

NONCONFORMITY IN CONDEMNATION: DAMAGES, GRANDFATHERING AND VARIANCES

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NONCONFORMITY IN CONDEMNATION: DAMAGES, GRANDFATHERING AND VARIANCES

The treatment of nonconforming projects caused by condemnation has perplexed and confounded many. When a previously conforming project becomes nonconforming, it is automatically placed in a different class from conforming projects. The legal rights which inure to a nonconforming project and its owner are often uncertain; dependent upon a variety of issues, including local practice, local ordinance, administrative interpretation, state law, state constitution, federal constitution and politics. The same fact situation may be treated differently by different local governments. Nonconformity, like most land use law, is a local issue decided at the municipal level. Texas counties have very few land use powers, thus, county involvement is virtually nonexistent. Additionally, state level regulation is rare, limited to a limited number of specific uses, such as serving alcohol, which have been determined to be most effectively regulated on a statewide basis. Much risk results from nonconforming status.

Outside condemnation, nonconformity is typically caused by a change in the local land use regulatory scheme:

- * new class of regulation
- * current regulations becoming more limiting
- * annexation of a property brings it into a current regulatory scheme.

In a condemnation setting, nonconformities are created by physical change to a property without a change in the regulatory scheme, eliminating one of the following requirements:

- setback
- open or pervious area
- access standards
- floor area ratio (FAR)
- parking.

Nonconforming status is an important elements of damages to the remainder. An effective condemnation advocate must understand the problems of nonconforming status. Local governments can reduce damages by clearly acknowledging the rights of nonconforming properties.

No landowner ever believes compensation by the condemning authority is adequate since Texas condemnation law simply does not recognize a full array of damages. Therefore, most land owners believe it just “isn’t fair” to require their building to be removed, or reduced in size to come into compliance with area based land use regulations (described above). Condemnation counsel must understand Texas land use law, particularly the concepts of vested rights (grandfathering) and variances to properly counsel a client on their rights and options. The risk of non-conformity should be considered in any valuation of the remainder. That risk will be determined by a careful review of the local land use regulations.

Post condemnation, a nonconformity may legally continue in existence either because it is given vested rights (i.e., “grandfathered”) or if it receives a variance. Vested rights are rights granted by common law or by ordinance/statute. Both situations are based on the principle that equity requires special dispensation be given to a project where the nonconformity is not due to the owner’s action, such as, a condemnation by a governmental authority, even if the violated land use regulation does not belong to the condemning authority. However, vested rights are subject to interpretation by a local government. If the local government denies vested rights, the land owner may seek judicial relief, including, but not limited to seeking a declaratory judgment.

If vested rights are denied, a variance is a statutory right granted by a Board of Adjustment (“BOA”) under the Texas Zoning Enabling Act to violate established land use regulations based upon non-financial hardship. TEX. LOC. GOV’T CODE ANN. § 211.009 (Vernon 2008). If a variance is denied, a special, limited statutory cause of action to challenge the denial by obtaining a writ of certiorari is available. TEX. LOC. GOV’T CODE ANN. § 211.011 (Vernon 2008).

This article covers damages due to a property being placed in nonconformity, and the application of either vested rights or variances post condemnation. The legal issues of nonconformity due to changed regulation or annexation into a zoned city are considered in detail in *Texas Municipal Zoning Law* (“TMZL”), Chapter 8, University of Houston Law Center Professor John Mixon’s treatise on Texas land use law, now updated by editor James L. Dougherty, Jr. (the author of this article is a contributing editor).

I. Vested Rights/Grandfathering

A. Nonconforming Use and Structures.

Nonconformities occur in two categories: use and structures. A nonconforming use is a use lawfully existing prior to the change in a zoning ordinance, which then prohibits that use where it is currently located. On the other hand, a nonconforming structure is a structure lawfully existing under prior land use regulations, but which could not be constructed new under current regulations. Condemnation should never create a nonconforming use, but only a nonconforming structure.

B. Constitutional Basis for Nonconforming Rights

The basic underpinning for vested rights for nonconforming structures is constitutional law, both U.S. and Texas Constitutions. Private property may not be taken under the U.S. and Texas Constitutions or damaged under the Texas Constitution without compensation. These are concepts well known to condemnation attorneys.

A physical taking occurs when the government requires a landowner to give the government a real property interest, whether in fee simple or an easement, for a public purpose. The value of the property interest taken is estimated and the land owner is compensated. This is the essence of condemnation law practice. In addition, if the taking has the result of damaging the remainder of the property retained by the owner, then additional compensation is due. As an

alternative to damages to the remainder property, the owner can recover the cost to cure the site deficiencies created by the taking. There are other damages permitted, and prohibited, which are outside the scope of this article. The general concept is that when the physical taking occurs, the landowner is entitled to a “whole” recovery. The “whole” recovery takes into consideration not only the value of the property interest taken, but the negative impact to the value of the remainder. Therefore, the impact of nonconforming status should also be considered in the calculation of damage to the remainder. The uncertainty of nonconforming status is a negative impact on value. Unless a landowner has been compensated for all damages in a condemnation, not just those recoverable under condemnation law, then that landowner has the equitable basis to assert either vested rights or to request a variance.

Taking of property can also occur through unreasonable regulation. This is the concept of a “regulatory taking,” otherwise known as “inverse condemnation.” The United States Supreme Court has identified “at least two discrete categories of regulatory action as compensable without case-specific inquiry.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). One is when a regulation compels the landowner to suffer a physical “invasion” of his property. *Id.* Second, is when a regulation eliminates all reasonable economically viable uses of a property. *Lucas*, 505 U.S. at 1015-16. To deprive an owner of all economically beneficial use of land is tantamount to depriving him of the land itself, and thus the regulation is virtually the same as a physical taking. Therefore, the regulating government must compensate the landowner for the full value of their property. An additional analysis to determine whether a regulation has gone “too far” and becomes a physical taking, thus requiring compensation under the constitution, involves a factor analysis commonly known as the Penn Central ad hoc analysis. Under the Penn Central ad hoc analysis, the Supreme Court established a three factor analysis to provide courts guidance on the effect of the regulation by balancing the interest of the public versus the private landowners: (1) Economic impact of the regulation; (2) Extent to which the regulation has interfered with distinct investment backed expectations; and (3) Character of government action. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). See TMZL Sections 10.200 (federal regulatory takings law) and 11.100 (state regulatory takings law).

Regulatory takings law is confusing and the cases sometimes show that the judges themselves are confused. However, it is clear that it takes a significant amount of regulation to constitute a taking. For example, the Texas Supreme Court held that a thirty percent (30%) diminution in value of property by an involuntary downzoning was not a taking. *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 677-79 (Tex. 2004). In *Sheffield*, the court upheld a significant downzoning, which dramatically reduced the density of permitted housing after a developer acquired property and conducted extensive due diligence in an effort to determine if downzoning was contemplated, which it was and the developer still lost. *Id.* Despite evidence of trickery by the city, the benefit to the public of protecting the city from adverse impact of new development was determined to be more important than the economic loss to the developer. *Id.* at 679. *Sheffield*, together with the earlier Texas Supreme Court decision in *Mayhew v. Town of Sunnyvale* (a refused upzoning case), makes it clear that the Texas Supreme Court will uphold significant increases in land use regulation despite dramatic negative economic consequences to landowners. *Id.* at 677-79; *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998). For example, land use regulations will be upheld if the regulation is related to the protection of a

rational public interest and can be shown to substantially advance that interest, notwithstanding whatever true intent may underlie the adoption of the regulation.

In addition, evidence of dislike for a specific developer, which may have contributed to the adoption of a stringent regulation, will not undermine the validity of a regulation, which on its face is reasonable and rational. *See Ballantyne v. Champion Builders*, 144 S.W.3d 417 (Tex. 2004). Further, the Texas Supreme Court has held that government officials are subject to a broad blanket of official immunity preventing personal liability for actions taken within the scope of their authority as a public official. *Id.* Government officials will be judged by an objective good faith standard not a subjective standard, which looks to the actual intent in the decision.

All of the foregoing illustrates that local governments have broad latitude to adopt regulations and implement them, so long as they have a reasonable, rational basis.

In the context of nonconforming projects caused by condemnation, it would be unreasonable and irrational for a local government to require a nonconforming project to be immediately brought into compliance or to be removed, where the property was compliant prior to the taking, unless the owner was fully compensated for its damages, not just the damages permitted under Texas condemnation law. Such draconian action would interfere with the reasonable investment expectations of the landowner. Investment-backed expectations are a concept in land use law which considers the equitable rights of a land owner who has made a rational, reasonable investment in property based on a rational, reasonable expectation that the property may be used for its intended purpose. *See Sheffield Dev. Co.*, 140 S.W.3d at 667. The investment-backed expectation is considered at the time of the investment and under the circumstances of the investment. For example, in *Mayhew*, the investment-backed expectation of the landowner was the right to use their ranch for agricultural purposes and the investment was the amount paid for that purpose. *See Mayhew*, 964 S.W.2d at 937. Moreover, Mayhew's investment-back expectation did not change even at a later time when the property could be redeveloped for typical residential subdivision and sold to a developer for that purpose at a very high price. Mayhew's initial investment expectation was still agricultural, only the circumstances had changed to permit alternative uses not contemplated upon original purchase.

In *Sheffield*, Sheffield was able to negotiate a very favorable price for the land he acquired, which set his investment-backed expectation at a relatively low level compared to the "value" he could have unlocked by developing his "bargain" land in accordance with the zoning in place at the time of the acquisition. The court determined that even at the reduced density after the downzoning, Sheffield could profitably sell the land to another developer or profitably develop the land himself. In a condemnation caused nonconformity case, the owner's investment expectation was set upon acquisition and might have been enhanced by later capital improvement.

At least one Texas city has denied vested rights if the land owner receives "compensation for demolition of improvements or for other curative measures". City of Irving, Texas Code of Ordinances Section 52-47a(b)(4). "The building official is authorized to revoke a certificate of

occupancy for any building or structure for which compensation has been paid to be demolished as part of a right-of-way acquisition by a government agency.” Id. Section 52-47a(b)(5).

C. Common Law Vested Rights

Texas common law provided vested rights for a nonconforming project to continue in existence, notwithstanding the nonconformance so long as (i) the land owner did not cause the nonconformance, (ii) the violation is not a nuisance, and (iii) there is no violation of public health, safety, morals or welfare by the continuation of the nonconformance. *Brown v. Grant*, 2 S.W.2d 285 (Tex. Civ. App.—San Antonio 1928, no writ); *Adcock v. King*, 520 S.W.2d 418, 423 (Tex. Civ. App.—Texarkana 1974, no writ); *City of Corpus Christi v. Allen*, 254 S.W.2d 759, 761 (Tex. 1953). This policy should apply to nonconformances caused by condemnation, even though there is no case law on this situation. See TMZL Section 8.200 for a discussion of the right to continue nonconformities due to changed regulation.

D. Municipal Vested Rights

Most municipal zoning ordinances specifically provide for vested rights for nonconforming uses and structures, but only when caused by the change in the zoning ordinance. See TMZL Section 8.203. See, *Bd. Of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424, 431 (Tex. 2002); *Tellez v. City of Socorro*, 296 S.W.3d 645, 650 (Tex. App.-El Paso 2009, pet. denied). An example provision follows:

City of Stafford, Texas Code of Ordinances Sections 102-58 to 63.

Sec. 102-58. Nonconforming uses and structures.

(a) *Authority to continue nonconforming uses.* The use of land or buildings or structures which was lawful upon the effective date of the ordinance from which this chapter is derived, although not conforming to the provisions hereof, may be continued subject to the terms hereof. No nonconforming use or nonconforming building or structure may be extended or expanded; provided, however, extension of a nonconforming use wholly within an existing building or arrangement of buildings designed and constructed for such use shall be permitted provided no structural alteration of such building or buildings is required, and the use of additional land is not required. If the nonconforming use of a building or land is discontinued for 90 consecutive days or more, the future use of such building or land shall be in conformity with the provisions of this chapter. For the purposes hereof, a use is discontinued when the land or a building becomes devoted to a different main use, or the land or building is no longer used for any purpose.

(b) *Nonconforming accessory uses.* No accessory use to a nonconforming use shall continue after termination of the nonconforming use unless such accessory use otherwise complies with the provisions of this chapter.

Sec. 102-59. Authority for continued existence of nonconforming structures.

A structure lawfully existing on the effective date of the ordinance from which this chapter is derived, although not conforming to the provisions hereof, shall be allowed to continue in existence subject to the following:

(1) Nonconforming structures shall not be extended or enlarged, nor shall they be structurally altered, unless such alteration converts such structure into conformity with the provisions hereof; provided, however, routine repairs and nonstructural alterations shall be permitted if not extending or enlarging the nonconforming characteristics thereof. Provided, further, nonconforming single-family dwelling main buildings may be extended or enlarged if the extension or enlargement does not increase the nature or degree of the nonconformity and the building is nonconforming due to lot size or the depth of the required front, side, or rear yard.

(2) Nonconforming structures shall not be rebuilt in the case of total destruction, or partial destruction exceeding 50 percent of its fair market value. If any such structure is damaged or destroyed to the extent of more than 50 percent of its fair market value, such structure shall not be rebuilt except in conformity with this chapter. If such structure is accidentally damaged to the extent of 50 percent or less of its fair market value, it may be repaired, restored, or renovated to its previous nonconforming status provided actual restoration, renovation, or repair is commenced within six months following the date the damage is incurred.

Sec. 102-60. Nonconforming status.

The following are hereby declared to be lawfully existing nonconforming uses or structures:

(1) Any existing use or structure not in conformance with the regulations of the zoning district in which it is located but lawfully existing at the time of the adoption of this chapter;

(2) Any existing use or structure not in conformance with the regulations of the zoning district in which it is located but lawfully existing at the time of the adoption of any amendment to this chapter, the result of which amendment renders such use or structure nonconforming; and

(3) Any existing use or structure not in conformance with the regulations of the zoning district in which it is located at the time of annexation into the city.

Sec. 102-61. Change in ownership.

The status of nonconforming uses and nonconforming structures are not affected by ownership and/or occupancy change, except as otherwise provided herein.

Sec. 102-62. Registration of nonconforming use or structure.

(a) The owner of any lot upon which a nonconforming use or nonconforming structure exists shall register said nonconforming use or structure with the city secretary within six months following adoption of this chapter or, as applicable, following adoption of any amendment hereto, which renders such use or structure nonconforming. In the event of registration of a nonconforming use or structure, the owner thereof shall be issued a certificate of occupancy nonconforming, with a brief description of the nonconformity, which shall thereafter be considered as evidence of the lawful existence of such nonconforming use or structure. The city secretary or zoning administrator shall maintain on file for the city all certificates of occupancy nonconforming.

(b) In the event an owner does not register a nonconforming use or structure as provided in subsection (a) above, then thereafter the city shall require proof by the owner that a use

or structure was lawfully existing at the time of adoption of this chapter, or any applicable amendment hereto, or said nonconforming use or structure shall be deemed unlawful and a violation of this chapter.

(c) It is the express purpose and intent of this section to create a presumption of illegality for any nonconforming use or structure not registered in accordance herewith, and such presumption of illegality shall apply in any permit approval process, in any criminal proceeding relating to violations of this chapter, or to any civil proceeding in which the city seeks to enjoin violation of any provision hereof or seeks the imposition of civil penalties for any such violation.

Sec. 102-63. Nonconforming lots of record.

Notwithstanding the minimum requirements for lot size within the various zoning districts, structures may be constructed, built, moved onto, expanded, reconstructed, occupied, or used on a nonconforming lot of record that existed prior to the enactment of this chapter, or any amendment hereto, provided all such structures shall meet all other applicable requirements of this chapter.

When a condemnation caused nonconformity is created, a municipality shall analogize to its treatment of legislatively created nonconformities. Counsel for the landowner should argue the equitable principals are the same. The ability to articulate clearly that the land owners have NOT been fully compensated is a critical component of this process.

Some cities specifically grant vested rights for noncompliance due to condemnation.

City of Irving, Texas Code of Ordinances Section 52-47a(b):

“In the event right-of-way acquisition by a governmental agency causes a property or its improvements to be in violation of city zoning ordinances, said property shall be exempt from said provisions to the extent said violation is caused by the right-of-way acquisition, subject to the following:

- (1) Property which undergoes a zoning change initiated by the property owner subsequent to right-of-way acquisition shall no longer be subject to this exemption and shall instead have a nonconforming status to the extent that any nonconformance with city ordinances resulted from a right-of-way acquisition by a governmental agency prior to the rezoning and shall therefore be treated as a nonconforming use pursuant to the provisions of this chapter rather than exempt as provided above. However, a zoning change initiated by the city shall not cause a property to lose the exemption provided by this section for properties affected by right-of-way acquisitions.
- (2) Nothing provided in this provision shall be construed to permit any obstruction which may create a traffic safety hazard or any other safety hazard.
- (3) Improvements required by SP, S-P-1, or S-P-2 zoning cases and located in the area acquired for right-of-way shall no longer apply subsequent to the acquisition,

except that required fencing originally located on the acquired property in the area of acquisition shall be relocated to the remainder of the tract as close as practicable inside the new property line.

- (4) Compensation provided; exemption inapplicable.
 - a. If a governmental agency provides compensation to a property owner for the demolition of improvements or for other curative measures which renders the property or its improvements to be in violation of city zoning ordinances, then the property shall not be eligible for exemptions under this section.
 - b. The building official is authorized to provide notice to any affected property owner, lienholder, or certificate of occupancy holder, listing the items of noncompliance for which no exemption is being provided under this section.
 - c. The building official is authorized to file an affidavit in the Dallas County Deed Records noting such noncompliance, that the property has been compensated for said noncompliance, and that a certificate of occupancy shall not be issued until such noncompliance is cured.
 - d. Once the property and its improvements are brought into full compliance with all applicable ordinances of the city, the building official will be authorized to file an affidavit in the Dallas County Deed Records noting such compliance.
- (5) The building official is authorized to revoke a certificate of occupancy for any building or structure for which compensation has been paid to be demolished as part of a right-of-way acquisition by a governmental agency.
- (6) A certificate of occupancy shall not be issued for any building or structure for which compensation has been paid to be demolished or for other curative measures until such time that the property and its improvements either come into full compliance with all applicable ordinances of the city or the curative measures, for which the compensation was paid, have been completed.”

Note that even when vested rights are specifically granted in a condemnation setting, there are significant limitations.

II. Limitations on Nonconforming Rights

There are several different issues to consider relating to nonconforming projects. The following discussion highlights these issues and how they are typically addressed in municipal zoning ordinances.

A. Continued Use

The most critical aspect of nonconforming rights is the ability for the project to continue to exist as physically situated and as currently used. Virtually every zoning ordinance permits nonconforming projects to remain forever, if unaltered. However, a local government could amortize a nonconforming project. *City of University Park v. Benners*, 485 S.W.2d 773 (Tex. 1972) (holding that termination of nonconforming use by amortizing the investment is not an unconstitutional taking). Amortization is the allowance for a nonconforming use to continue for a reasonable period of time necessary to permit the owner to recoup their investment. Moreover, amortization requires an analysis of the investment in the project and a determination of a reasonable number of years to permit a full recovery of that investment. In essence, under amortization, the local government is permitting the recovery of the "reasonable investment-backed expectation" of the owner. Amortization has been upheld in Texas as a reasonable regulatory scheme. *Id*; see TMZL Section 8.308.

Usually amortization is applied where there are safety issues involved. An example is the imposition of "fire safety" requirements for buildings, including the requirement to install sprinkler systems or a reasonable substitute. Another example is disability access where existing properties must be modified if readily achievable.

B. Reconstruction After Casualty

The right of a nonconforming project to be reconstructed after casualty is important. Typically, the test is that reconstruction is permitted if it is less than fifty percent (50%) in value or cost (different municipalities pick different standards) to replace. *See, Adcock v. King*, 520 S.W.2d 418, 421 (Tex. Civ. App.–Texarkana 1975, no writ). These standards are significantly different. There is no case law on this point, but a court would logically adopt a similar analysis. Further, to the extent that reconstruction could be brought into compliance, compliance would be required. For example, a portion of a nonconforming project being reconstructed would need to comply with the then current building code even though the structure might be rebuilt in a nonconforming location or to a nonconforming height.

The owner of a nonconforming project will want to obtain "law and ordinance" insurance coverage, which would cover the increased cost to rebuild the project in compliance with new regulations. *See* TMZL Section 8.304 for a discussion of this issue.

C. Expansion

Typically a nonconforming project may not be expanded if it is a nonconforming use or the degree of nonconformance increased if the project is nonconforming physically. Normally, the law allows the owners of nonconforming uses to repair, maintain, and internally alter a nonconforming project so long as there is no increase in the degree of noncompliance with the locality's zoning regulations. Additionally, some ordinances will permit a reasonable amount of expansion (for example, ten percent (10%)) to provide flexibility for the continued viability of the nonconforming project.

D. Abandonment

A nonconforming use can be abandoned by disuse if the disuse is coupled with an intention, express or deemed, to discontinue the use. *See* TMZL Section 8.305. Typically, a municipal ordinance will establish a period of nonuse which will be deemed to be abandonment, often six (6) months. For example, if an industrial building is rezoned retail and the industrial use is discontinued for more than six (6) months, a municipality could assert that the nonconforming use has been abandoned, and thereafter the industrial building must be converted to retail use. However, if the industrial building owner has exercised good faith market efforts to lease the building during the six (6) months and can show that the building has been maintained as an industrial building, marketed as an industrial building and it is the clear intention of the owner to continue that use in the future, then, notwithstanding the municipal presumption of abandonment, the nonconforming use rights should continue. *McDonald v. Bd. of Adjustment*, 561 S.W.2d 218, 222 (Tex. App.—San Antonio 1977, no writ); *Plemons-Eakle Neighborhood Assoc., Inc. v. City of Amarillo*, 694 S.W.2d 218 (Tex. App.—Amarillo 1985, writ ref'd n.r.e.). However, this is a fact-driven analysis, and after some period of time of attempting to re-let a former industrial building, a court could determine that abandonment had occurred and future use would have to be compliant with the new permits.

A nonconforming structure cannot be abandoned unless it was removed. If a nonconforming structure is removed, it is unlikely to be permitted to be rebuilt even if the nonconforming structure were removed due to structural damage, termite damage, *etc.*

III. Impact of Nonconformity

In a condemnation setting, nonconformity is imposed due to the physical taking, typically creating a violation in either setback or parking. The two nonconformances have two components of the effect of their creation: (1) impact upon legal status and (2) impact on functionality/financeability/marketability. When nonconformity is a likely result of a taking, the land owner and their attorney must investigate, before proceeding far in the condemnation process, the impact of the nonconformity.

A. Legal Status

1. Grandfathering- Is the Nonconformity Excused?

The first issue to consider for a nonconforming project is how the local government will treat the project after the condemnation. Many cities view condemnation as a hardship imposed on a project and recognize the equitable considerations due to a property owner. This is particularly true where the condemnation is by an entity other than the city.

In *City of Lubbock v. Austin*, the city condemned a street right-of-way from the Austins, thereby creating a nonconformance with a zoning setback. 628 S.W.2d 49 (Tex. 1982). The Austins sought to *prevent the condemnation* by arguing that the city should be bound by its own zoning ordinance and should not be permitted to create the nonconformance. The court disagreed, holding that the city was not bound by its own zoning ordinance and could proceed

with the condemnation. However, the court, *in dicta*, stated that it was “obvious” that *the city could not then enforce the setback against the Austins*. Therefore, it is clear that if a city creates through condemnation a nonconformance, then the city may not enforce the elements of the local regulation against the landowner. The *Austin* case applies estoppel concepts, therefore it might not apply if the taking was by a different governmental entity. However, *Austin* is precedence for the protection of a landowner whose nonconformity was created by the local government seeking to enforce the regulation.

If the taking is by the county or state (or related entity), the issue becomes how will the local government treat a nonconformance? Most cities don’t specifically grant vested rights for nonconformances created by condemnation. However, most zoning ordinances specifically protect zoning nonconformances. It is reasonable to suggest that a city should apply the same regulatory scheme to a nonconformance created by condemnation to one caused by a change in regulation. The issues are the same—balancing of equities when changes in regulation affect a land owner who did not create the nonconformity. Therefore, a strong argument can be made that a court should consider a city's zoning nonconformance provisions in determining the appropriate standard to apply in the event of a noncompliance caused by condemnation.

Sometimes, the language in the municipal ordinance does not specifically limit nonconforming status protection to any particular basis for the nonconformance. In this situation, counsel can argue that the language should be interpreted to including condemnation nonconformance, not just nonconformance due to annexation or change in regulatory scheme.

The determination of municipal treatment is an interpretation of the city's ordinances, more specifically, their applicability. The interpretation is made at a staff level by the building inspector, planning director, or city manager. If a lower level staff official makes an adverse decision, it is appropriate to seek to discuss that decision with others above the initial decision maker, up to the level of the city manager or administrator. Once a final interpretation has been reached, it is appropriate to request that interpretation in writing. If the determination is that the project is grandfathered, inquire about the ability to rebuild upon casualty and to expand. Where there is no statutory right to be grandfathered, the city’s decision is whatever it says it is, so you want to have these two very important issues resolved up front, if possible. Often, a city will apply the standards in its zoning ordinance for zoning nonconformances to a condemnation nonconformance, even if there is no basis in municipal ordinance, based on equitable considerations.

If the interpretation is unsatisfactory, the interpretation might be appealable to the BOA. This appeal is not a request for variance, but a request for an administrative appeal of the interpretation. BOAs may administratively review interpretations by building officials. In most situations, the nonconformity is a zoning nonconformity and therefore, the BOA would have authority.

This appeal is to determine whether or not the project is "grandfathered." An affirmative vote of 75% of the BOA members (usually a 5 member panel, so 4 affirmative votes is required, even if only 4 members appear for the hearing) is required. Experience teaches that the vast majority of staff interpretations are upheld. However, sometimes staff are not sure of the proper

interpretation and are happy to “kick it upstairs” to the BOA. These are the situations where an appeal has the greatest likelihood of success. If the BOA rules in favor of the grandfathering, then the issue is resolved unless the city appeals. If the BOA rules adversely, then the landowner must appeal this decision within ten (10) days from the date that the decision of the BOA is filed in its records. A complete discussion regarding dealing with Boards of Adjustment and the unusual rules applicable to them is set forth later in this paper. Also see TMZL Sections 6.401-.402 and 8.100 *et seq.*

Even if a project is grandfathered, that does not mean the project has the same value as when it was conforming. Grandfathered projects are typically subject to restrictions on reconstruction after casualty and expansion, which limit future functionality and value. What limits are applicable vary and in many instances may not be known, either to the local government or the land owner. Therefore, the granting of grandfathered status does not eliminate damage to the value of the nonconforming project.

2. Variance

Even if the city determines that a project is not grandfathered and thus, it intends to enforce its regulations against the project once it becomes nonconforming, the landowner may request a variance from the application of the regulations from the BOA. This is a separate request from the appeal of the determination whether the project is grandfathered. Many of the same equitable considerations would be presented to the BOA in the request for a variance that would be presented in the request for grandfathering. However, the legal requirements are different. In order to obtain a variance, the board must find that there is some unique aspect to the property and because of that unique aspect the literal application of the zoning regulations would create an unnecessary hardship. Unnecessary hardship cannot be economic alone, per well-settled Texas law. In addition, the BOA must find that the granting of the variance is not contrary to the spirit of the zoning ordinance and as a result of the issuance of the variance “substantial justice will be done.” Further, if the city's zoning ordinance contains other more restrictive standards for the granting of a variance, then those standards must be additionally satisfied. *City of Dallas v. Vanesko*, 189 S.W.3d 769, 722 (Tex. 2006). See TMZL Section 6.300 *et seq.* for discussion of the requirements for variances, with the requirement for an “unnecessary hardship” discussed in Section 6.306.

If a grandfathering interpretation has already been turned down by a BOA, it will be practically difficult to convince the same BOA that a variance is appropriate. In fact, the BOA would have greater latitude to consider an interpretation than a variance. An appeal from the decision on the variance would be handled in the same way as an appeal from the decision on the interpretation. Tactically, it may be best to seek the variance first, then fall back on the interpretation, since the legal standard for variance is more stringent.

As with interpretations, an affirmative vote of 75% of the BOA members (usually a 5 member panel, so 4 affirmative votes is required, even if only 4 members appear for the hearing) is required. Experience teaches that the vast majority of variances are denied. Statements from city officials that the land owner can file for a variance should not be given weight.

Even if a variance is granted, there may be limitations required as a condition to the variance. Also, the market discount value of a project with a variance compared to a conforming project. Therefore, the granting of the variance does not mean there is not damage to the value of the nonconforming project.

Practically, obtaining a variance before the taking is not feasible in most circumstances, since the nonconformance is not final. However, condemnation counsel must understand the variance process pre-taking.

3. Local Government “Agreement” to Grandfather- Not Enforceable!

The condemning authority may argue that a city's historic practice is to permit nonconformances to be grandfathered, and that “agreement” is set forth in a letter (to the land owner or to the condemning authority). However, historic treatment is not binding in the future. Also, letters sent by a city to a condemning authority or even to a landowner are highly suspect under current Texas case law, which will uphold the application of the equitable doctrine of estoppel against a city enforcing land use regulation only in the most extreme and extraordinary circumstances. *See City of White Settlement v. Super Wash*, 198 S.W.3d 770 (Tex. 2006); TMZL § 11.800 *et seq.* (complete discussion of estoppel case law).

Under current Texas case law, a city is likely to be estopped from enforcing its zoning ordinance only where it has obtained a significant benefit from statements made to or approvals granted a property owner. Thus, statements by a city that it intends to grandfather nonconforming structures made to the condemning authority should be ignored and considered to be of no benefit to the landowner in the condemnation process. A statement made specifically to a landowner and upon which the landowner relies in settling a condemnation for an amount less than they would have obtained otherwise might be binding on the city. However, the law is uncertain because the Texas Supreme Court has held that enforcement of land use regulations are an important municipal function which supports ignoring equities which usually give rise to estoppel. *See Super Wash*, 198 S.W.3d at 775-778; TMZL § 11.802.

Therefore, in a condemnation, the landowner counsel should be aware that it is virtually impossible to legally commit a local government to a course of action which would result in a nonconforming project being grandfathered, unless municipal ordinance provides vested rights (such as in the City of Irving, Texas) or there is a BOA interpretation. As a result, projects made nonconforming by condemnation should be entitled to compensation adequate to cause a cure of the site deficiencies created. For example, a landowner who under the nonconformity would have to remove the portion of the building which is encroaching, or required to create or obtain additional parking is entitled to the cost to cure. *See Interstate Northborough P’ship v. State*, 66 S.W.3d 213, 224 (Tex. 2001) (“Damages due to required modifications to the remainder, as a result of the condemnation...may be compensable.”). The cost to cure might exceed the alternative condemnation damages. Sometimes, the condemning authority will acknowledge that a building is a total loss and will pay the full value of the building due to nonconformance.

On possible exception to the foregoing analysis is obtaining a BOA interpretation that the project has vested rights. Even if that interpretation is wrong, the failure to appeal it by the city

could be sufficient for a court to enforce it if later city staff seek to withdraw the interpretation. Procedurally, the owner will seek the staff interpretation. Then the owner would appeal to the BOA (even though the owner is satisfied with the interpretation). This gives the BOA jurisdiction to consider the issue. At the hearing, the city staff defends the interpretation and the owner makes no objection. City staff needs to be sure the BOA chair understands the situation and the reasoning. If the interpretation is upheld, then neither the city nor the owner will appeal and 10 days later, the interpretation is final. There is no case law supporting this concept.

B. After the Taking

1. Grandfathering

Once the taking has occurred, whether or not the award is final, the landowner must then determine what the local government's actual position will be regarding the nonconformance. Only then can the landowner be somewhat assured of their treatment. Even then, that treatment may change over time as interpretations change and politics impact the situation.

After the physical taking, the landowner would go through the same process as described above to obtain an interpretation on whether the nonconforming project is grandfathered or whether or not a variance would be issued. A detailed review of the powers of the BOA, the unusual procedures and the law which applies, the handling of presentations before the BOA and appealing decisions of the BOA are contained in subsequent sections of this paper.

A request for interpretation on whether or not a project would be grandfathered can be readily obtained before or after the taking. *However, so that the board is assured of the physical circumstance in question, the request for variance might not be accepted by a BOA as ripe for consideration until the taking is complete.*

2. Variance

General variance issues regarding the impact of nonconformity were discussed earlier in this article. A particular issue to be considered in a post-award variance is the temptation that the BOA and the city will look at the amount of the award as part of the consideration of the equitable determination whether or not there is an unnecessary hardship. Under variance law, economic hardship alone will not support a variance; therefore any consideration of the award granted to a land owner should be irrelevant in a variance hearing. Unfortunately, the amount of the award is likely to be an issue which Board members and the city may know or want to know and may want to consider in the variance hearing. The applicant has a tough choice to make. The applicant must either: (1) discuss the award and be prepared to justify that it was a reasonable award that did not compensate the applicant for the nonconforming status; or (2) decline to discuss the award arguing that economic hardship is irrelevant anyway. Since a BOA acts in a quasi-judicial manner and a variance by its nature is equitable, a case-by-case analysis must be made.

The more well known the project, the owner and the award amount, the more likely that it is in the best interest of the applicant to fully disclose all aspects of the condemnation, the award

and the basis of the award. If this avenue is taken, then the applicant must first fully explain the circumstances of the condemnation, the damages to the applicant and the justification for the award. Then the applicant must articulate that the award was not adequate to fully compensate the applicant for the nonconformance. Only after those points have been successfully made will the BOA be able to consider the equitable circumstances necessary to justify a variance. This type of variance hearing is particularly challenging and must be handled with great care.

Where the decision is made not to discuss the condemnation or the award, the applicant must have the ability to clearly articulate variance case law and that economic hardship is irrelevant. If the city attorney will attend the variance hearing and would be willing to corroborate that economic hardship is not relevant, and therefore the amount of the condemnation award is also not relevant, then in that circumstance, not discussing the condemnation process or award might be an appropriate tactic. However, simply taking a “none of your business” approach is usually counter-productive and results in the denial of the variance.

The reality is that Boards of Adjustment are citizen volunteers, generally not lawyers and generally not well versed in variance law. Therefore, they are likely to be extremely interested in a condemnation award. Rather than bemoan this unfortunate complication to the variance hearing, the applicant is best served by taking this opportunity to make a full and persuasive presentation outlining the negative impact of the condemnation and the damages incurred by the applicant which were not included within the award. Most condemnations are settled for an amount less than the applicant's stated damages. That difference should be hammered home as a loss incurred by the applicant, justifying equitable relief by the BOA.

Further, condemnation law does not permit recovery from a number of real-life damages such as loss of profits, loss of business, diminution in access, diminution in visibility, time, energy, stress, pain and suffering and similar damages. Further, everyone knows that dealing with condemning authorities, particularly the Texas Department of Transportation, is a difficult and frustrating experience. The opportunity to describe the condemnation process, in excruciating detail, can be an opportunity to bring the BOA to an equitable mind set to offset the unrecovered damages incurred by the applicant and to convince them to mitigate the impact of the applicable zoning regulations, even though economic hardship is not supposed to be relevant!

C. Damage to the Remainder

Even if the city grandfathers or grants the project a variance, the project is subject to significant negative impact due to nonconformance.

1. Loss of Setback

If the property is not adequately set back from a street, there will be noise, vibration, lights and other physical impacts, which may make portions of the building less valuable. A loss of setback may negatively affect the aesthetics of the building. If parking is lost, many tenants will avoid the building rather than be subjected to parking shortages affecting employees or

customers. The aesthetics of the building can be negatively affected, which may make potential purchasers, lenders and/or tenants uncomfortable.

2. Loss of Parking

Texans, perhaps more than other Americans, love their cars/trucks and consider a ample parking a necessity, preferably in the front of a project. When condemnation removes that preferred front parking, value is negatively impacted, even without nonconformance. If nonconformance with local land use requirements occur, the impact increases. Most real estate lenders carefully consider parking in underwriting a real estate loan. Even if the loan is approved, it may have a lower loan to value or the requirement for more personal liability than a conforming project.

3. Noncompliance with Area Based Density Requirements

Many land use regulations limit density by ratios tied to project area. When a portion of the area is taken, the ratios may become noncompliant. Examples are Building Floor Area to Project Land Area Ratio (“FAR”), Open Space Ratio (developed building ground floor to total land area), and Pervious Ratio (impervious area to total land area).

4. Marketability

Nonconforming status is a negative to investors/users, thereby resulting in a reduction in marketability and market value. Many purchasers are not interested in spending the time to attempt to understand complicated land use concepts or to hire a special counsel to do so on their behalf. This is particularly true for users not familiar with real estate ownership and with out of state investors. If the city is permitting the continuation of the non-conformance due to historic practice or equitable considerations, in either event without specific ordinance authority, that risk to marketability is significant.

5. Reconstruction & Expansion

Under typical nonconforming status treatment, which is the most typical characterization for a condemnation, a significant casualty loss results in a loss of status and the reconstruction must be to then current standards. Conformance typically results in less density, and thus, less value. This same rule often applies to “major” renovations, which cities often treat as a reconstruction.

Also, expansion of a nonconforming building is often not permitted. Some ordinances will only limit the expansion of the nonconforming aspect and others permits minor expansions. If not, then the nonconforming building is limited to maintenance and repair only. The inability to expand negatively impacts value.

6. Uncertainty as to Status

Most grandfathering is a result of the city's decision based on fairness and equitable considerations, not a specific ordinance provision. Proving the grandfather status is often by a letter issued by the city, which might or might not be "re-affirmed" in the future. Further, the treatment of casualty damage and the right to reconstruct, as well as the right to expand may not be set. More likely, the city will simply want to retain the right to make a decision in the future and not make any representation as to future circumstances. This adversely impacts marketability of a nonconforming project.

IV. Board of Adjustment

As discussed above, the BOA has a critical place in determining the treatment of a nonconforming project. This section provides a detailed review of the BOA, its unique position on land use law including its creation, power, procedure and unusual appeal process. Two recent cases discuss BOA review of nonconforming projects in the context of the application of municipal zoning ordinance provisions "grandfathering" certain projects. *Bd. Of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424, 431 (Tex. 2002); *Tellez v. City of Socorro*, 296 S.W.3d 645, 650 (Tex. App.-El Paso 2009, pet. denied). Although not precisely on point, they are helpful to understand the BOA process.

The BOA may hear an appeal of a city's denial of grandfather status or an application for a variance to permit noncompliance. However, the BOA is authorized by the Texas Zoning Enabling Act for the purposes of hearing and deciding only the following issues:

- Appeals from the administrative decisions including interpretations of the zoning ordinance;
- "Special exceptions";
- "Variances"; and
- Other matters authorized by ordinance.

TEX. LOC. GOV'T CODE ANN. § 211.009 (Vernon 2008).

Judicial expansion of the BOA's power has been limited to allowing a BOA to supervise the phasing out of nonconforming uses. *See White v. City of Dallas*, 517 S.W.2d 344 (Tex. Civ. App.—Dallas 1974, no writ). Legislation enacted in 1993 authorized a city to delegate "other matters" to a BOA by ordinance. TEX. LOC. GOV'T CODE ANN. § 211.009(a)(4) (Vernon 2008). Some cities delegate enforcement to its BOA. *See MONT BELVIEU, TEX., ORDINANCES § 25-96.*

A. Organization

The BOA is organized as follows:

- The board is appointed by the governing body of the city.
- The board is composed of at least five members.
- Members serve two year terms, with vacancies filled for the remaining term.
- Each member of the governing body may be authorized to appoint one member and remove that member for cause, after a public hearing on a

written charge.

- A city, by charter or ordinance, may provide for alternative members to sit in place of regular members when requested to do so by the mayor or city manager.
- All cases must be heard by at least seventy-five percent (75%) of the BOA members (four out of the typical five members).
- The BOA may adopt rules pursuant to an ordinance authorizing it to do so.
- The presiding officer may administer oaths and compel attendance of witnesses.
- All meetings must be public.
- Minutes must be maintained reflecting each member's vote and attendance.
- Minutes and records are public and must be filed immediately.
- The governing body of a Type A municipality may act as its BOA.

TEX. LOC. GOV'T CODE ANN. § 211.008 (Vernon 2008).

Cities with a population of 500,000 or more may create multiple panels, each of which have the powers of the BOA. TEX. LOC. GOV'T CODE ANN. § 211.014 (Vernon 2008). (In 2005, the Texas legislature substituted 500,000 for 1.8 million). This provision was originally adopted in 1993 to facilitate the zoning of Houston, then anticipated to be implemented in 1994.

B. Authority

A concurring vote of seventy-five percent (75%) (which is 4 of 5 or 6 of 7) of the members of the BOA is necessary to decide in favor of the applicant on a variance or to reverse an appealed interpretation. TEX. LOC. GOV'T CODE ANN. § 211.009(c) (Vernon 2008).

C. Quasi-Judicial Nature of BOA

Courts have disagreed over whether a BOA is a quasi-judicial or quasi-legislative body. *Compare Shelton v. City of College Station*, 780 F.2d 475, 479-83, 486-90 (5th Cir. 1986) (nine judge majority decision held the BOA's decision on a variance was quasi-legislative while a five judge dissent claimed the action was quasi-judicial), *with Bd. of Adjustment v. Flores*, 860 S.W.2d 622, 625 (Tex. App.—Corpus Christi 1993, writ denied), *and Bd. of Adjustment v. Winkles*, 832 S.W.2d 803, 805 (Tex. App.—Dallas 1992, writ denied) (concluding that BOA actions are quasi-judicial). Despite the Fifth Circuit's position, most Texas appellate courts agree that the BOA is quasi-judicial. *See Galveston Historical Found. v. Zoning Bd. of Adjustment*, 17 S.W.3d 414, 416 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

D. Appeal

1. Procedure.

The BOA's decision can be challenged by petition to a court of record to review the BOA's decision by writ of certiorari. TEX. LOC. GOV'T CODE ANN. § 211.011 (Vernon 2008). The court may reverse or affirm wholly or in part and modify the decision reviewed. § 211.011.

The right to appeal a BOA decision is limited exclusively to writ of certiorari under section 211.011. *Reynolds v. Haws*, 741 S.W.2d 582, 584 (Tex. App.—Fort Worth 1987, writ denied). As an alternative to writ of certiorari, the property owner may independently challenge the validity of the zoning ordinance rather than seeking a variance from its provisions. *City of Amarillo v. Stapf*, 129 Tex. 81, 89, 101 S.W.2d 229, 234 (1937). The court may also remand the case to the BOA for further actions taking into consideration the court's judgment. *Wende*, 27 S.W.3d at 173.

If an aggrieved party decides to appeal an order of the BOA by requesting a writ of certiorari, they have ten (10) days after the notice of decision to file suit. § 211.011; *Reynolds*, 741 S.W.2d at 584. The aggrieved party must establish compliance with this requirement in order to be entitled to appeal. *Fincher v. Bd. of Adjustment*, 56 S.W.3d 815, 817 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The former characterization of the ten day period as “jurisdictional” is incorrect; rather it is an issue for the parties to raise on the merits. *Id.* (citing *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76–77 (Tex. 2000)). The BOA itself is an indispensable party and must be named as a defendant, even if individual members of the BOA are served and answer. *Reynolds*, 741 S.W.2d at 587. When the petition names all members of the BOA in their official capacities without specifically naming the board as an entity, this defect is curable and petitioner may amend the petition to include the board after expiration of the statutory ten day period for filing a writ of certiorari. *Pearce v. City of Round Rock*, 992 S.W.2d 668 (Tex. App.—Austin 1999, pet. denied).

2. Standing.

The following parties may appeal to the BOA: (i) a person aggrieved by the decision, or (ii) any officer, department, board, or bureau of the municipality affected by the decision, other than a member of a governing body sitting on a BOA under Texas Local Government Code section 211.008(g). TEX. LOC. GOV'T CODE ANN. § 211.010 (a), (e) (Vernon 2008). In order to have standing to appeal an order, requirement, decision, or determination made by an administrative official, the appealing party must demonstrate unique injury or harm to himself other than as an aggrieved member of the general public. *Galveston Historical Found.*, 17 S.W.3d at 416–17; *Texans to Save the Capitol, Inc. v. Bd. of Adjustment*, 647 S.W.2d 773, 775 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Standing does not require establishing a direct link between a party's activities and the BOA's decision, or that a harm had already occurred. Residents in the same zoning district are aggrieved and therefore have standing. *Galveston Historical Found.*, 17 S.W.3d at 418. An adjacent city is aggrieved if the decision adversely affects it differently than the general public. *Wende*, 27 S.W. 3d at 167.

3. Limitations on BOA Action.

The BOA is an administrative, fact finding, quasi-judicial body. It is empowered to grant variances or exceptions from the zoning ordinance, but it cannot be delegated the legislative function of the City Council with regard to its zoning ordinance. The BOA is only authorized to ameliorate exceptional instances which, if not relieved, could endanger the integrity of a zoning plan. *Thomas v. City of San Marcos*, 477 S.W.2d 322, 324 (Tex. Civ. App.—Austin 1972, no writ); *Swain v. Bd. of Adjustment*, 433 S.W.2d 727, 735 (Tex. Civ. App.—Dallas 1968, writ ref'd

n.r.e.). A BOA must act within its specifically granted authority. *W. Tex. Water Refiners, Inc. v. S & B Beverage Co.*, 915 S.W.2d 623, 626 (Tex. App.—El Paso 1996, no writ). If the BOA acts outside its specifically granted authority, it is subject to a collateral attack in district court, which suit is not governed procedurally by Texas Local Government Code section 211.011. *Id.* For example, if a board grants a special exception that is not a conditional use expressly provided for under the ordinance, then the board has exceeded its authority to act rather than merely exercising its power legally. *S & B Beverage Co.*, 915 S.W.2d at 627.

The BOA has no power to grant zoning exceptions or variances that amount to a zoning ordinance amendment. If the approval of a “specific use permit” constitutes a zoning ordinance amendment, the city council is the only body that may approve or disapprove such a permit. *See Tex. Att’y. Gen. Op. JM-493* (1986), 1986 WL 219339.

4. Rules for Writ of Certiorari

a. A legal presumption exists in favor of the BOA's decision. *Sw. Paper Stock, Inc. v. Zoning Bd. of Adjustment*, 980 S.W.2d 802, 805 (Tex. App.—Fort Worth 1998, pet. denied); *Bd. of Adjustment v. Amelang*, 737 S.W.2d 405, 406 (Tex. Civ. App.—Houston [14th Dist.] 1987, writ denied).

b. The burden of proof to establish its illegality rests upon the contestant. *Sw. Paper Stock, Inc.*, 980 S.W.2d at 805; *Swain*, 433 S.W.2d at 731.

c. "If the evidence before the court as a whole is such that reasonable minds could have reached the conclusion that the Board of Adjustment must have reached, . . . the order must be sustained." *McDonald v. Bd. of Adjustment*, 561 S.W.2d 218, 220 (Tex. Civ. App.—San Antonio 1977, no writ).

d. The review of the decision of a BOA is not a trial de novo where facts are established, but is based on whether the BOA abused its discretion. *SWZ, Inc. v. Bd. of Adjustment*, 985 S.W.2d 268, 270 (Tex. App.—Fort Worth 1999, pet. denied); *Sw. Paper Stock, Inc.*, 980 S.W.2d at 805; *Amelang*, 737 S.W.2d at 406; *City of Lubbock v. Bownds*, 623 S.W.2d 752, 755–56 (Tex. App.—Amarillo 1981, no writ).

e. The court must not substitute its judgment for the BOA's. *Sw. Paper Stock, Inc.*, 980 S.W.2d at 805; *Amelang*, 737 S.W.2d at 406.

f. The only question which can be raised is the legality of the BOA decision. *Sw. Paper Stock, Inc.*, 980 S.W.2d at 805; *Amelang*, 737 S.W.2d at 406.

g. The court should make its decision on the legality of the BOA's decision based on the materials obtained in response to the writ of certiorari and any testimony received. *Sw. Paper Stock, Inc.*, 980 S.W.2d at 805; *Amelang*, 737 S.W.2d at 406.

h. The legality of a BOA's denial is a question of law. *Sw. Paper Stock, Inc.*, 980 S.W.2d at 805.

i. As a question of law, whether a BOA decision should be upheld is appropriately determined by summary judgment. *Sw. Paper Stock, Inc.*, 980 S.W.2d at 805; *Amelang*, 737 S.W.2d at 406.

The foregoing rules incorporate the “abuse of discretion” rule, which was adopted by the Texas Supreme Court in *City of San Angelo v. Boehme Bakery*, 190 S.W.2d 67 (Tex. 1945) and *Nu-Way Emulsion, Inc. v. City of Dalworthington Gardens*, 610 S.W.2d 562 (Tex. Civ. App.—Fort Worth 1981), *writ ref’d*, 617 S.W.2d 188 (Tex. 1981) (per curiam), *See also SWZ, Inc.*, 985 S.W.2d at 268. Some courts of appeals apply the “substantial evidence” rule, requiring a factual basis for the BOA's decision, whereas the “abuse of discretion” standard only inquires whether the BOA's decision is arbitrary and unreasonable. *See Pick-N-Pull Auto Dismantlers v. Zoning Bd. of Adjustment*, 45 S.W.3d 337, 340 (Tex. App.—Fort Worth 2001, pet. denied) (court cites the “abuse of discretion” rule, but applies the “substantial evidence” rule); *Bd. of Adjustment*, 860 S.W.2d 622, 625–26 (Tex. App.—Corpus Christi 1993, writ denied) (discussing the conflict). This conflict is fully reviewed in TMZL § 11.516.

In *Wende v. Board of Adjustment*, 27 S.W.3d 162 (Tex. App.—San Antonio 2000), *rev’d on other grounds*, 92 S.W.3d 424 (Tex. 2002), the court of appeals applied nonzoning law applicable in mandamus actions to determine whether a BOA abused its discretion. The court cited *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992), which held that an abuse of discretion occurs if a decision is so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker*, 27 S.W.3d at 839. The court specifically rejected the “substantial evidence” rule. *Wende*, 27 S.W.3d at 167. The court considered a BOA, as a quasi-judicial body, to be subject to the same limitations as a trial court being reviewed in a mandamus action. *Id.* In *Wende*, the appellate court held that the trial court misapplied the zoning ordinance and remanded the matter for further action consistent with the appellate court's decision. However, the Supreme Court disagreed with the court of appeals' interpretation and upheld the BOA interpretation. The Supreme Court's opinion indicated that a reviewing court should give greater deference to the BOA interpretation, but did not overrule the court of appeals analysis, just its result. The court of appeals analysis gives the aggrieved party more room for success on appeal, but the Supreme Court's reversal, even without directly overruling the mandamus analogy takes away most of the benefit.

5. Disqualification of BOA Member.

The test for disqualification of a BOA member from a vote is whether the member has an “irrevocably closed mind.” *Shelton v. City of College Station*, 780 F.2d 475, 486 (5th Cir. 1986) (en banc). In *Shelton*, the fact that a BOA member was also a member of a church which actively opposed a variance before the BOA (which was denied) did not require the disqualification of the BOA member. *Id.*

6. Official Immunity.

In *Ballantyne v. Champion Builders*, 144 S.W.3d 417 (Tex. 2004), the Texas Supreme Court provides a roadmap to the history and scope of official immunity in Texas, a fifty year old

doctrine based on well settled public policy to (i) encourage confident decision making by public officials without intimidation, even if errors are sure to happen, and (ii) ensure availability of capable candidates for public service, by eliminating most individual liability. The court held that BOA members are entitled to official immunity if the following three issues are satisfied:

- Scope of authority – The action must fall within state law authorizing action by the official. Whether the BOA made an incorrect decision or had never previously revoked the permit is irrelevant.
- Discretionary not ministerial action – The action must be a discretionary action, which is one involving personal deliberation, judgment and decision. A ministerial act is one where the law is so precise and certain that nothing is left to the exercise of discretion or judgment.
- Subjective good faith – If a reasonably prudent official under the same or similar circumstances would have believed their conduct was justified based on the information available, then this subjective good faith supports official immunity. Neither negligence nor actual motivation is relevant. They need not be correct, only justifiable. Specifically, the personal animus of the Board members in *Ballantyne* to apartment residents established on the record did not preclude a good faith holding, and in fact was irrelevant.

The court analogized to U.S. Supreme Court decisions interpreting qualified immunity for federal officials. The facts in *Ballantyne* were quite pro-developer, including tapes of an executive session considering the request in issue which clearly demonstrated personal prejudice of the BOA members to all apartment projects and their inhabitants. Specific derogatory comments were included. Nonetheless, the court held that these personal feelings, even if the basis for the BOA decision, are not sufficient for individual liability.

F. Hints for Board of Adjustment Proceedings

The BOA is a “quasi-judicial” body established to provide an administrative approval body for various land use matters which require a public hearing for the party desiring relief. It acts like a “mini-court” to consider a request, hear testimony, consider written evidence and apply the zoning ordinance and applicable law. It will render a formal decision after following a formalized procedure intended to provide procedural and substantive due process to the owner of the property in question. In handling a variance application, keep in mind that a variance allows violation of a zoning ordinance where literal compliance is a “hardship,” but granting the variance will not be contrary to the general purposes of the zoning ordinance. The key is the determination of hardship, which may not be self-imposed, purely financial/economic and must relate to the unique characteristics of the real estate, not the personal desires or needs of the owner.

If the BOA action is an appeal of an administrative interpretation, hardship issue is not present and the issue is whether the administrative interpretation is proper. An administrative interpretation may include both factual and legal determinations.

1. Due Diligence

The following information should be obtained to knowledgeably handle a BOA matter:

- Comprehensive plan (and confirmation of whether formally adopted and how adopted [resolution or ordinance]);
- Zoning ordinance (and all amendments);
- Rules of BOA, including form for Variance application;
- Confirmation that no zoning changes are pending (obtained through City Secretary/Secretary to Planning & Zoning Commission); and
- Zoning map.

Each of the documents must be confirmed to be the most current before it is adopted. Care should be taken to insure there are no pending changes.

The attorney should determine all zoning violations and list them, review the Zoning Ordinance provisions regarding the BOA and variances, specifically, and be sure they understand the procedural process and the holdings required by the BOA to approve the necessary variances. For interpretations, the attorney should look to see if there is specific language in the Zoning Ordinance relating to interpretations, or if the BOA authority is simply based on state law.

The practitioner may, in appropriate situations, consider contacting the chief planning official with the city to review all issues and determine the following:

- (1) The planning staff's position;
- (2) Treatment of similarly situated properties in the past (and why);
- (3) Make-up and philosophy of the BOA; and
- (4) Current political issues in the city affecting land use decisions.

Often city planning staff can provide helpful (although perhaps biased) insights into issues critical to the city. Experienced local engineers, planners, real estate professionals and attorneys should also be consulted.

2. Application Process

Before applying for a variance or appealing an administrative determination, the practitioner must be sure they have fully investigated the legal and political aspects of the situation. The application must not be considered simply a formality, but as the first presentation of the request. As public record, it may be circulated and quoted widely. It must not be sloppy, incomplete or non-persuasive. Do not be limited by the form as most cities will allow additional materials and or the retyping and reformatting of the application form in order to allow a more complete presentation of the project application.

3. Procedural Process

Variations are decided solely by the BOA. Usually only one public hearing is held and the BOA makes its decision at that meeting or the succeeding one. As an appointed body, the BOA is somewhat distanced to the political issues which affect a City Council. Often, the BOA has members with experience in their positions and an understanding of their authority.

Variations require very careful consideration of the scope of the requested noncompliance. That scope should be kept as narrow as possible, but broad enough to provide the practical benefits desired.

Hardship is the almost exclusive focus of a BOA considering a variance. Keep in mind that most BOA's deny the vast majority of variations and thus have a "negative" mind set. The requirement of a supermajority seventy-five percent (75%) vote is a structural guard against "easy" variations. For most variations, the situation can be characterized as either self-imposed or financial, neither of which is a basis for a variance. In a condemnation situation, there is not an issue if self-imposition. However, the applicant may be challenged that the compensation from the condemnation makes the applicant whole. It must not be allowed for the BOA to believe the applicant is "double dipping", particularly where the condemnation recovery is significant and the applicant's condemnation counsel asserted that the improvements were of no continuing value after the taking. Always challenge the allegation that the condemnation award was sufficient or was near true third party fair market value. Even if the local appraisal district's tax value is near or less than the condemnation award, the applicant must state that such valuation is below true third party fair market value.

The applicant must do its best to articulate a legitimate argument based on the physical characteristics of the site to support the variance. Sometimes, a BOA will be willing to distinguish between sympathetic owners and either (i) their predecessor or (ii) their contractor, where the violation was made by that "third party." However, where a mistake can be cured (what mistake cannot) there needs to be an argument that just because the mistake can be fixed for an exorbitant amount of money does not make it a purely financial hardship. The time to cure and the possibility that the cure will not look as good, or function appropriately should be mentioned.

When appealing an administrative determination or interpretation, the applicant must carefully and logically lay out its proposed interpretation in a way which is not disrespectful to the city staff. Remember that city staff has ongoing interaction with the BOA and the BOA may be reluctant to overrule the individual they interact with regularly, unless the case is very well presented and supported.

4. Political Process

The BOA is appointed and not subject to easy removal by the City Council. Plus, the typical BOA member is a technician, often a lawyer, engineer, architect or contractor. This is a tough audience who feels little, if any, political pressure. This group has no broad focus, but is very limited in the consideration of its responsibility to the city. Beware of political pressure,

which may backfire. Many BOAs will not allow direct contact of members to discuss pending matters, but rarely is this a written policy in smaller communities. The BOA rules should be reviewed to determine what prohibitions on ex parte contact exist.

5. Public Presentations

Public presentations are tricky and the applicant and its team must present a presentation carefully tailored to the city and specific project. Several rules apply:

- Know Your Forum – The BOA is different from other governmental bodies, and is quasi-judicial. Treat it accordingly. Address the local concerns and be careful about citing other cities.
- Be Prepared – Know the facts, the law, the BOA commissioners, the opposition and your presentation. Do not read a prepared presentation. Be ready to speak extemporaneously. Have exhibits mounted on boards and copies to distribute, if appropriate (enough for all of the zoning body and all city staff, perhaps copies for the audience).
- Be Professional – Keep cool and unemotional. Realize that many of the public will react emotionally and perhaps make personal accusations. Show knowledge and preparation in your presentation and response to issues. Dress appropriately to show respect for the forum and the importance of the issue. In asserting legal points, beware of being overbearing, unless part of your plan.
- Be On Point and Timely – Never ramble. Abide by procedural rules and time limits. Keep on point and directed. If irrelevant issues arise, do not hesitate to guide the hearing back on track.
- Prepare the Client – The client representative should be fully prepared to respond to questions from the zoning body. Any presentation by the client should be carefully outlined, and if needed, rehearsed. Prepare the client for any likely attacks, so they will not be surprised. Never let the client respond emotionally. Do what you can to prevent the client from harming their own cause.
- Be Ready to React – Be ready to speak extemporaneously. Have set answers to likely questions and concerns. Use the opportunity to respond as a forum to reassert applicant's position.