Powers of the board of adjustment

The first of three powers granted boards of adjustment as a “safety valve” is *interpretation* of the zoning ordinance. In this case, the careful wording of intent and purpose of the ordinance and of each zoning district is especially crucial. For example, an ordinance may permit “home occupations” within residential districts, but may not list all of the specific uses that can be included in this category. An applicant may apply for a building permit to remodel a portion of a residence for use as a bicycle shop. If the permit is refused, an appeal may be made to the board because the applicant believes this is as much of a home occupation as engaging in ironing or dressmaking.

Another case upon which the board takes action may arise over the interpretation of the zoning map. If the boundary lines between districts are unclear and the applicant believes his or her land is located within the commercial district, when he or she applies for a zoning permit, the zoning administrator may deny the permit if he or she interprets the map differently. The only recourse is to appeal the decision to the board of adjustment, asking the board to determine the exact location of the boundary line.

The second safety valve permitted in zoning is the power to grant *special exceptions*. Certain special uses occur infrequently within a city or county and rarely, if ever, do they exist in groups. As such, these special uses may be listed in the ordinance either as a permitted use within certain zoning districts or a permitted use throughout the jurisdiction, subject to a hearing before the board. The applicant petitions the board of adjustment directly to authorize a special use. At this time, the legislative bodies are not involved; however, most boards of adjustment refer the special-use request to the planning and zoning commission for its review and recommendation. Generally, as a part of granting the special use, the board attaches conditions to the approval to ensure that the purpose of the zoning ordinance is carried out.

One example of special exceptions would be an ordinance that has the following list of special uses within a residential (R-1) district: 1. golf courses, but not miniature courses; 2. broadcasting towers, but not the broadcasting station; 3. community recreation centers; and 4. fairgrounds. The list of special uses may be entirely different under commercial or agriculture districts.

Another type of special exception is where there is one, and only one, list of special uses for the entire jurisdiction. The special use may be allowed in any district as long as the use meets the conditions of the board of adjustment. Usually the list is quite long.

One important point: If an applicant comes before the board to request a special exception use that is on the permitted list within the ordinance, the board cannot deny the request if it complies with the conditions established by the ordinance. Thus, if the use does not conflict with the purpose and intent of the ordinance, the board must approve the application for the special exception.

The final power of the board of adjustment is the authority to grant *variances*. This power is the least understood and most abused, and in
many cases is the principal reason a zoning ordinance loses much of its effectiveness. A variance is exactly that—the board of adjustment authorizes a landowner or developer to vary from the express regulations of the zoning ordinance because enforcing the provisions of the ordinance would cause extraordinary hardship on that person.

For the board to grant a variance, several general rules prevail:

• The board may not make any decision that is contrary to the purpose and intent of the zoning ordinance.

• An adjustment may be made in the application of the zoning provisions on a particular parcel of land.

• If a situation exists which affects a general land area of the city or county, it may not be considered for adjustment (see example below).

• The board may not grant a variance unless the zoning ordinance prevents a reasonable use of the property.

A good example of permitting a variance is the case where several properties in a row, all of the same general size and shape, are zoned residential and require a common backyard setback of 25 feet. On one property, however, there is an unusual topographic situation. A small creek cuts the property in half, leaving a buildable area only in the back half. This is a unique situation—one where the owner simply cannot comply with all the setback requirements and still build a home on the lot. In this case the board of adjustment may review the facts relating to the particular lot and conceivably could permit the backyard requirement to be reduced from 25 feet to, say, 10 feet without destroying the intent of the ordinance.

The board of adjustment could not grant a variance in the case above if the situation were different. For example, if the creek split twenty lots in one area, such matters should be handled through an amendment to the zoning ordinance, and not by the wholesale application of the discretionary power of the board of adjustment. In another case, if the applicant requests to use this lot to store machinery, the board has no power to grant the variance. To permit business or industrial uses in a residential district is not an adjustment; it requires a zoning amendment, and amendments are made only by the city council or county board of supervisors.

Numerous court cases have established some precedents that the board of adjustment should keep in mind while considering each application for an adjustment. The following are good questions to ask to test the legality of an application:

1. Has unnecessary hardship been proven by the applicant? While “unnecessary hardship” has no hard-and-fast definition, the legal precedent has established several conditions of hardship.

   a. Mere inconvenience to the applicant is not sufficient grounds for “unnecessary hardship.”

   b. Inability to put the property to its most profitable use does not constitute “unnecessary hardship.”

   c. The hardship must be a compelling force; that is, the problem must be a very real hardship and not just a perceived one.

   d. A strict application of the provisions of the zoning ordinance will preclude its use for any purpose to which the land is reasonably adapted.

   e. The premises cannot be used in a manner permitted by the zoning ordinance unless the adjustment is granted.

   f. Value alone is not the proper criterion in determining “unnecessary hardship.”

The burden of proof of “unnecessary hardship” rests upon the applicant and, without such proof, an adjustment must be denied. Also, the
Sample

NOTICE TO INTERESTED PROPERTY OWNERS
BOARD OF ADJUSTMENT

Refer to Appeal No. ______

Dear Property Owner:

An application for a variance to the City Zoning Ordinance has been filed with the Board of Adjustment by ________________________________,

Name

__________________________

Address

The property is situated in the ______________________________ Zone District and is located at ________________________________.

The request, if approved, would authorize __________________________________________________________.

The Enforcing Officer was required, under the provisions of the Zoning Ordinance, to deny the permit because __________________________________________________________.

However, the Board of Adjustment, under certain conditions and safeguards, may have the authority to grant the request.

A public hearing will be held by the Board of Adjustment on _________________, 19___, at ____ p.m., in the City Hall, at which time you may submit your views on the matter in person, by writing, or by representative.

If you know of any interested property owner who, for any reason, has not received a copy of this letter, it would be greatly appreciated if you would inform him or her of the time and place of the hearing.

Sincerely yours,

BOARD OF ADJUSTMENT

Date: ________________________ By: ________________________

Secretary
hardship must be created by the ordinance, not by the applicant. If the applicant has made improvements to the property in violation of the zoning ordinance, either willfully or inno-
cently, the hardship was created by the appli-
cant and an adjustment may not be granted.

2. Has the public interest been served?
Again, there is not explicit definition of a “public interest,” but the board of
adjustment may not grant a variance if the action will injure or endanger other
property or persons. Will the variance devalue nearby property? In the ex-
ample of the property cut in half by a creek, will the adjustment cause more
flooding potential? The public good should be promoted by granting a
variance, not undermined.

3. Is the spirit and intent of the ordinance and comprehensive plan upheld? The
board of adjustment must assure that granting the adjustment will not be con-
trary to the general land use plan or other elements of the comprehensive
plan. The board’s actions should never knowingly destroy the provisions of the
ordinance but take steps to assure itself that its action is in harmony with the
ordinance.

4. Has substantial justice been done? In its decision on an appeal for a variance,
it is the duty of the board of adjustment to see that “substantial justice” is done
to all parties concerned: the applicant, the people directly affected, and the
general public.