

## **SECTION 9        ZONING BOARD OF ADJUSTMENT (ZBA)**

### **9.1      CREATION:**

- A. There is hereby created a Zoning Board of Adjustment (ZBA), hereafter referred to as the "Board", for the purpose, in appropriate cases and subject to appropriate conditions and safeguards, to make special exceptions to the terms of this Ordinance that are consistent with the general purpose and intent of this Ordinance. The Board shall be composed of members who are resident citizens, taxpayers, qualified voters or have a demonstrable interest in the City of Terrell.

### **9.2      MEMBERS; TERMS OF OFFICE:**

- A. The Board shall consist of five (5) regular members, and two alternates who shall be appointed by a simple majority vote of the full City Council, and shall operate in accordance with Sections 211.008 through 211.011 of the Texas Local Government Code, as amended.
- B. Board members shall serve for a term of three (3) years.
- C. Any vacancy(s) on the Board of a regular member shall first be filled via promotion of an alternate to regular board member status for the remainder of the alternate's term(s). If no alternates are available or if alternate positions are open then vacancies of either regular board members or alternates shall be filled by a simple majority vote of the full City Council.
- D. Term Limitations: No person shall serve more than three (3) consecutive terms as a member of the Board of Adjustment.
- E. Members of the Board may be removed from office for cause on written charge, and after a public hearing, by a simple majority vote of the full City Council. An excused absence must be noted by the Chair of the Commission or acting Chair at the meeting or at the following meeting by stating the Member and the justification. The only acceptable instances of excused absences shall be major personal or family health events and required travel for employment. The Chair or acting Chair must receive documentation of such prior to stating for the record that the absence shall be considered excused. Members with two (2) consecutive unexcused absences or three (3) consecutive unexcused total absences per rolling 12-month period from regular or posted meetings shall automatically forfeit the unexpired portion of their term and shall not be eligible for reinstatement to any City Board of Commission for two (2) year period. Members with extenuating circumstances may request City Council act to suspend their service for a designated period of time with a temporary replacement.
- F. Both regular and alternate members of the Board shall regularly attend all meetings and public hearings of the Board, shall serve without compensation.
- G. The Board shall elect a Chairperson and a Vice-Chairperson from among its membership, and each officer shall hold office until replaced by a simple majority vote of the full Board. The City Manager's designee shall serve as Secretary to the Board, and shall keep minutes of all meetings held by the Board. The Secretary shall also set up and maintain a separate file for each application for hearing by the Board, and shall record therein the names and addresses of all persons/entities to whom notices are mailed, including the date of mailing and the person by whom such notices were delivered to the Post Office. All records and files herein provided for shall be permanent and official records of the City of Terrell. The Secretary shall also immediately notify in writing the City Council, Planning and Zoning Commission, and the Municipal Development Department (MDD) of each decision rendered by the Board in the conduct of its duties.

H. The Board shall have the power to make the rules, regulations and bylaws for its own government, which shall conform as nearly as possible to those governing the City Council, and the Board's rules, regulations and bylaws shall be subject to approval by City Council.

### 9.3 MEETINGS:

- A. Meetings of the Board shall be held at the call of the Chairperson and at such other times as the Board may determine. All meetings of the Board shall be open to the public, and minutes shall be kept of all proceedings at Board meetings.
- B. The Board will follow the parliamentary procedure adopted by the City Council, and procedures shall not be in conflict with the laws applicable to the Board on the following:
  1. **Quorum** - Four (4) members of the Board shall constitute a quorum for the conduct of business.
  2. **Voting** - All Board members, including the presiding Chairperson, shall be entitled to one vote each upon any question, a quorum being present. A simple majority of the membership shall be required to adopt rules, approve meeting minutes or pass other procedural issues. Each case before the Board must be heard by at least 75 percent of the regular members. A lack of a motion or a failure to receive four (4) affirmative votes to grant a variance shall result in the denial of the variance.
  3. Alternate members in attendance at a meeting may take part in the discussion of cases before the Board but shall not vote on a case unless they are representing a regular member who is absent.
  4. **Conflict of Interest** - If any member has a conflict of interest regarding any item on the Board's agenda, he/she shall remove himself/herself from the room and shall refrain from voting only on the item for which a conflict exists. If a conflict of interest results in less than the required quorum for the Board to take action then an alternate may then be allowed to vote on that item. (Refer to Chapter 171, Texas Local Government Code regarding conflicts of interest)

### 9.4 AUTHORITY OF ZONING BOARD OF ADJUSTMENT:

- A. The Board shall have the authority, subject to the standards established in Sections 211.008 through 211.011 of the Texas Local Government Code and those established herein, to exercise powers and to perform duties including the following:
  1. Hear and decide an appeal that alleges error in an order, requirement, decision or determination made by an administrative official in the enforcement of this Ordinance;
  2. Authorize, in specific cases, a variance (see Section 9.6) from the terms of this Ordinance if the variance is not contrary to the public interest and if, due to special conditions, a literal enforcement of the Ordinance would result in unnecessary hardship, and so that the spirit of this Ordinance is observed and substantial justice is done; and
  3. Make interpretations on zoning district boundaries shown on the Zoning Map where uncertainty exists because physical features on the ground differ from those on the Zoning Map or where the rules in Section 4 of this Ordinance (Zoning District Boundaries) do not apply or are ambiguous.
- B. In exercising its authority under Subsection A.1 above, the Board may reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision or determination from which an appeal is taken and make the correct order, requirement, decision or determination, and for that purpose the Board has the same authority as the administrative official.

C. The concurring vote of at least four (4) members (75% of the regular members), of the Board is necessary to:

1. Reverse an order, requirement, decision or determination of an administrative official;
2. Decide in favor of an applicant on a matter on which the Board is required to review under this Zoning Ordinance;
3. Authorize a variance from a provision of this Zoning Ordinance; or
4. Hear and decide special exceptions to a provision of this Zoning Ordinance (see Section 9.6E.).

#### **9.5 LIMITATIONS ON AUTHORITY OF BOARD OF ADJUSTMENT:**

- A. The Board may not grant a variance authorizing a use other than those permitted in the district for which the variance is sought, except as provided in Section 9.6.
- B. The Board shall have no power to grant or modify Planned Developments, Plats or Specific Use Permits authorized under Section 31B of these regulations.
- C. The Board shall have no power to grant a zoning amendment. In the event that a request for a zoning amendment is pending before the Planning and Zoning Commission or the City Council, the Board shall neither here nor grant any variances with respect to the subject property until final disposition of the zoning amendment by the Commission and the City Council.
- D. The Board shall not grant a variance for any parcel of property or portion thereof upon which a site plan, or any type of plat, where required, is pending on the agenda of the Planning and Zoning Commission and, where applicable, by the City Council. All administrative and procedural remedies available to the applicant shall have been exhausted prior to hearing by the Board.
- E. No variances shall be granted to allow any prohibited sign, use or activity.
- F. The Board shall not have the authority to grant a variance to any adopted building or electrical code or life safety requirement.

#### **9.6 VARIANCES AND SPECIAL EXCEPTIONS:**

- A. The Board may authorize a variance from these regulations when, in its opinion, undue hardship will result from requiring strict compliance. For example, if the subject property substantially differs from other similarly zoned land parcels by being of such restricted area, shape or slope that it cannot reasonably be developed in the same manner as other similarly zoned land parcels, then a variance of the building setback, lot width or depth, parking requirement, or other development standard may be warranted. In granting a variance, the Board shall prescribe only conditions that it deems necessary for, or desirable to, the public interest. In making the findings herein below required, the Board shall take into account the nature of the proposed use of the land involved, existing uses of land in the vicinity, the number of persons who will reside or work within the proposed use, and the probable effect such variance will have upon traffic conditions and upon the public health, safety, convenience and welfare of the community.
- B. **Conditions Required for Variance** - No variance shall be granted without first having given public notice and having held a public hearing on the variance request in accordance with Section 9.8 of this Ordinance and unless the Board of Adjustment finds:

1. That there are special circumstances or conditions affecting the land involved such that the strict application of the provisions of this Ordinance would deprive the applicant of the reasonable use of his/her land; and
2. That the variance is necessary for the preservation and enjoyment of a substantial property right of the applicant; and
3. That the granting of the variance will not be detrimental to the public health, safety or welfare, or injurious to other property within the area; and
4. That the granting of the variance will not have the effect of preventing the orderly use of other land within the area in accordance with the provisions of this Ordinance; and
5. That a finding of undue hardship exists (see Section 9.6C below).

Such findings of the Board, together with the specific facts upon which such findings are based, shall be incorporated into the official minutes of the Board meeting at which such variance is granted. Variances may be granted only when in harmony with the general purpose and intent of this Ordinance so that the public health, safety and welfare may be secured and that substantial justice may be done.

**C. Findings of Undue Hardship** - In order to grant a variance, the Board must make written findings that an undue hardship exists, using the following criteria:

1. literal enforcement of the controls will create an unnecessary hardship in the development of the affected property; or
2. the situation causing the hardship or difficulty is neither financial in nature, self-imposed nor generally affecting all or most properties in the same zoning district; or
3. the relief sought will not injure the permitted use of adjacent conforming property; or
4. the granting of a variance will be in harmony with the spirit and purpose of these regulations; or
5. the cost of compliance with the zoning ordinance is greater than 50 percent of the appraised value of the structure as shown on the most recent certified appraisal roll; or
6. compliance would result in a loss to the lot on which the structure is located of at least 25 percent of the area on which development may physically occur; or
7. compliance would result in the structure not in compliance with a requirement of another city ordinance, building code, or other requirement; or
8. compliance would result in the unreasonable encroachment on an adjacent property or easement; or
9. the city considers the structure to be a nonconforming structure.

**D. A variance shall not be granted to relieve a self-created or personal hardship, nor shall it be based solely upon economic gain or loss, nor shall it permit any person the privilege in developing a parcel of land not permitted by this Ordinance to other parcels of land in the particular zoning district. No variance may be granted which results in undue hardship upon another parcel of land.**

E. **Special Exceptions for Nonconforming Uses and Structures** - Upon written request of the property owner, the Board may grant special exceptions to the provisions of Section 7 of this Ordinance, limited to the following, and in accordance with the following standards:

1. Expansion of the land area of a nonconforming use, up to a maximum of ten (10) percent; or
2. Expansion of the gross floor area of a nonconforming structure, up to a maximum of ten (10) percent, provided that such expansion does not decrease any existing setback and does not encroach onto adjacent property; or
3. In granting special exceptions under this Subsection, the Board may impose such conditions as are necessary to protect adjacent property owners and to ensure the public health, safety and general welfare, including but not limited to conditions specifying the period during which the nonconforming use may continue to operate or exist before being brought into conformance with the standards of the Zoning Ordinance.
4. For existing single-family and duplex structures that were constructed prior to the effective date of this Ordinance, the Board may authorize a special exception for any structure that was constructed over a setback line established by this Ordinance.
5. The Board may authorize a special exception for the reconstruction and occupancy of a nonconforming structure, or a structure containing a nonconforming use and/or the restoration of a building site that is nonconforming as to development standards (including, but not limited to, parking arrangement, landscaping, etc.), when a structure has been damaged by fire or other cause to the extent of more than sixty percent (60%), but less than the total, of the appraised value of the structure, as determined from the records of the Kaufman County Appraisal District, as of the date of the damage. Such action by the Board shall have due regard for the property rights of the person or persons affected, and shall be considered in regard to the public welfare, character of the area surrounding such structure, and the conservation, preservation and protection of property.
6. The Board may authorize a special exception for the enlargement, expansion or repair of a nonconforming structure if such enlargement, expansion or repair will improve the condition of the structure, if it will bring the structure closer into compliance with this Ordinance, or if it will otherwise improve or enhance public health, safety or welfare.

#### 9.7 APPEALS TO THE BOARD OF ADJUSTMENT:

A. **Authority** - In addition to the authorization of variances and special exceptions from the terms of this Ordinance, the Board shall have the authority to hear and decide an appeal that alleges error in an order, requirement, decision or determination made by an administrative official in the enforcement of this Ordinance. The Board may reverse or affirm, in whole or in part, or may modify the administrative official's order, requirement, decision or determination from which an appeal is taken and make the correct order, requirement, decision or determination, and for that purpose, the Board has the same authority as the administrative official. The Board may also hear and decide other matters authorized by the Subdivision Ordinance and other City ordinances regarding land use and development regulations.

B. **Who May Appeal** - Any of the following persons may appeal to the Board a decision made by an administrative official:

1. A person directly aggrieved by the decision; or
2. Any officer, department, board or office of the City affected by the decision.

C. **Procedure for Appeal** - The appellant must file with the Board and the official from whom the appeal is taken a written Notice of Appeal specifying the grounds for the appeal. The Notice of Appeal shall be filed within fifteen (15) calendar days after the decision has been rendered. Upon receiving the Notice, the official from whom the appeal is taken shall immediately transmit to the Board of Adjustment all papers constituting the record of action that is appealed. An appeal stays all proceedings in furtherance of the action that is appealed unless the official from whom the appeal is taken certifies in writing to the Board facts supporting the official's opinion that a stay would cause imminent peril to life or property. In that case, the proceedings may be stayed only by a restraining order granted by the Board or a court of record on application, after notice to the official, if due cause is shown. The appellant party may appear at the appeal hearing in person or by agent or attorney. The Board shall decide the appeal within forty-five (45) calendar days after the written request (i.e., Notice of Appeal) was received. The Board may reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision or determination from which an appeal is taken, and may make the correct order, requirement, decision or determination.

D. A member of the City Council may not bring an appeal to the Board.

## 9.8 PROCEDURES:

- A. **Application and Fee** - An application for a variance or a special exception to be heard by the Board, or for an appeal to the Board, shall be made in writing using forms prescribed by the City, and shall be accompanied by an application fee (as set forth by Ordinance of the City Council), a site plan, and any other additional information as may be requested in order to properly review the application. Such information may include, but is not limited to, plat plans, site building plans, photographs, topographic contour maps, and other similar documents. All drawings must be to scale.
- B. **Review and Report by the City** - A representative of the Municipal Development Department shall visit the site where the proposed variance or special exception will apply and the surrounding area, and shall report his/her findings to the Board of Adjustment.
- C. **Notice and Public Hearing** - The Board shall hold a public hearing for consideration of the variance or special exception request no later than forty-five (45) calendar days after the date the application for action, or an appeal, is filed. Written notice of the public hearing for a variance or special exception shall be provided to all property owners, via U.S. mail, within two hundred feet (200') of the affected property at least ten (10) calendar days prior to the public hearing. Notice shall also be published in the official local newspaper before the fifteenth (15<sup>th</sup>) calendar day prior to the public hearing.
- D. **Action by the Zoning Board of Adjustment** - The Board shall not grant a variance unless it finds, based upon compelling evidence provided by the applicant, that each of the conditions in Section 9.6 has been satisfied. The Board may impose such conditions, limitations and safeguards as it deems appropriate upon the granting of any variance or special exception as are necessary to protect the public health, safety, convenience and welfare. Violation of any such condition, limitation or safeguard shall constitute a violation of this Ordinance.
- E. **Burden of Proof** - The applicant bears the burden of proof in establishing the facts that may justify a variance, a special exception, an appeal, or any other action in his/her favor by the Board.
- F. **Waiting Period** - No appeal to the Board for the same or a related variance or special exception on the same piece of property shall be allowed for a waiting period of six (6) months (i.e., 180 calendar days) following an unfavorable ruling by the Board unless other property in the immediate vicinity has, within the six-month waiting period, been changed or acted upon by the

Board or the City Council so as to alter the facts and conditions upon which the previous unfavorable Board action was based. Such changes of circumstances shall permit the re-hearing of a variance or special exception request by the Board, but such circumstances shall in no way have any force in law to compel the Board, after a hearing on the matter, to grant a subsequent variance or special exception request. Any subsequent variance or special exception request shall be considered entirely on its own merits and on the specific circumstances related to the subject property.

G. **Timeliness of Application for Building Permit or Certificate of Occupancy** – Upon a favorable Board action on a variance or special exception request, the applicant shall apply for a building permit or a certificate of occupancy, as applicable to his/her particular situation, within three (6) months (i.e., 180 calendar days) following the date of Board action, unless the Board specifies a longer time period in the minutes of its action. If the applicant fails to apply for a building permit or certificate of occupancy, as applicable, within the six-month time frame, then the variance or special exception shall be deemed to have been waived, and all rights there under shall be terminated. Such termination and waiver shall be without prejudice to a subsequent appeal, and such subsequent appeal shall be subject to the same regulations and requirements for hearing as herein specified for the original variance or special exception request.

#### **9.9 FINALITY OF DECISIONS; JUDICIAL REVIEW:**

A. All decisions of the Board are final and binding. However, any person aggrieved by a decision of the Board may present a verified petition to a court of record which states that the decision of the Board is illegal, in whole or in part, and specifying the grounds of the illegality. Such petition must be presented within ten (10) calendar days after the date the Board's decision is filed in the City Secretary's office. Subject to the provisions of Chapter 211.011 of the Texas Local Government Code, only a court of record may reverse, affirm or modify a decision of the Board.