

Board of Adjustment Meeting
August 19, 2014
Minutes

Present: Mike Harrison, Art Whittington, Julian Council, Gail Royster, Lucius Jones, Gayenell Gull

Absent: None

Also Present: Planning Director David Bergmark.

1. Call to Order: Chairman Mike Harrison called the meeting to order at 6 p.m.

2. Recognition of Guests: Chairman Mike Harrison recognized all guests.

3. Swearing in of New Members

Mr. Bergmark recited the oath to new Board of Adjustment members Lucius Jones and Julian Council. Both members responded in the affirmative and signed the oath.

4. Board of Adjustment Training

Mr. Bergmark presented a powerpoint presentation on the duties and responsibilities of the Board of Adjustment (Attachment A – See Attached)

Mr. Whittington made the motion to adjourn. Lucius Jones seconded the motion. The motion was unanimous.

Board of Adjustment

- ▶ Board Composition
 - 7 Members total:
 - 5 from within city limits
 - 2 from the town's ETJ
- ▶ Members at Meetings
 - 5 members actively participate at meetings.
 - (4 of 5 members participating from corporate limits)
 - 2 members serve as 'Alternates'
 - Alternates are rotated when necessary to allow all to serve.

Board of Adjustment

- ▶ Duties and Responsibilities
 - Administrative Review – To hear and decide any appeal from and review any order, requirement, decision, or determination made by the Administrator or the Technical Review Committee.
 - Variations – To authorize on appeal variances from the terms of this Ordinance as will not be contrary to the public interest.

Board of Adjustment

- ▶ Only 3 members are needed for a Quorum, which is able to make routine administrative decisions.
- ▶ However, in order to vote on a variance request, all 5 members must be present.
 - Statutes require 4/5 vote for variance decisions.

Board of Adjustment

- ▶ Procedure for Approving/Denying Variations
 - The BOA must draw Conclusions of Law which are supported by defined Findings of Fact
 - Substantial evidence in the record is *required* for each key factual determination
 - In order to approve a variance, the BOA must Conclude that the applicant's case meets the requirements of all Permit Standards, as shown by the Findings of Fact.
 - Precedents -- prior decisions are not legally binding, but are persuasive

Board of Adjustment

- ▶ Legislation passed in 2013 loosened the permit standards for variance approvals. Stricter language regarding the "reasonable use" of the property and the "practical difficulties" requirement were removed.

Board of Adjustment

- ▶ Before a BOA can approve an ordinance, there are 3 main Conclusions which must be drawn (based on Findings of Fact for the case)
 1. It is the Board's CONCLUSION that there are/are not real, substantial, and unnecessary hardships in the way of carrying out the strict letter of the Ordinance
 - A self-created hardship cannot be the basis for a variance.
 - The fact that the applicant did not create the rule/regulation is not relevant.
 - The hardship must result from conditions *peculiar to the property* (such as location, size, or topography), *not* the personal circumstances of the applicant.

Board of Adjustment

▶ Conclusions (based on Findings of Fact)

2. It is the Board's **CONCLUSION** that in granting the variance, the public safety and welfare have/have not been assured and substantial justice has/has not been done.

Board of Adjustment

▶ Conclusions (based on Findings of Fact)

3. It is the Board's **CONCLUSION** that, if granted, the variance will/will not be in harmony with the general purpose and intent of the ordinance and will/will not preserve its spirit.

- When evaluating this item, consider why the UDO standard being requested for a variance was created. What was the purpose behind it. Can a variance be created which still achieves that same purpose through a somewhat different manner?

Board of Adjustment

▶ Four permit standards have been developed to show whether there are "unnecessary hardships" within the meaning of the statute.

- (1) that the hardship results from the application of the ordinance to his property;
 - (2) that the hardship of which he complains is suffered by his property directly, and not by others;
 - (3) that the hardship is not the result of his own actions; and
 - (4) that the hardship is peculiar to the applicant's property.
- The burden of proving that these conditions exist is on the applicant.

Board of Adjustment

▶ The BOA must specifically address and form Conclusions regarding all Permit Standards, stating what facts support their decision.

- ▶ Use Variances are **NOT ALLOWED**
 - The BOA can not grant a use of land not authorized by the Unified Development Ordinance (UDO).
 - Text and Map Amendments should be used to address these issues.
- ▶ The Board of Adjustment's conclusions are included in the 'Order Granting/Denying a Variance', which must be signed by the Chairman.

Board of Adjustment

▶ Examples of Valid Variance Requests

1. Reduced setback request for a vacant lot of an odd configuration which would otherwise not meet standards allowing a building to be placed. (where no alternatives exist - ie. Smaller building or recombination of lots is not available)
 - ▶ Ex. - New ROW bisects property.
2. Height variance request due to the extreme slope of a piece of property.

Board of Adjustment

- ▶ Board of Adjustment Cases are Quasi-Judicial
- ▶ Chairman must open and close the public hearing
- ▶ Only evidence presented at hearing may be considered -- no ex parte communication allowed
- ▶ Witnesses
 - Oaths needed for all offering evidence
 - (administered by Chairman)
 - Cross-examination must be allowed
- ▶ Evidence
 - Hearsay limited
 - Opinions only from experts

Board of Adjustment

- ▶ Variances may be granted outright, granted partially, or denied.
 - Conditions may be attached to an approval so long as those conditions relate to the nature of the request and protect public safety/welfare.
- ▶ Site Visits by Board Members
 - Board should not visit site as a group, except as part of a meeting.
 - Site visitor should avoid discussing case with property owner.
 - Impressions must only be revealed at hearing.



Board of Adjustment

- ▶ Conflict of Interest in Quasi-Judicial Matters
- ▶ Members must not have:
 - Financial conflict
 - Bias or fixed opinion
 - Undisclosed outside contacts
 - Close family tie
 - Close business tie



Board of Adjustment

- ▶ If a conflict exists, full recusal required
- ▶ May not participate in
 - Questioning witnesses
 - Discussing case
 - Voting



Board of Adjustment

- ▶ Rehearings
 - A variance request may only be reheard by the BOA if there are changed conditions.



Board of Adjustment

- ▶ Changes Due to the Adoption of the UDO
- ▶ Nonconformities
 - With the passing of the UDO, the Board of Commissioners shall hear and decide appeals and modifications of nonconformities from any land owner provided the appeal does not involve the replacement of one nonconformity with another nonconformity.
 - The same rules of procedure will apply for these cases.



Board of Adjustment

- ▶ Changes Due to the Adoption of the UDO
- ▶ Expansion of non-conforming structures
 - Prior to the adoption of the UDO, non-conforming structures could not be expanded in any fashion without a minor deviation (approved by staff) or a Variance (approved by the BOA).
 - Under the UDO, a non-conforming structure may be expanded without a variance or minor deviation so long as the enlargement itself is in compliance with all yard requirements and other regulations of such structures.

