

# VARIANCE ISSUES IN BUILDING PERMIT ERROR CASES



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Texas City Attorneys Association  
Semi-Annual Summer Conference  
South Padre Island, Texas  
June 9, 2005

## VARIANCE ISSUES IN BUILDING PERMIT ERROR CASES

### ACT 1 – THE BACKGROUND:

#### City Officials Cannot Waive Zoning Ordinances

For some time, the Texas Courts have held fast to the maxim that municipalities “in the discharge of their governmental, as distinguished from their proprietary, functions cannot be bound or stopped by unauthorized acts of their officers.” *Davis v. City of Abilene*, 250 S.W.2d 685 (Tex. Civ. App. – Eastland 1952, writ ref’d n.r.e.); *Newton v. Town of Highland Park*, 282 S.W.2d 266 (Tex. Civ. App. – Dallas 1955, writ ref’d n.r.e.); *Robinson v. Puckett*, 145 Tex. 366, 198 S.W.2d 74 (1946). This rule has frequently been applied in the context of zoning ordinances. A municipality may not, for instance, be estopped from enforcing its zoning regulations unless the alleged violator has relied to his detriment on an *authorized* act of the city. *City of Hutchins v. Prasifka*, 450 S.W.2d 829 (Tex. 1970); *City of Amarillo v. Stapf*, 129 Tex. 81, 101 S.W.2d 229 (1937); *City of San Angelo v. Deutsch*, 126 Tex. 532, 91 S.W.2d 308 (1936). To be an authorized act of the municipality, the act must be officially adopted or approved by the governing body. *Id.* For instance, the Amarillo Court of Appeals has held that the City of Amarillo building inspector’s issuance of a certificate of compliance did not estop the City from denying a specific use permit contrary to the terms of the certificate of compliance. *T&R Associates, Inc. d/b/a Scarlett v. City of Amarillo*, 688 S.W.2d 622 (Tex. App. – Amarillo 1985, writ ref’d n.r.e.).

Additionally, actions of a building official cannot “be used to prejudice or destroy the rights of the public to require the enforcement of the zoning ordinance which was valid on its face. . . .” *Edge v. City of Bellaire*, 200 S.W.2d 224, 228 (Tex. Civ. App. – Galveston 1947, writ ref’d). In fact, an incorrect act of a building official or inspector cannot estop a city from enforcing its legally valid zoning ordinances “no matter how unjust and harsh its effect might be.” *Swain v. Board of Adjustment of the City of University Park*, 433 S.W.2d 727, 732 (Tex. Civ. App. – Dallas 1968, writ ref’d n.r.e.).

#### Persons Charged with Constructive Knowledge of Municipal Ordinances

Moreover, persons building or developing property within a municipality are presumed to have knowledge of the contents and provisions of the city’s zoning and development regulations. *Greater Houston Transportation Company v. Phillips*, 801 S.W.2d 523 (Tex. 1990).<sup>1</sup> In other words, persons dealing with cities are charged with

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<sup>1</sup> See also: *E.H. Stafford Manufacturing Company v. Wichita School Supply Company*, 118 Tex. 650, 23 S.W.2d 695 (1930); *City of Fort Worth v. Johnson*, 388 S.W.2d 400 (Tex. 1964); *Board of Adjustment of the City of San Antonio v. Nelson*, 577 S.W.2d 783 (Tex. Civ. App. – San Antonio 1979, writ ref’d n.r.e. by 584 S.W.2d 701 (Tex. 1979)); *City of Dallas v. Coffin*, 254 S.W.2d 203 (Tex. Civ. App. – Austin 1963, writ ref’d n.r.e.); *Heisig v. Vaughn & Gardner*, 15 S.W.2d 113 (Tex. Civ. App. – Texarkana 1929, writ ref’d); *Trail Enterprises, Inc. v. City of Houston*, 957 S.W.2d 625 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1997), *cert. denied*, 525 U.S. 1070 (1999) (“Those residing in or having business dealings with a city are presumed to know its ordinances.”).

constructive notice of the municipal regulations affecting them; they may not, therefore, argue that they reasonably and innocently relied to their detriment on unofficial statements from city officials. *City of Fort Worth v. Johnson*, 388 S.W.2d 400 (Tex. 1964).

### **The Request for a Variance – the Zoning Board of Adjustment**

Section 211.009, of the Texas Local Government Code specifically defines and limits the authority of a city’s board of adjustment. The legislatively prescribed authority of a board with regard to variances is limited to:

“. . . authorize in specific cases a variance from the terms of the zoning ordinance if the variance is not contrary to the public interest *and due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship*, and so that the spirit of the ordinance is observed and substantial justice is done. . . .” TEX. LOCAL GOV’T. CODE ANN. 211.009(a)(3) (Vernon’s 2004). [emphasis added].

### **“Unnecessary Hardship”**

To find an “unnecessary hardship,” the board of adjustment must determine whether a literal application of the zoning ordinance in question to the particular property would be unreasonable in light of the general statutory purpose to secure reasonable zoning. *Currey v. Kimple*, 577 S.W.2d 508 (Tex. Civ. App. – Texarkana 1979, writ ref’d n.r.e.). The test for determining the existence of an unnecessary hardship, as required by Section 211.009 has been stated by one court as: “Is the environment such that the lot is not reasonably adapted to a conforming use?” *Board of Adjustment v. Stovall*, 218 S.W.2d 286, 288 (Tex. Civ. App. – Fort Worth 1949, no writ). Other Texas courts have agreed, holding “a property owner challenging the action of a Board of Adjustment must show that enforcement of the ordinance *would destroy any reasonable use of his property.*” *Reiter v. City of Keene*, 601 S.W.2d 547 (Tex. Civ. App. – Waco 1980, writ dism’d). [emphasis added]. Moreover, the hardship must be something more than financial:

“The Code expressly provides that the unique circumstances existing on the property so as to justify granting a variance must be something other than a financial hardship. A variance is not authorized merely to accommodate the highest and best use of the property, but where the zoning ordinance does not permit any reasonable use of such lot.” *Board of Adjustment of the City of San Antonio v. Willie*, 511 S.W.2d 591, 594 (Tex. Civ. App. – San Antonio 1974, writ ref’d n.r.e.)

The Dallas Court of Appeals has added that a financial hardship is not a “special condition” as described in the statute. *Bat’tles v. Board of Adjustment and Appeals of the City of Irving*, 711 S.W.2d 297 (Tex. App. – Dallas 1986, no writ).

## Standard of Review on Appeal of Board of Adjustment Decision

Add to this mix the standard of review of a decision of a municipal board of adjustment. The question for a reviewing court on appeal is whether the board of adjustment abused its discretion in making the ruling it did. *Nu-Way Emulsions, Inc. v. City of Dalworthington Gardens, Inc.*, 617 S.W.2d 188 (Tex. 1981); *Board of Adjustment of the City of Corpus Christi v. Flores*, 860 S.W.2d 622 (Tex. App. – Corpus Christi 1993, writ denied). An abuse of discretion occurs when the board of adjustment acts without reference to any guiding rules and principles of law. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986). Moreover, a strong presumption exists in favor of the board of adjustment’s decision, giving the party attacking the decision of the board of adjustment the very heavy burden of demonstrating the decision’s illegality. *SWZ, Inc. v. Board of Adjustment of the City of Fort Worth*, 985 S.W.2d 268 (Tex. App. – Fort Worth 1999, review denied).<sup>2</sup>

## ACT 2 – THE CONTROVERSY

### Request for a Variance After Building Permit is Issued In Error

Unfortunately, often cities are faced with a situation where a property owner or developer has applied for and received a building permit from the city. Sometime during construction, it is discovered that the building under construction violates one or more provisions of the City’s zoning ordinance. Often, the building in question is 60% or more complete and the changes necessary to bring the building into compliance are quite costly. In this instance, sensing the equities in his favor, the property owner frequently

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<sup>2</sup> See also: *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238 (Tex. 1985), *cert. denied*, 472 U.S. 1159 (1986); *West Texas Water Refiners, Inc. v. S & B Beverage Company, Inc.*, 915 S.W.2d 623, 626 (Tex. App. – El Paso 1996, no writ) (“The decision of a board of adjustment is reversible **only if the facts are such that board could have reached but one decision.**”) [emphasis added.]; *Murmur Corporation v. Board of Adjustment of the City of Dallas*, 718 S.W.2d 790, 799 (Tex. App. – Dallas 1986, writ ref’d, n.r.e.) (“If reasonable minds could have reached the conclusion the board must have reached in order to justify its action, the order must be upheld.”); *Wende v. Board of Adjustment of the City of San Antonio*, 27 S.W.3d 162, 167 (Tex. App. – San Antonio 2000), *rev’d on other grounds*, 92 S.W.3d 424 (Tex. 2003) (“With respect to factual matters, however, a reviewing court may not substitute its decision for that of the board”); *SWZ, Inc. v. Board of Adjustment of the City of Fort Worth*, 985 S.W.2d 268, 270 (Tex. App. – Fort Worth 1999, review denied) (“The district court cannot put itself in the adjustment board’s position or substitute its discretion for that of the board.”); *Southland Addition Homeowner’s Association v. Board of Adjustments, City of Wichita Falls, Texas*, 710 S.W.2d 194 (Tex. App. – Fort Worth 1986, writ ref’d, n.r.e.); *Board of Adjustment, City of Corpus Christi v. McBride*, 676 S.W.2d 705 (Tex. App. – Corpus Christi 1984, no writ); *Pick-N-Pull Auto Dismantlers v. Zoning Board of Adjustment of the City of Fort Worth*, 45 S.W.3d 337 (Tex. App. – Fort Worth 2001, review denied); *Town of South Padre Island Texas v. Cantu*, 52 S.W.3d 287, 289 (Tex. App. – Corpus Christi 2001, no writ) (“A district court may not substitute its judgment for that of a board of adjustment, even when the overwhelming preponderance of the evidence is against the board’s decision.”); *Currey v. Kimple*, 577 S.W.2d 508, 511-512 (Tex. Civ. App. – Texarkana, writ ref’d n.r.e.) (“The Court, when considering the legality of the Board’s order, must not put itself in the position of the Board and substitute its findings for that of the Board, even though the Court concludes that the overwhelming preponderance of the evidence is against the Board’s decision.” *Quoting Zoning Board of Adjustment v. Marshall*, 387 S.W.2d 714 (Tex. Civ. App. – San Antonio 1965, writ ref’d n.r.e.).

seeks a variance from the board of adjustment. Based on the foregoing principles, the board of adjustment denies the request for variance. Incensed, the property owner seeks judicial review in district court. Applying the frequently utilized, but rarely stated “bad facts make bad law” doctrine, the district court seizes the equities in favor of the property owner and overrules the variance denial by the board of adjustment. Somewhat amazingly, this decision is upheld on appeal.

This precise scenario played out in *Town of South Padre Island v. Cantu*, 52 S.W.3d 287 (Tex. App. – Corpus Christi 2001, no writ). In *Cantu*, the city determined that the structure in question encroached into the airspace over the set-back by twenty-two inches (22”). A review of the building plans filed with the city, upon which the building permit was issued, showed the very same twenty-two inch (22”) encroachment. In ignoring the foregoing line of cases, the Corpus Christi Court of Appeals accepted the unchallenged findings from the lower court implying that South Padre Island was estopped from revoking the Cantus’ permit because it accepted the submission of the defective building plans. The Court next found that special conditions existed because the “Cantus’ property was subject to a unique, oppressive condition, caused by the Town’s acquiescence to the building plans.” Once the city stopped the construction, the real property “was subject to a unique, oppressive condition because the house could no longer be completed as designed without a variance.” Relying somewhat on an earlier decision in *Board of Adjustment of the City of Corpus Christi v. McBride*, 676 S.W.2d 705 (Tex. App. – Corpus Christi 1984, no writ), the Court concluded that the board of adjustment could have reached only one conclusion: grant the variance. Although the Corpus Christi Court of Appeals did not expressly state that it based its decision on estoppel grounds, there appears to be no other explanation for the decision.

### **ACT 3 – ANOTHER COURT JOINS THE FRAY**

*City of Dallas v. Vanesko*, 127 S.W.3d 220  
(Tex. App. – Dallas 2003, review granted 12/17/04)

For sometime, practitioners in this area have been forced to argue that the Corpus Christi opinions were simply an aberration: The Texas Supreme Court was asked to review neither case, and no other courts in Texas seemed to follow *Cantu* and *McBride*. This changed in November of 2003, when the Dallas Court of Appeals issued the *Vanesko* wholeheartedly adopting the reasoning and holdings in the *Cantu* and *McBride* opinions.

The Vaneskos began living in a home on their property in the City of Dallas in 1991. In 1996, they demolished their existing home and built a new home on the same lot. Doug Vanesko served as his own general contractor. Recognizing that he lacked experience as a contractor, Mr. Vanesko paid the Dallas building inspector extra money to approve his construction plans. The City approved the plans and made periodic inspections of the home.

When the construction was nearly completed, it was discovered that the height of the roof exceeded the zoning restrictions for its district. The actual construction conformed to the plans approved by the City, but the roof as constructed exceeded the height limitations of its zoning district by 8.11 feet. After the City brought this fact to the attention of the homeowner, the Vaneskos filed an application for a variance with the City's Board of Adjustment. Evidence at the Board of Adjustment hearing indicated that it would cost the Vaneskos between \$50,000 and \$100,000 to remove and replace the roof with one in conformance with the City's zoning restrictions. Additionally, the neighbors expressed no objection to the existing height of the roof, but did indicate some disdain for the actions of the City with regard to the Vaneskos.

Of some interest to the Dallas Court of Appeals was the advice given by an assistant city attorney to the board of adjustment. The Court noted:

During the hearings before the Board on the request for a variance, the Board was specifically instructed by an assistant city attorney not to consider the fact that the permit had been issued in error or that the home was already completely built. Accordingly, the Board denied the request for a variance. *Vanesko*, at 223-224.

In holding in favor of the landowner, the Court specifically determined that it was error for the board to not consider the case in light of *Cantu* and *McBride*. The Court summarily concluded that the board of adjustment abused its discretion when it failed to analyze or apply those two cases correctly. In so doing, the Court concluded that the trial court did not substitute its discretion for that of the board of adjustment. The Court reasoned:

We agree with the *Cantu* court that once construction of the home began, the nature of the realty was affected because the construction materials which were affixed to the property actually became a part of the property. [citations omitted]. The *Cantu* court concluded that once the town withdrew its authorization to continue construction in accordance with the erroneous plans, the real property became subject to a unique oppressive condition because the home could not be designed without a variance. [citations omitted]. The same logic applies in the instant case.

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We conclude that the hardship was not merely personal to the Vaneskos, but was also linked to the realty. The shape of the structure at the time the error was discovered rendered the Vaneskos' parcel incapable of being developed in a manner commensurate with the development of other parcels of land in that zoning area. To require the roof to be replaced with a much more shallow pitched roof would cause the Vaneskos' property to inappropriately stand out amongst the other properties which have more steeply pitched roofs. *Id.* at 227.

Fortunately, the City has appealed the *Vanesko* decision to the Texas Supreme Court, which accepted writ on December 17, 2004. The case was argued in February. Unfortunately, as of the time this paper was written, the Supreme Court had not issued an opinion.