to current code is insufficient. Provide supporting proof of your claim to the board, ideally in the initial application.

Applicants are responsible for maintaining the city-provided notice yard sign(s) posted on their property. Notification is also sent to nearby property owners and neighborhood organizations that are registered with the city's Community Registry. **It is wise to DISCUSS your variance request with your NEIGHBORS early in the process.** You should also **CONTACT the Neighborhood Association** for your area. You may search the city's Community Registry by zip code or association name to obtain association contact information here: [www.ci.austin.tx.us/neighbor/search.htm](http://www.ci.austin.tx.us/neighbor/search.htm)

**Variances are granted for a one-year period.** Following receipt of a variance, the applicant typically must proceed with a Building Permit. Receiving a variance is the beginning of a process, not the end. Project completion should take place before the variance expires. In some cases, a variance may be granted for an additional year for a showing of good cause. If a variance is DENIED, the BOA may not hear a request for substantially the same variance for a one-year period.

Either side may request RECONSIDERATION of the BOA's decision to either grant or deny a variance. To do so, one must apply for reconsideration in writing (email will suffice) to the BOA Staff Liaison within 10 days of the board's decision. A request to reconsider shall state clearly **how the Board erred in its determination, why the action should be reconsidered, and be supported by new or clarified evidence that was not available at the initial hearing.** All of this information should be submitted within the 10-day period, as Board members will review the request prior to any public hearing or live presentation.

The only recourse for an aggrieved party (Applicant or Interested Party) that is unsatisfied with the BOA reconsideration decision is only an appeal to District Court. BOA appeals do not go to City Council.



## Development Services Department

One Texas Center | Phone: 512.978.4000  
505 Barton Springs Road, Austin, Texas 78704

# Board of Adjustment General/Parking Variance Application

The following information provides a summary of the Board of Adjustment variance process. This is not intended to be a complete or exhaustive guide in assisting you through this process.

## Variance Requirements

- A. A variance may be granted if, because of special circumstances of a property, the strict application of the City of Austin Land Development Code regulations deprives the property owner of privileges that are enjoyed by another person who owns property in the area that has the same zoning designation as the property for which the variance is requested.
- B. A variance to a regulation may not grant special privileges that are inconsistent with the limitations on other properties in the area or in the district in which the property is located.

## Submittal Requirements

**All variances expire one year after approval date per City Code Section 25-1-217 unless Board decision states otherwise.**

Failure to complete the application or to submit all the required materials below will result in non-acceptance of the application, and it will not be added to the next Board agenda.

1. A completed application indicating all variances being requested. The application must include proposed findings that will support requested variances. The required findings must address each variance being sought.
  - Application must be typed
  - Application must be signed and dated by owner and agent
2. A site plan or survey drawn to scale indicating present and proposed construction and location and use of structures on adjacent lots.
3. If property is located in Williamson County, then contact Williamson County Appraisal District for an electronic spreadsheet list of the property owners' names and addresses within a 500-foot radius.
4. Check made payable to the City of Austin for the Board of Adjustment application fee.
  - See Board of Adjustment fees at: <http://www.austintexas.gov/department/fees>
5. Other Information — Although the following is not a requirement of submittal you may wish to include additional information that may assist the Board in making an informed decision regarding your request such as: photos of the site or visual aids to support the request, letters from the neighborhood association(s), signatures of support from neighbors, tree and topography information, cover letter explaining extenuating circumstances, elevations of the proposed

structure, floorplans of the proposed structure, etc. Any additional information you wish to submit must be in our office two weeks prior to the meeting. The Board will receive an 8-1/2" x 11" black and white copied packet with all information that has been submitted on the Thursday prior to the meeting. If you would like the Board to see any of your evidence in either full color or large format, provide 15 sets of the information to our office two weeks prior to the meeting.

— Please consider contacting your Neighborhood Association about your request

6. Austin Energy approval as noted below:

— The Austin Electric Utility Department (Austin Energy) enforces electric easements and the setback requirements set forth in the Austin Utility Code, Electric Criteria Manual, and National Electric Safety Code. The Board of Adjustment considers variance to the City of Austin Land Development Code, and a variance granted by the Board does not waive the requirements enforced by Austin Energy. Prior to your variance hearing, you must receive approval from Austin Energy by contacting Eben Kellogg at (512) 322-6050 or email [eben.kellogg@austinenergy.com](mailto:eben.kellogg@austinenergy.com).

Variances approved by the Board are limited to and conditioned upon the plans and specifications presented by the applicants, except as modified by the Board.

Please be advised that the Board only reviews 16 new cases a month, therefore, applications will be accepted on a first come, first served basis. In addition, a request for reconsideration must be filed within 10 days from the Board meeting.

Board of Adjustment staff

City of Austin – Development Assistance Center  
505 Barton Springs Road  
Austin, Texas 78704  
Phone: (512) 978-4000; Fax: (512) 974-6305

Mailing Address

P. O. Box 1088  
Austin, Texas 78767-1088

## Required Findings

All variance findings must be met in order for the Board to grant a variance. An application must include proposed findings that will support the requested variance. Incomplete applications will not be accepted.

### Reasonable Use

Application must demonstrate to the Board how the zoning regulations applicable to the property do not allow for a reasonable use of the property. (Note: The Board cannot approve a variance for a use that is not allowed in the zoning district in which the property is located. This requires a change in zoning.)

### Hardship

- a) Application must demonstrate to the Board how the hardship for which the variance is requested is unique to the property. Hardship should be specific to the property for which the variance is being requested (for example, topography, lot configuration, or any physical constraint that would limit the placement of the structure or prevent compliance with required site development regulations, etc.). A strictly financial or personal reason is not a valid hardship.

- b) Application must demonstrate to the Board why the hardship is not general to the area in which the property is located. Describe how the hardship relating to the site is different from other properties in the area.

## **Area Character**

Application must demonstrate to the Board how the variance will not alter the character of the area adjacent to the property, will not impair the use of adjacent conforming property, and will not impair the purpose of the zoning regulations of the zoning district in which the property is located.

## **Parking**

Parking variances **require additional findings** to be made. The additional findings are listed on the application and must also be completed for submittal of the application.





## Development Services Department

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505 Barton Springs Road, Austin, Texas 78704

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This application is a fillable PDF that can be completed electronically. To ensure your information is saved, [click here to Save](#) the form to your computer, then open your copy and continue.

The Tab key may be used to navigate to each field; Shift + Tab moves to the previous field. The Enter key activates links, emails, and buttons. Use the Up & Down Arrow keys to scroll through drop-down lists and check boxes, and hit Enter to make a selection.

The application must be complete and accurate prior to submittal. ***If more space is required, please complete Section 6 as needed.*** All information is required (if applicable).

### For Office Use Only

Case # _____	ROW # _____	Tax # _____
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### Section 1: Applicant Statement

Street Address: \_\_\_\_\_

Subdivision Legal Description:

\_\_\_\_\_  
\_\_\_\_\_

Lot(s): \_\_\_\_\_ Block(s): \_\_\_\_\_

Outlot: \_\_\_\_\_ Division: \_\_\_\_\_

Zoning District: \_\_\_\_\_

I/We \_\_\_\_\_ on behalf of myself/ourselves as  
authorized agent for \_\_\_\_\_ affirm that on

Month \_\_\_\_\_, Day \_\_\_\_\_, Year \_\_\_\_\_, hereby apply for a hearing before the

Board of Adjustment for consideration to (select appropriate option below):

☐ Erect ☐ Attach ☐ Complete ☐ Remodel ☐ Maintain ☐ Other: \_\_\_\_\_

Type of Structure: \_\_\_\_\_

Portion of the City of Austin Land Development Code applicant is seeking a variance from:

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## Section 2: Variance Findings

The Board must determine the existence of, sufficiency of, and weight of evidence supporting the findings described below. Therefore, you must complete each of the applicable Findings Statements as part of your application. Failure to do so may result in your application being rejected as incomplete. Please attach any additional supporting documents.

**NOTE: The Board cannot grant a variance that would provide the applicant with a special privilege not enjoyed by others similarly situated or potentially similarly situated.**

I contend that my entitlement to the requested variance is based on the following findings:

### Reasonable Use

The zoning regulations applicable to the property do not allow for a reasonable use because:

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### Hardship

a) The hardship for which the variance is requested is unique to the property in that:

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b) The hardship is not general to the area in which the property is located because:

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**Area Character**

The variance will not alter the character of the area adjacent to the property, will not impair the use of adjacent conforming property, and will not impair the purpose of the regulations of the zoning district in which the property is located because:

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**Parking** (additional criteria for parking variances only)

Request for a parking variance requires the Board to make additional findings. The Board may grant a variance to a regulation prescribed in the City of Austin Land Development Code Chapter 25-6, Appendix A with respect to the number of off-street parking spaces or loading facilities required if it makes findings of fact that the following additional circumstances also apply:

1. Neither present nor anticipated future traffic volumes generated by the use of the site or the uses of sites in the vicinity reasonably require strict or literal interpretation and enforcement of the specific regulation because:

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2. The granting of this variance will not result in the parking or loading of vehicles on public streets in such a manner as to interfere with the free flow of traffic of the streets because:

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3. The granting of this variance will not create a safety hazard or any other condition inconsistent with the objectives of this Ordinance because:

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4. The variance will run with the use or uses to which it pertains and shall not run with the site because:

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## Section 3: Applicant Certificate

I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Applicant Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Applicant Name (typed or printed): \_\_\_\_\_

Applicant Mailing Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone (will be public information): \_\_\_\_\_

Email (optional – will be public information): \_\_\_\_\_

## Section 4: Owner Certificate

I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Owner Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Owner Name (typed or printed): \_\_\_\_\_

Owner Mailing Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone (will be public information): \_\_\_\_\_

Email (optional – will be public information): \_\_\_\_\_

## Section 5: Agent Information

Agent Name: \_\_\_\_\_

Agent Mailing Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone (will be public information): \_\_\_\_\_

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Applicant Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Applicant Name (typed or printed): \_\_\_\_\_

Applicant Mailing Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone (will be public information): \_\_\_\_\_

Email (optional – will be public information): \_\_\_\_\_

## Section 4: Owner Certificate

I affirm that my statements contained in the complete application are true and correct to the best of my knowledge and belief.

Owner Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Owner Name (typed or printed): \_\_\_\_\_

Owner Mailing Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone (will be public information): \_\_\_\_\_

Email (optional – will be public information): \_\_\_\_\_

## Section 5: Agent Information

Agent Name: \_\_\_\_\_

Agent Mailing Address: \_\_\_\_\_

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# **A COMMUNITY GUIDE TO THE CITY OF AUSTIN'S BOARD OF ADJUSTMENT: Practical Tips for Zoning Variances, Special Exceptions and Administrative Appeals**

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Approved by the Board of Adjustment, on April 13, 2015, and prepared in collaboration with the City Law Department and Development Services Department.

**Boardmembers:**

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Melissa Hawthorne, Vice Chair  
Michael Von Ohlen  
Vincent Harding  
Sallie Burchett  
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## INTRODUCTION

This guidebook explains the purpose and function of the Board of Adjustment in the context of the City of Austin's regulations for the use and development of land. It seeks to provide practical information on how to request a variance, special exception, or an appeal, while also conveying a broader understanding of the purpose behind the City's regulations.

Zoning ordinances are laws, so this guidebook necessarily covers some basic legal information. However, it is not intended as legal advice and should not be relied on as such. In the event of a conflict with the City's Land Development Code or other applicable law, the code or other law supersedes this guidebook.

## ZONING IN AUSTIN: A BRIEF HISTORY

The Board of Adjustment derives its legal authority from both the City of Austin's Land Development Code and Chapter 211 of the Texas Local Government Code. Its purpose is to help administer and interpret zoning ordinances adopted by the City Council. To understand the Board's role, it's important to understand what zoning is and the purpose it serves in regulating land use and development in Austin.

In broad terms, zoning implements a community's vision for the use and development of land. As such, zoning seeks to balance competing goals and values, such as providing parks and open space, ensuring adequate infrastructure, and controlling traffic, along with the protection of private property rights and achieving the goals of the City's comprehensive plan.

Historically, communities across the country have used zoning to serve two main functions. First, traditional zoning establishes geographic "districts" that group compatible land uses together and prohibit incompatible uses, such as residential and industrial, from occurring adjacent to each other. Second, zoning regulates the physical characteristics of development by restricting things like building height, setbacks from a property line, density, impervious cover, floor-to-area

ratio, and other aspects of development. These restrictions are generally referred to as “site development standards.”

The first zoning ordinance in the United States was adopted by New York City in 1916, primarily to limit the construction of large skyscrapers adjacent to residential neighborhoods. Cities across the nation followed New York’s lead, adopting their own zoning ordinances tailored to address local circumstances. The City of Austin adopted its first zoning ordinance in 1931, with several rewrites occurring in the following decades.

Today, while the City’s regulations retain many aspects of traditional zoning, they have evolved in response to new challenges posed by sky-rocketing growth and the broader range of planning goals defined in the *Imagine Austin Comprehensive Plan*. The comprehensive plan, adopted by the City Council in 2013, serves as the policy guide for city regulations and emphasizes the importance of efficient transportation, environmental protection, household affordability, and the preservation of neighborhood character. *Imagine Austin* also incorporates more detailed subarea plans, including approximately 53 separately adopted neighborhood plans, station area plans, and corridor regulating plans, which set forth more detailed goals and policies for particular areas.

A detailed understanding of the City’s zoning regulations is not necessary for everyone using this guide. In many cases, an explanation from staff as to what’s required will be sufficient for anyone wishing to understand the rules that apply to a particular property. For those who need or desire more information, however, Appendix E summarizes some of the most common types of zoning regulations.

## **THE BOARD OF ADJUSTMENT: PURPOSE & FUNCTIONS**

The Board of Adjustment, established by the City in the 1940s, is one of two bodies authorized under state law to provide community residents with a meaningful role in the regulatory process. Composed of 11 members appointed by the Mayor and City Council, the Board is



charged with considering requests to relax the strict application of development regulations to particular properties. Additionally, the Board is authorized to hear appeals of administrative decisions by city staff in enforcing and interpreting zoning regulations.

The Board of Adjustment is a “sovereign board,” which means that it makes final decisions on behalf of the City for those matters within its legal authority. A party aggrieved by the Board’s decision, whether a citizen or a city department, can appeal the Board’s decision to District Court in accordance with requirements of state law. The city council may not overturn a decision by the Board.

The Land Use Commission, which is divided into the Planning Commission and the Zoning & Platting Commission, is the other citizen board established to assist in the zoning process. Unlike the Board of Adjustment, the Commission functions in an advisory capacity on zoning matters by providing recommendations to the City Council on proposed rezones and regulatory amendments. The Commission consists of 13 members, one for each council office, and four ex officio members as established by city charter.

## **RULES & GUIDELINES FOR VARIANCES, SPECIAL EXCEPTIONS, AND APPEALS**

To make a request to the Board of Adjustment, the landowner or the landowner’s agent must file an application with city staff and then present his or her case to the Board at one of its regularly held public meetings or, in exceptional cases, at a special-called meeting. This section summarizes the specific applications that can be filed and the rules governing how the Board reviews an application. Copies of each application can be found in Appendices B-D.

### **A. Zoning Variances**

The most common type of application is a request for a zoning variance to reduce a numeric regulation, such as a yard setback or limit on impervious cover. The “Guidelines for Zoning Variances,” which appear on the following page, provide a useful summary of the criteria the Board uses in considering a variance and practical tips for presenting a variance case to the Board.

### *Guidelines for Zoning Variances*

To get a variance, your property must have special characteristics that make it extremely hard to comply with a regulation without giving up a privilege enjoyed by similar properties in your area.



#### **Here's what you have to prove:**

- (a) A hardship that's unique to the property and not common to the area. Self-created or financial hardships are not enough, nor are personal circumstances, design preferences, or desire for additional space. **Focus on the property, not the people.**
- (b) The regulation deprives your property of a "reasonable use" that's fundamental to its use & enjoyment and is allowed by zoning ordinance. Simply wanting to make your property more valuable is not sufficient for a variance.
- (c) Granting the variance would not change the character of your neighborhood, impair the use of adjacent property, or impair the purpose of the regulations. To satisfy these findings, proposed construction must be consistent with surrounding development in appearance and intensity.

#### **Here's what you need to do:**

- ✓ Be prepared to explain what you're planning to build and why it requires a variance. Ask for the smallest variance needed to achieve your objective.
- ✓ A picture is often worth more than a 1000 words, so using scaled drawings and photographs is strongly encouraged.
- ✓ Reach out to your neighbors. Let them know what you're trying to do and work with them, as best you can, to address any reasonable concerns.
- ✓ Offer conditions that will lessen the impact of your variance.

## **1. *When Is A Variance Required? The Importance of Considering Alternate Designs***

The most common function of the Board of Adjustment is to consider requests for a variance from a site development regulation, such as a restriction on building height, setbacks, impervious cover, floor-to-area ratio, or any zoning regulation imposed under City Code Chapter 25-2 (*Zoning*). A variance relaxes the regulation by a specified amount; for example, increasing a height limit from 100 to 125 feet or a setback restriction from 20 to 15 feet from a property line. However, the Board cannot grant a variance to allow a use that is not permitted.

When a building permit or site plan application is submitted to city staff, they review it for compliance with the regulations in the Land Development Code and, in some cases, separate requirements of a neighborhood plan, small area plan, or regulating plan. During the review process, staff will notify a permit applicant if changes to the building plans are required in order to comply with applicable regulations. Staff cannot approve a permit or site plan that fails to comply with applicable regulations.

If an applicant believes that full compliance is impossible or unreasonable due to unique features of the property, he or she may seek a variance from the Board of Adjustment. The Board may approve a variance as requested by the applicant, deny the variance, or approve the variance with conditions it considers necessary to mitigate the impacts of development allowed by the variance. The Board's decision is final, unless appealed to district court in accordance with Chapter 211 of the Local Government Code.

A copy of the City's variance application is included in Appendix B. Please refer to "Guidelines for Zoning Variances" on the preceding page for general tips and the discussion below for more detailed information on how the process works.

## **2. *Basic Requirements for Obtaining a Variance.***

Before seeking a variance, an applicant should evaluate the feasibility of potential design changes that would bring a project into

compliance with city regulations and thus avoid the need for a variance. Those changes may require reducing square footage, moving new construction further away from a property line, or reducing the amount of impervious cover. If an applicant decides to seek a variance, he or she should be prepared to provide evidence to show what design changes were considered and why they were determined to be infeasible.

The Board of Adjustment may only approve a variance by a “super-majority” vote of at least nine out of 11 members. To grant a variance, the Board must find that the request meets the three specific criteria described below. An applicant should carefully consider these criteria, which are called “findings,” when deciding whether or not to request a variance. If an applicant chooses to request a variance, he or she should make sure to address these findings in the variance application and supporting materials, as well as when presenting the case to the Board.

**(a) Hardship: Focus on Property, Not People**

To grant a variance, the Board must find that strict application of a zoning regulation would create a “hardship” that is “unique to the property and not generally characteristic of the area in which the property is located.” There is no clear-cut, universal definition of what constitutes a “hardship”; each case will vary according to the type of property involved and the nature of the variance requested.

That said, the following guidelines are based on decisions of the Texas courts and the Board’s experience over the years. ***In general, these are the factors the Board considers in determining whether a “hardship” exists:***

- ✓ A hardship cannot be personal, but must be based on unique physical features of the property for which the variance is sought.
- Courts have held that: “[A] hardship must not be self-imposed, nor financial only, and must relate to the very property for which a variance is sought, i.e. a condition unique, oppressive, and not common to other property.”

- Common examples of hardship include lots with steep slopes, topographical restraints, unusually small lot area, or irregular lot shapes. Trees may constitute a hardship, if they are required to be preserved or if an applicant wants to preserve them.
- Personal circumstances, such as financial difficulties or troubles with neighbors, cannot be the sole basis for finding a hardship. An applicant may mention such factors, but should focus primarily on characteristics of the property itself.
- ✓ A hardship cannot be self-created.
  - An applicant for a permit or site plan cannot claim a hardship based on conditions that he or she is responsible for creating.
  - For example, if a structure is designed in a manner that fails to comply with regulations, the structure's non-compliance isn't a hardship. Or, if a landowner subdivides a lot into irregular pieces, he or she can't rely on their irregular shape to prove a hardship.
- ✓ A hardship must be unique to the property, not general to the area where it's located.
  - If steep slopes or small lots are common to a particular area, then neither condition is sufficiently unique to constitute a hardship by itself.
  - If a lot is entitled under city code to "small lot amnesty," which automatically relaxes certain development regulations for small lots, then lot size alone should not be relied on as evidence of a hardship. Small lot amnesty was approved with the understanding that, with the exception of minimum lot area, development would meet other site development regulations.
  - The City's regulations alone cannot be the hardship. For example, an applicant cannot request a height variance and

claim that the restrictions on building height constitute a hardship. The applicant must focus on unique features of his or her property.

**(b) Reasonable Use: Not “Highest & Best” Use**

To grant a variance, the Board of Adjustment must also find that the regulation “does not allow for a reasonable use of property.” As with hardship, there is no clear-cut answer to what constitutes reasonable use. However, the following guidelines are helpful:

- ✓ A property is not left with no reasonable use just because a regulation limits the size or design of a structure or increases development costs.
- ✓ A property does not need to be left completely undevelopable in order for the Board to find that a regulation does not allow for a reasonable use.
  - Depriving a residential lot of amenities commonly associated with a residence may constitute a lack of reasonable use. However, as with all variances, there must be a hardship related to physical features of the property such that there is no feasible alternative to accommodate the amenity without a variance. And if an amenity requires increasing utilization of the site, reducing the size and scale of the development should also be considered as a tradeoff for the amenity.
  - In general, the fact that a regulation reduces the potential profitability of an otherwise developable commercial or residential property does not constitute a lack of reasonable use.

**(c) Area Character & Purpose of Regulations**

In addition to the “hardship” and “no reasonable use” findings discussed above, the Board of Adjustment cannot grant a variance unless it finds that development under the variance would not:



- alter the character of the area adjacent to the property;
- impair the use of adjacent property that conforms with City regulations; or
- impair the purposes of the applicable zoning regulations.

These criteria require the Board of Adjustment to consider the potential impacts of granting a variance on the surrounding area. An applicant should be able to show the Board that the variance will not significantly affect neighborhood character or harm adjacent properties. This can be done most effectively by photographs of the surrounding area, as well as letters or testimony from neighbors and, if possible, from the neighborhood association or neighborhood plan contact team.

While there are no hard and fast rules, many factors may result in altering area character. For example, increasing traffic to adjacent streets, reducing tree canopy, or diminishing privacy to adjacent properties could have the effect of altering area character. Development that exceeds the size and scale typical of properties in the vicinity may also alter area character.

An applicant should also be able to explain, in general terms, how the variance will not significantly impair the purpose of the regulation. For example, a residential setback restriction is intended to protect privacy, provide for open space, and avoid the aesthetic and safety concerns associated with over-crowding. An applicant requesting a setback variance, therefore, should be able to explain how decreasing the setback will not undermine those objectives. Appendix E summarizes the goals behind several important city regulations.

### **3. *Special Types of Variances.***

The requirements discussed above apply to all variances considered by the Board of Adjustment, and in many cases those are the only requirements that must be met to obtain a variance. Each of the variances discussed below, however, has additional requirements or considerations.

**(a) Parking Variances**

In order to grant a variance from a minimum parking or loading facility requirement, the Board must find that it meets all of the general findings discussed above—i.e., *hardship, reasonable use, area character*—in addition to the following special findings:

- current or anticipated traffic volume generated by the use of the property or a nearby property does not reasonably require strict compliance with and enforcement of the requirement;
- development under the variance will not result in parking or loading on public streets that interferes with the free flow of traffic on the streets; and
- development under the variance will not create a safety hazard or any other condition that is inconsistent with the objectives of the Code.

In applying these criteria, the Board may consider street width and the availability of on-street parking in determining impacts on traffic.

**(b) Sign Variances**

The Board may grant a variance from the structural requirements for signs adopted in City Code Chapter 25-10, which restrict the number of signs allowed on a property, as well as the height, size, location, and lighting of signs. Because these requirements are not traditional zoning regulations, approval of a variance from sign regulations only requires a “simple majority” vote of six members as opposed to 11 members as required for a variance from zoning regulations.

The Board may grant a sign variance only if it finds that:

- the variance is necessary because the requirement prevents any reasonable opportunity to provide adequate signs on the site, considering the unique features of a site including its dimensions, landscaping, or topography;



- granting the variance will not have a substantially adverse effect on neighboring properties; or
- granting the variance will not substantially conflict with the purposes of the sign regulations.

**(c) Existing Construction: Asking Forgiveness, Rather Than Permission**

The best time to ask for a variance is during the development review process, before starting construction. An applicant who builds first, without obtaining a building permit or variance, runs the risk of having to tear down or modify a structure in the event that a variance is later denied. Building permits are sometimes issued in error; responsibility for building in compliance with city regulations rests ultimately with the landowner and his or her consultants and contractors. Staff error in issuing a permit should not be relied on as the sole basis for requesting a variance.

The Board of Adjustment considers a variance request under the same criteria, regardless of whether the structure has already been built or not. For this reason, an applicant seeking a variance for existing construction must meet the legal requirements discussed at pages 7-12, just like any other zoning variance.


In many cases, however, applicants in this situation may want to emphasize the reasons that construction occurred without a variance. (Errors by contractors during construction, or by city staff during the review process, are common examples). Members of the Board understand the significance of these considerations for applicants and are not unsympathetic to landowners who genuinely tried to follow the rules. However, personal circumstances can never be the basis for obtaining a variance, so an applicant should focus primarily on the characteristics of the property and the legal requirements for obtaining a variance.

## **B. SPECIAL EXCEPTIONS**

Texas law allows cities to authorize a board of adjustment to grant “special exceptions” from a zoning ordinance. Unlike a standard zoning

variance, the criteria for a special exception can be tailored to address different kinds of situation and don't necessarily require a showing of "hardship."

In 2011, the City of Austin adopted a special exception process designed to address minor setback violations that have existed for long periods of time without incident, but which might not meet the criteria required for a traditional zoning variance. The guidelines below summarize the requirements for obtaining a special exception and are followed by a more thorough explanation on the next page.

<p><i>Guidelines for Special Exceptions</i></p> <p>To get a special exception from a setback requirement, the violation must have existed for at least 25 years or, if you apply before June 6, 2014, then only 15 years.</p>	
<p>To get a special exception:</p> <ul style="list-style-type: none"> <li>✓ The city Building Official must find that the violation is not a threat to public safety.</li> <li>✓ The Board of Adjustment must find that: <ul style="list-style-type: none"> <li>○ the use is allowed in an SF-3 or more restrictive zoning district;</li> <li>○ the structure either has a permit, or is legally nonconforming, and doesn't share a lot with more than one other primary residence; and</li> <li>○ granting the exception would not alter the character of the area, impair the use of adjacent property, or grant a special privilege inconsistent with other properties in the area.</li> </ul> </li> </ul>	

## ***1. Different than a Variance: No Hardship Required***

The Land Development Code, specifically City Code § 25-2-476, authorizes the Board of Adjustment to grant “special exceptions” for minor setback violations that have existed for ten years or more without objection if the violation does not threaten public safety or create a hazard particular to the property or adjacent properties.

To obtain a special exception, an applicant needs to show that the requirements listed in the Guidelines (above) have been met. The key difference between a special exception and a zoning variance is that, unlike a variance, a special exception does not require proof of hardship or lack of reasonable use.

## ***2. Health & Safety Inspection***

The purpose of a health and safety inspection is to determine whether granting the special exception would adversely impact public safety by, for example, obstructing access to a property by the fire department or creating unsafe conditions on adjacent properties. When applying for a special exception, an applicant should work with staff to schedule a safety inspection of the property in advance of the hearing and pay the required fee. The Board of Adjustment cannot grant a special exception unless the structure and the premises pass the inspection.

## **C. APPEALS**

The Board of Adjustment has the authority to consider appeals of decisions by city departments regarding the interpretation of zoning ordinances. While a variance or special exception grants relief from the strict application of a zoning ordinance, an appeal provides a means to challenge how city staff interprets and applies particular zoning regulations. Granting an appeal has the effect of over-turning city staff and, like a variance, it must receive a “super-majority” vote of at least nine BOA members in order to pass.

It’s important to remember that neither city staff nor the Board of Adjustment can re-write the Land Development Code, even if they see

flaws in how it's written. If the code supports the department's determination, the Board of Adjustment will not over-turn the decision even if members of the Board don't like the result. Only the City Council, through the code amendment process, can change the code itself.

An appeal has a greater potential to impact city operations than a variance, because some of the issues that come to the Board on appeal are ones that affect how the code is applied to projects across the City. Unless an applicant or an interested party understands the nuances of how city regulations are written, he or she would be well advised to seek legal counsel before appealing an administrative decision. Appealing a decision by staff is only appropriate where the code seems to be ambiguous or appears to have been miss-applied.

Only an applicant for a permit or an "interested party" has the right to appeal an administrative decision. Depending on the circumstances, interested parties may include residents affected by nearby development or representatives of neighborhood associations or neighborhood plan contact teams. The Land Development Code, specifically City Code § 25-1-131, lists the requirements which must be met to be considered an interested party.

Following is an explanation of the different types of appeals that can be filed with the Board of Adjustment. The Land Development Code contains additional information on appeals as well. An appeal cannot be placed on the Board's agenda if it lacks the required information or is not filed within 20-days of the staff decision, as required by City Code § 25-1-182.

### ***1. Code Interpretations***

When city staff reviews a permit application, they often have to exercise professional judgment regarding the meaning and intent of particular regulations. If an applicant or an interested party believes that a regulation has been misinterpreted, he or she can appeal the determination to the Board of Adjustment within 20-days of a staff decision.

The Land Development Code acknowledges the Board's authority to hear interpretation appeals in Section 25-2-475, but does not address several questions regarding the process for appealing a determination. Here are a few general rules of thumb:

***Non-Project Appeals:***

- If an applicant or interested party has questions about how staff is applying a regulation overall, they can request a general code interpretation regarding the meaning of the regulation and how it applies to particular situations. Staff will then provide a written determination of the code, which can be appealed within 20-days to the Board of Adjustment.
- If a general code interpretation is appealed to the Board, and the Board votes to overturn the interpretation, the decision will impact how staff applies that regulation to future permit applications. However, it will not affect permits that have already been issued.

***Project Appeals:***

- An interpretation appeal associated with a building permit or site plan must be filed within 20-days from the date that the permit or site plan is issued. Since public notice is not provided for building permits, residents as well as neighborhood associations and contact teams should monitor the City website for information on issuance of building permits.
- An applicant may also challenge interpretations made during "plan review" by filing an appeal within 20 days after staff receiving staff comments on the project.

***Enforcement Appeals:***

- If a landowner or tenant has received a decision from staff finding that his or her property is out of compliance with a zoning regulation, he or she may appeal within 20 days of receiving the first notification of the violation.

- Examples of enforcement decisions include a “notice of violation” or an administrative order suspending or revoking a permit.
- The 20-day clock does not start over when subsequent notices for the same violation are received. So, a landowner who disagrees with staff’s decision that a violation exists must appeal within 20-days of receiving the first written decision from staff that a violation exists.

***General Requirements & Pointers:***

- An interpretation appeal may only be filed for site development regulations that are codified in the City’s zoning code, which is at Chapter 25-2 of the Land Development Code, or in a separately adopted zoning ordinance such as a Neighborhood Conservation Combining District or small area regulating plan. The Board may not consider appeals involving environmental regulations or building codes.
- In presenting an appeal to the Board, an applicant or interested party should:
  - Explain why he or she believes staff misinterpreted the code as it is currently written. This requires carefully reading the code provisions in question and understanding how they work with the context of the Land Development Code.
  - Suggest an alternate interpretation and explain why he or she believes it is more consistent with the code

## ***2. Use Determinations***

The Land Development Code defines various categories of residential, commercial, and civic uses. Some of these definitions are self-explanatory: a traditional house, for example, is “Single-Family Residential” and an auto-dealership is “Automobile Sales.” In some cases, though, a land use may not fit neatly into one particular category or it may have similarities to two or more different use categories.

If a proposed land use is not clearly defined, staff has to decide which category is the best fit based on the similarities of the proposed use to the more clearly defined uses. How such uses get classified is an important decision, since it will impact whether the use is allowed, prohibited, or “conditional” within a particular zoning district. (A “conditional use” is one that requires discretionary review by the Planning Commission, or the Zoning & Platting Commission, in order to be approved).

The permit applicant or interested party should consult staff, and read City Code § 25-1-197 (*Use Determinations*), for the requirements on challenging a use determination. Following are a few pointers to keep in mind:

- Whether you’re an applicant or a neighbor, the first step is to formally request a use determination. This triggers a more thorough review by staff and will result in a formal written determination that can then be appealed to the Board of Adjustment.
- A “project-level determination” is where either an applicant or an interested party (usually a neighbor) is challenging a determination that’s related to a particular development. Once a determination is made by staff, an appeal must be filed within 20 days or it will be rejected.
- If you’re concerned about a broad category of projects, and are not trying to challenge a particular permit, then you can request a “non-project determination.” A non-project determination may be requested at any time and provides a better vehicle for looking at overall issues of how the code is being applied.

Once you receive a use determination from the department, consider it carefully before deciding whether to appeal. If you do appeal, be prepared to explain to the Board as specifically as possible why you believe the department is wrong—i.e., why doesn’t the proposed land use fit within the particular category identified by staff?



Before the Board can overturn the department, they will need to conclude that the proposed use has greater similarities to another defined land use than the one identified by staff. Overturning a staff interpretation requires a “super-majority” vote of the Board (i.e., at least nine out of 11 members).

### ***3. Non-Conforming Uses & Non-Complying Structures***

Existing land uses that were begun legally, under the code in effect at that time, are generally allowed to continue operating, even if they could no longer be permitted today. Such uses fit into one or both of the following categories:

- A non-conforming use is one that was permitted under the rules in place when it began, but could no longer be allowed under current use regulations in place for the applicable zoning district. An auto body repair shop in a residential neighborhood, for example, that began before the area was subsequently zoned “Single Family.”
- A non-complying structure is one that doesn’t meet current site development regulations, such as setbacks or impervious cover limitations, but did comply with the code in effect at the time it was built.

The rules for what a landowner can do with a non-conforming use or a non-complying structure are set forth in Sections 25-2-941 and 25-2-963, respectively. These and other sections of the Land Development Code describe in detail the requirements for continuing to operate a non-conforming use or non-complying structure, including limited allowances for alterations and maintenance. A landowner who fails to comply with these requirements may be required to bring his or her property into full compliance with current regulations.

If a landowner or other interested party disagrees with staff’s determination regarding the non-conforming or non-complying status of a property, he or she may appeal the decision to the Board of Adjustment. As with an interpretation appeal, the 20-day clock for filing



an appeal starts to run with the first written communication from staff regarding the determination.

Staff determines a property's non-conforming or non-complying status are dependent on the facts of each case—for example, when did the use begin, what did the rules allow at that time, and how significantly has the use or structure been altered? In appealing staff's determination, an applicant or interested party should be able to provide evidence backing up his or her position on all of the relevant factors considered by staff in making their determination.

## **PREPARING & PRESENTING YOUR CASE**

The main thing to remember is to be prepared and to be respectful to other parties and to members of the Board. Following are a few examples of things you can do ahead of time to maximize the chances of a smooth, orderly hearing on your case and a timely decision by the Board.

### **A. OBTAINING NECESSARY INSPECTIONS & SIGN-OFFS**

The Board will generally not consider a case involving construction which impacts an Austin Energy or other public utility easement unless the utility has agreed in writing that it does not object to the variance. Work with the Board's staff liaison who can direct you to the appropriate department to obtain the necessary approvals before your case is heard.

Likewise, if you are requesting a special exception or a variance for an existing structure, the Board needs to have a determination by staff that structure is safe and does not pose a threat to "life, health, or public safety." Work with staff to obtain any required inspections before your case is heard.

### **B. CONSULTING YOUR NEIGHBORS**

If you're requesting a variance or a special exception, reach-out to your neighbors, neighborhood association, and neighborhood contact

team to discuss what you plan to do—ideally before filing an application, but definitely before your hearing. Residents within 500-feet of your property, as well as registered neighborhood associations and contact teams, will obtain notice from the City of your application regardless of whether you tell them or not, and it's usually better if they hear it directly from the applicant first.

If your neighbors do not object to what you'd like to do, ask if they'd be willing to sign or submit a short letter to that effect. A written letter is stronger evidence of neighborhood support than simply stating that you've obtained their support. While it doesn't guarantee approval, written support for a variance from those most likely to be affected goes a long way towards addressing compatibility with "area character," which is one of the findings the Board has to make in order to approve a variance.

In some cases, the Board will want to know whether you proactively sought to engage your neighbors, neighborhood association or neighborhood plan contact team. If possible, it's always best to present your proposal to the neighborhood association or contact team in writing and to make yourself available to answer questions. Meeting times for neighborhood associations and contact teams vary, so plan ahead and make sure to submit your request in plenty of time for the neighborhood association or contact to consider it before the Board considers your case.

### **C. PROPOSED FINDINGS**

As explained at pages 7-14, above, the Board of Adjustment has to make certain "findings" in order to legally approve a variance. When you submit an application, provide staff with an explanation as to how your request meets each of those findings. Likewise, in presenting to the Board, be sure to emphasize:

- (1) How physical features of your property constitute a hardship that makes strict compliance with the regulations impossible or extremely difficult;

- (2) Why your variance is necessary to obtain reasonable use of your property; and
- (3) The compatibility of what you'd like to do with surrounding development in your neighborhood.

In addition to standard restrictions on height, setbacks, and impervious cover, the City's zoning regulations also seek to ensure neighborhood compatibility, pedestrian-friendly streetscapes, and building scale that's appropriate to surrounding patterns of development. Similarly, while the City continues to limit uses to specific zoning districts, such as "Single-Family Residential" or "Commercial Services," current regulations make greater allowance for mixed-use development that allows people to shop and work near their homes.

#### **D. USE OF GRAPHICS & PICTURES**

The old adage "a picture is worth a thousand words" holds true for cases before the Board. Applicants are strongly encouraged to provide staff with scaled drawings and photographs to include in their supporting materials and to use them in their presentation to the Board.

Not every case requires an elaborate plan set or detailed architectural drawings. But in order to convince the Board that your case meets the findings required for a variance, you should be prepared to accurately depict the physical dimensions of your property, what you're proposing to build, and the general character of the surrounding area. If a case is more complex, or requests a larger variance, you should be prepared to provide more detailed information. Likewise, if you're relying on a tree or other natural feature as a "hardship," be prepared to provide pictures or a site survey substantiating it.

### **BOARD MEETINGS: RULES & PROTOCOLS**

The Board of Adjustment meets on the 2<sup>nd</sup> Monday of every month and occasionally holds special meetings to consider more complex cases. Applicants should work with staff to schedule their cases and should try to consult with surrounding neighbors, as well as the

neighborhood association or contact team, to make sure the hearing date works for anyone who is interested in the case.

The Board's meetings are governed by Rules of Procedure and Bylaws, which are available online at:

[Rules of Procedure](#) (rules for hearings and action on cases)

[Bylaws](#) (overall structure and operation)

It's important to be familiar with the general order of presentations and time limits, which are summarized in Appendix F. Additionally, all comments should be directed to the Board, and not to other parties. Be concise in your presentation, and once your time is up, do not speak unless members of the Board have questions for you. Be respectful and courteous, even if you disagree with statements made about your case.

## **RULES FOR CONTACTING THE BOARD**

Because the Board is a quasi-judicial body, applicants and interested parties cannot communicate with the Board or with individual members outside of a public meeting. All information intended for the Board should be provided to the Board's staff liaison to be included in the "backup" (i.e., supporting materials) that is posted on the Board's agenda.

The staff liaison, whose contact information is listed below, can also help you to schedule your case and work with plan reviewers to make sure that you're requesting the correct variances for your project:

### **Leane Heldenfels**

*Senior Planner*

Development Services Department

One Texas Center

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