

CITY OF TOPEKA PLANNING DEPARTMENT

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BOARD OF ZONING APPEALS APPLICATION PROCEDURE

I. BACKGROUND INFORMATION: There are three (3) types of actions that the Board of Zoning Appeals (BZA) may consider. These are:

- 1) Variances
- 2) Exceptions
- 3) Appeals

A. Variances – Variances are by far the most common form of application made to the BZA. A variance is a relaxation of a specific requirement of the zoning ordinance when conditions or circumstances warrant. A variance *IS NOT* an adjustment of a particular situation or circumstance. For example, an applicant for a building permit in a residential district finds that the 30-foot front yard setback requirement of the ordinance prevents the lot from being used for residential purposes. To avoid a stream running through the rear portion of the lot, it may be necessary to locate the house less than 30 feet from the street. In this case, the BZA may review the facts relating to the particular lot and modify the front-yard requirement without destroying the intent of the ordinance.

B. Exceptions – Less common are exceptions. An exception is an allowance of an otherwise prohibited use within a given zoning district. In order for an exception to be granted, it must be specifically stated within the zoning ordinance that such uses may be permitted by special exception. For example, if a particular business has been allowed to operate as a “legal non-conforming” business under the zoning codes’ “grandfather” clause, that business is prohibited from any form of expansion or major improvement to their business location. However, in very certain circumstances, the Board of Zoning Appeals may approve an exception to the prohibition against expanding a legal non-conforming land use. Exceptions are generally very rare, and are approved only after a thorough investigation and only under compelling extenuating circumstances.

There are only three (3) references to exceptions in the zoning code. These are:

- 1) 48-109(4) – Exception for manufactured homes.
- 2) 48-28.04 – Reconstruction, alteration or enlargement of a legal non-conforming land-use.
- 3) 48-34.11 – Another citation dealing with the reconstruction of a non-conforming building.

C. Appeals – Appeals are generally filed after the Topeka Zoning Administrators have filed a violation notice. If a property owner disagrees with the decision of a zoning administrator, their decision can be appealed to the BZA to nullify the violation notice. This differs from a variance in that an appeal reverses the decision of the zoning administrator. A variance permits a relaxation of the code as it pertains to a specific property before issuance of a building permit, or after a violation has been cited.

II. PRE-APPLICATION CONFERENCE: Prior to filing an application to the Board of Zoning Appeals (BZA), the applicant should request a pre-application conference with the planning staff. The purpose of the conference is to provide the applicant an opportunity to explain the general purpose of the appeal to be filed, the site conditions, and implications of existing regulations on the site. The conference also provides an opportunity for staff to explain to the applicant the application process, background on any regulations involved, development alternatives, and constraints applicable to the proposal.

The applicant should provide the following information at the pre-application conference:

- 1) Location of the property.
- 2) The present use of the site.
- 3) The use of adjacent properties.
- 4) A statement regarding the intended use of the site.

An application packet will be provided at this time.

III. APPLICATION: The applicant/owner must file an application for an appeal to the Board of Zoning Appeals. A scheduling index listing application deadlines is included in the application packet. The following information is required for submittal of an application:

- 1) The filing fee (\$130.00).
- 2) An official application.
- 3) Proof of ownership.
- 4) A scaled drawing of the property showing all improvements and the variance sought. (For applications for appeals, a site plan may or may not be required as determined by the Planning Department).

IV. PUBLICATION: The proposed variance, appeal, or exception must be published in the official newspaper at least twenty (20) days prior to the public hearing date. Publication will be arranged by the Planning Department.

V. WRITTEN NOTICES: Written notices will be mailed to all adjacent property owners at least twenty (20) days prior to the public hearing. Mailing will be arranged by the Planning Department.

VI. STAFF REVIEW: The planning Staff will examine the application with respect to the following factors a set forth by *Article XXXIV, Section 48-34-10* of the Comprehensive Zoning Regulations:

1. That the variance requested arises from such condition which is unique to the property in question and which is not ordinarily found in the same zone or district and is not created by an action of the property owner or applicant (The problem must relate to the land. Community needs or personal hardships do not qualify as legitimate grounds for issuing a variance.);
2. That the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or resident;
3. That the strict application of the provisions of this chapter of which variance is requested will constitute unnecessary hardship upon the property owner represented in the application;
4. That the variance desired will not adversely affect the public health, safety, morals, order, convenience, property, or general welfare; and
5. That granting the variance desired would not be opposed to the general spirit and intent of this chapter.

A copy of the staff report will be mailed to the applicant.

VII. PUBLIC HEARING: The Board of Zoning Appeals holds a public hearing to consider appeals on the second Monday of each month. At this time, the BZA acts in a quasi-judicial capacity, weigh the facts and conditions of each case, and makes findings and conclusions based on a variety of factors. Prior to hearing any testimony, committee members will disclose publicly any ex-parte contacts. A majority of voting members is required to approve an appeal.

VIII. FREQUENTLY ASKED QUESTIONS ABOUT THE BOARD OF ZONING APPEALS –

WHAT IS A BOARD OF ZONING APPEALS? – The board of zoning appeals is a quasi-judicial body established under state law to provide relief in special cases where the exact application of the terms of the zoning ordinance would be unduly restrictive and would cause a hardship. Its function is to hear and decide upon the interpretation and application of the provisions of the zoning ordinance in these cases. Although the board has certain discretionary powers in making its decisions, these powers have definite limits. The board must always abide by and comply with the powers granted to it by the local zoning ordinance and the state-enabling act.

WHY DOES THE BOARD OF ZONING APPEALS EXIST? – The primary function of the BZA is to vary the specific terms of the zoning ordinance so that practical development problems of the community may be met within the provisions of the ordinance. In effect, the board acts as a “safety valve”. A zoning ordinance cannot provide for all conceivable situations to which it must apply. Provisions must be made to balance the strict application of the ordinance. Without this body to decide on such matters, solutions to these development problems would have to be accomplished by amendments to the ordinance or through a lawsuit.

WHAT IS “UNDUE HARDSHIP” – There is no hard and fast definition of “hardship”. To gain an understanding of what constitutes an unnecessary hardship, first we need to understand what a hardship is not.

- A hardship *is not* a mere inconvenience to the applicant. There is no basis for granting a variance unless the zoning for a particular parcel presents special, or unique conditions that would prohibit or unreasonably restrict the use of the property;
- Loss or gain of monetary value *is not* a proper criterion for determining hardship;
- The inability to put the property to its most profitable use *does not* constitute a hardship.

There are, however, many circumstances that may constitute an undue hardship. For example:

- A hardship may be proven if the property cannot be used in a manner permitted by the zoning ordinance;
- A hardship may be proven if the property cannot be used for purposes to which it has been reasonably adapted (e.g., a pre-existing 18,000 sq. ft. lot in a residential district requiring a minimum 20,000 sq. ft. lot).
- The hardship must be unique to the property in question. If the condition of hardship is common to other properties in the immediate area, the governing body should consider a change in the zoning ordinance.
- The hardship must be created by strict application of the ordinance. If the hardship is self-imposed, caused by an action of the landowner, the applicant, or some other agent, relief by means of a variance may not be granted (e.g. and accessory structure placed on a lot so as to violate the yard requirements of the zoning ordinance).

The burden of proof of “undue hardship” rests upon the applicant, and without such proof, a variance must be denied. A variance issued for a lesser reason, or a simply because the board feels it is doing “justice” constitutes an invalid application of board authority. Therefore, it is essential to hear all the facts surrounding a case, and measure each case on its own merits.

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