

**2015 NEBRASKA PLANNING & ZONING ASSOCIATION  
ANNUAL CONFERENCE  
March 13, 2015**

**The Board of Adjustment**

**CITY AND VILLAGE BOARDS OF ADJUSTMENT**

Sec. 19-907. Board of adjustment; appointment; restriction on powers.

Except as provided in section 84-155, the local legislative body shall provide for the appointment of a board of adjustment. Any actions taken by the board of adjustment shall not exceed the powers granted by section 19-910.

Sec. 19-908. Board of adjustment; members; term; vacancy; adopt rules; meetings; records; open to public.

The board of adjustment shall consist of five regular members, plus one additional member designated as an alternate who shall attend and serve only when one of the regular members is unable to attend for any reason, each to be appointed for a term of three years and removable for cause by the appointing authority upon written charges and after public hearings. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant. One member only of the board of adjustment shall be appointed from the membership of the planning commission, and the loss of membership on the planning commission by such member shall also result in his or her immediate loss of membership on the board of adjustment and the appointment of another planning commissioner to the board of adjustment. After September 9, 1995, the first vacancy occurring on the board of adjustment shall be filled by the appointment of a person who resides in the extraterritorial zoning jurisdiction of the city or village at such time as more than two hundred persons reside within such area. Thereafter, at all times, at least one member of the board of adjustment shall reside outside of the corporate boundaries of the city or village but within its extraterritorial zoning jurisdiction. The board of adjustment shall adopt rules in accordance with the provisions of any ordinance adopted pursuant to sections 19-901 to 19-914. Meetings of the board shall be held at the call of the chairperson and at such other times as the board may determine. Such chairperson, or in his or her absence the acting chairperson, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, showing

the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

Sec. 19-909. Board of adjustment; appeals to board; record on appeal; hearing; stays.

Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment, after the notice of appeal shall have been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application on notice to the officer from whom the appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

Sec. 19-910. Board of adjustment; powers; jurisdiction on appeal; variance; when permitted.

The board of adjustment shall, subject to such appropriate conditions and safeguards as may be established by the legislative body, have only the following powers:

- (1) To hear and decide appeals when it is alleged there is error in any order, requirement, decision, or determination made by an administrative official or agency based on or made in the enforcement of any zoning regulation or any regulation relating to the location or soundness of structures, **except that the authority to hear and decide appeals shall not apply to decisions made under subsection (3) of section 19-929** \* (LB 973 - 2004);

- (2) to hear and decide, in accordance with the provisions of any zoning regulation, requests for interpretation of any map; and
- (3) when by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the zoning regulations, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any enacted regulation under this section and sections 19-901, 19-903 to 19-904.01, and 19- 908 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardships upon the owner of such property,

to authorize, upon **an appeal relating to the property**, a variance from such strict application so as to relieve such difficulties or hardship, **IF** such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any ordinance or resolution.

No such variance shall be authorized by the board unless it finds that:

- (a) The strict application of the zoning regulation would produce undue hardship;
- (b) such hardship is not shared generally by other properties in the same zoning district and the same vicinity;
- (c) the authorization of such variance will not be of substantial detriment to adjacent property **AND** the character of the district will not be changed by the granting of the variance; and
- (d) the granting of such variance is based upon reason of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice.

No variance shall be authorized unless the board finds that

- (e) the condition **OR** situation of the property concerned **OR** the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the zoning regulations.

In exercising the above-mentioned powers such board may, in conformity with the provisions of sections 19-901 to 19-915, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken. The concurring vote of four members of the board shall be necessary to:

- (1) reverse any order, requirement, decision or determination of any such administrative official,
- (2) to decide in favor of the applicant on any matter upon which it is required to pass under any such regulation, or
- (3) effect any variation in such regulation.

\* 19-929(3) - The commission may grant conditional uses or special exceptions to property owners for the use of their property if the municipal governing body has, through a zoning ordinance or special ordinance, generally authorized the commission to exercise such powers and has approved the standards and procedures adopted by the commission for equitably and judiciously granting such conditional uses or special exceptions. The granting of a conditional use permit or special exception shall only allow property owners to put their property to a special use if it is among those uses specifically identified in the zoning ordinance as classifications of uses which may require special conditions or requirements to be met by the owners before a use permit or building permit is authorized. The power to grant conditional uses or special exceptions shall be the exclusive authority of the commission, except that the municipal governing body may choose to retain for itself the power to grant conditional uses or special exceptions for those classifications of uses specified in the zoning ordinance. The municipal governing body may exercise such power if it has formally adopted standards and procedures for granting such conditional uses or special exceptions in a manner that is equitable and will promote the public interest. An appeal of a decision by the commission or municipal governing body regarding a conditional use or special exception shall be made to the district court.

Sec. 19-911. Board of adjustment; legislative body of village may act; exception; powers and duties.

Notwithstanding the provisions of sections 19-907 and 19-908, the legislative body of a **VILLAGE** may, except as set forth in section 84-155, provide by ordinance that it shall constitute a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of sections 19-901 to 19-905 may provide that as such board of adjustment it may exercise only the powers granted to boards of adjustment by section 19-910. As such board of adjustment it shall adopt rules and procedures that are in harmony with sections 19-907 to 19-910, and shall have the powers and duties therein provided for the board of adjustment, and other parties shall have all the rights and privileges therein provided for. The concurring vote of **TWO-THIRDS** of the members of the legislative body acting as a board of adjustment shall decide any question upon which it is required to pass as such board.

### **NOTES OF DECISIONS**

The city council of a first-class city is not authorized by this section to sit as a board of adjustment. Staley v. City of Blair, 206 Neb. 292, 292 N.W.2d 570 (1980).

**NOTE:** Pursuant to Neb. Rev. Stat. Sec. 19-911, a **village**, except as provided in 19-912.01 (village may request County Board of Adjustment to serve as its BOA) **may by ordinance** provide that it shall be its own Board of Adjustment.

Sec. 19-912. Board of adjustment; appeal; procedure.

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to the district court a petition duly verified, setting forth that such decision is illegal, in whole or in part, and specifying the grounds of such illegality. Such petition must be presented to the court within fifteen days after the filing of the decision in the office of the board. Upon the filing of such petition a summons shall be issued and be served upon the board of adjustment, together with a copy of the petition. Return of service shall be made within four days after the issuance of the summons. Within ten days after the return day of such summons, the board of adjustment shall file an answer to said petition which shall admit or deny the substantial averments of the petition, and shall state the contentions of the board with reference to the matters in dispute as disclosed by the petition. The answer shall be verified in like manner as required for the petition. At the expiration of the time for filing answer, the court shall

proceed to hear and determine the cause without delay and shall render judgment thereon according to the forms of law. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review. **Said appeal to the district court shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.** Any appeal from such judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law.

### **COUNTY BOARDS OF ADJUSTMENT**

Sec. 23-168.01. Board of adjustment; members; appointment; qualifications; term; vacancy; rules and regulations; records; open to public.

(1) The county board shall appoint a board of adjustment which shall consist of five members, plus one additional member designated as an alternate who shall attend and serve only when one of the regular members is unable to attend for any reason, each to be appointed for a term of three years and be removable for cause by the appointing authority upon written charges and after public hearing. No member of the board of adjustment shall be a member of the county board of commissioners or county board of supervisors. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant. One member only of the board of adjustment shall be appointed by the county board from the membership of the county planning commission, and the loss of membership on the planning commission by such member shall also result in his immediate loss of membership on the board of adjustment and the appointment of another planning commissioner to the board of adjustment.

(2) The board of adjustment shall adopt rules in accordance with the provisions of any resolution adopted pursuant to sections 23-114 to 23-114.05, 23-168.01 to 23-168.04, 23-172 to 23-174, 23-174.02, 23-373, and 23-376. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. Such chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the

public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed with the county clerk and shall be a public record.

Sec. 23-168.02. Board of adjustment; decision; appeal.

(1) An appeal to the board of adjustment may be taken by any person or persons aggrieved, or by any officer, department, board, or bureau of the county affected by any decision of an administrative officer or planning commission. Such appeal shall be taken within a reasonable time, as provided by the rules of the board of adjustment, by filing with the board a notice of appeal specifying the grounds thereof. The officer or agency from whom the appeal is taken shall transmit to the board of adjustment all the papers constituting the record upon which the action appealed from was taken.

(2) The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof as well as due notice to the parties in interest, and decide the same within a reasonable time. Any party may appear at the hearing in person, by agent, or by attorney.

Sec. 23-168.03. Board of adjustment; powers; variance; when permitted; power to reverse or modify action.

The board of adjustment shall, subject to such appropriate conditions and safeguards as may be established by the county board, have only the following powers:

- (1) To hear and decide appeals where it is alleged by the appellant that there is an error in any order, requirement, decision, or refusal made by an administrative official or agency based on or made in the enforcement of any zoning regulation or any regulation relating to the location or soundness of structures. **The Board of Adjustment shall have no authority to hear and decide appeals regarding condition use permits or special exceptions which may be granted pursuant to section 23-114.01; \* (LB 973 - 2004)**
- (2) To hear and decide, in accordance with the provisions of any regulation, requests for interpretation of any map; and

- (3) Where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the adoption of the zoning regulations, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any enacted regulation under sections 23-114 to 23-114.05, 23-168.01 to 23-168.04, 23-172 to 23-174, 23-174.02, 23-373, and 23-376 would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon the owner of such property,

to authorize, upon an appeal relating to the property, a VARIANCE from such strict application so as to relieve such difficulties or hardship, IF such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any zoning regulations, but no such variance shall be authorized unless the board of adjustment finds that:

- (a) The strict application of the resolution would produce undue hardship;
- (b) such hardship is not shared generally by other properties in the same zoning district and the same vicinity;
- (c) the authorization of such variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance; and
- (d) the granting of such variance is based upon reasons of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice.

No variance shall be authorized unless the board finds that:

- (e) the condition OR situation of the property concerned or the intended use of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the zoning regulations.

In exercising the above-mentioned powers, the board may, in conformity with the provisions of sections 23-114 to 23-114.05, 23-168.01 to 23-168.04, 23-172 to 23-174, 23-174.02, 23-373, and 23-376, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order, requirement, decision, or determination as shall be proper, and to that end shall have the power of the officer or agency from whom the appeal is taken. The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such regulation or to effect any variation in such regulation.

\* 23-114.01(4) In all counties in the state, the county planning commission may grant conditional uses or special exceptions to property owners for the use of their property if the county board of commissioners or supervisors has officially and generally authorized the commission to exercise such powers and has approved the standards and procedures the commission adopted for equitably and judiciously granting such conditional uses or special exceptions. The granting of a conditional use permit or special exception shall only allow property owners to put their property to a special use if it is among those uses specifically identified in the county zoning regulations as classifications of uses which may require special conditions or requirements to be met by the owners before a use permit or building permit is authorized. The applicant for a conditional use permit or special exception for a livestock operation specifically identified in the county zoning regulations as a classification of use which may require special conditions or requirements to be met within an area of a county zoned for agricultural use may request a determination of the special conditions or requirements to be imposed by the county planning commission or by the county board of commissioners or supervisors if the board has not authorized the commission to exercise such authority. Upon request the commission or board shall issue such determination of the special conditions or requirements to be imposed in a timely manner. Such special conditions or requirements to be imposed may include, but are not limited to, the submission of information that may be separately provided to state or federal agencies in applying to obtain the applicable state and federal permits. The commission or the board may request and review, prior to making a determination of the

special conditions or requirements to be imposed, reasonable information relevant to the conditional use or special exception. If a determination of the special conditions or requirements to be imposed has been made, final permit approval may be withheld subject only to a final review by the commission or county board to determine whether there is a substantial change in the applicant's proposed use of the property upon which the determination was based and that the applicant has met, or will meet, the special conditions or requirements imposed in the determination. For purposes of this section, substantial change shall include any significant alteration in the original application including a significant change in the design or location of buildings or facilities, in waste disposal methods or facilities, or in capacity.

(5) The power to grant conditional uses or special exceptions as set forth in subsection (4) of this section shall be the exclusive authority of the commission, except that the county board of commissioners or supervisors may choose to retain for itself the power to grant conditional uses or special exceptions for those classifications of uses specified in the county zoning regulations. The county board of commissioners or supervisors may exercise such power if it has formally adopted standards and procedures for granting such conditional uses or special exceptions in a manner that is equitable and which will promote the public interest. An appeal of a decision by the county planning commission or county board of commissioners or supervisors regarding a conditional use or special exception shall be made to the district court.

(6) Whenever a county planning commission or county board is authorized to grant conditional uses or special exceptions pursuant to subsection (4) or (5) of this section, the planning commission or county board shall, with its decision to grant or deny a conditional use permit or special exception, issue a statement of factual findings arising from the record of proceedings that support the granting or denial of the conditional use permit or special exception. If a county planning commission's role is advisory to the county board, the county planning commission shall submit such statement with its recommendation to the county board as to whether to approve or deny a conditional use permit or special exception.

## **CROSS REFERENCE**

For authorization to act as a zoning board of adjustment for a municipality, see section §84-155.

## **NOTES OF DECISIONS**

Board's only statutory power being to grant zoning variances resolution purporting to grant exemption construed to grant variance and action presumed correct until changed by court, and requirement of immediate compliance proper. Adler v. Lynch, 415 F.Supp. 705 (1976).

Sec. 23-168.04. Board of adjustment; decision; appeal; procedure.

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any officer, department, board, or bureau of the county, may present to the district court for the county a petition, duly verified, setting forth that such decision is illegal, in whole or in part, and specifying the grounds of the illegality. The petition must be presented to the court within fifteen days after the filing of the decision in the office of the board of adjustment. Upon the filing of such petition a summons shall be issued and be served upon the board of adjustment together with a copy of the petition, and return of service shall be made within four days after the issuance of the summons. Within ten days after the return day of the summons, the county board shall file an answer to the petition which shall admit or deny the substantial averments of the petition and matters in dispute as disclosed by the petition. The answer shall be verified in like manner as required for the petition. At the expiration of the time for filing the answer, the court shall proceed to hear and determine the cause without delay and shall render judgment according to law. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review. **Appeal to the district court shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.** Any appeal from such judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law.

Sec. 84-155. Comprehensive development plan; zoning board of adjustment; serve municipalities, when; board of zoning appeals.

The zoning board of adjustment of a county that has adopted a comprehensive development plan, as defined by section 23-114.02, and is enforcing zoning regulations based upon such a plan, shall, upon request of the governing body of a village or second-class city, serve as the zoning board of adjustment for such village or city of the second class in that county. A city of the first class may request that the county zoning board of adjustment of the county in which it is located serve as that city's zoning board of adjustment, and such county government shall comply with that request within ninety days. A municipality located in more than one county shall be served by request or otherwise only by the county zoning board of adjustment of the county in which the greatest area of the municipality is located, and the jurisdiction of such county zoning board of adjustment shall include all portions of the municipality and its area of extraterritorial control, **regardless of county lines**. In a county where there is a city of the primary class, the board of zoning appeals, created under section 23-174.01, may serve in the same capacity for all cities of the second class and villages in place of a zoning board of adjustment.

### **CROSS REFERENCE**

For provisions relating to boards of adjustment for cities of the first and second class and villages, see sections 19-907 to 19-912.

### **APPLICABLE TO COUNTIES, CITIES & VILLAGES**

Hansen v. Sarpy County Bd. of Adjustment, (Neb.App. 1992)

"[T]he decision of the board of adjustment will not be disturbed unless it is found to be illegal or from the standpoint of fact it is not supported by evidence, or is arbitrary and unreasonable, or is clearly wrong." Frank v. Russell, 160 Neb. 354, 363, 70 N.W.2d 306, 312 (1955). Accord Crane v. Board of County Commissioners, 175 Neb. 568, 122 N.W.2d 520 (1963).

CITY OF BATTLE CREEK, Nebraska v. MADISON COUNTY BOARD OF ADJUSTMENT,  
(Neb.App. 2002)

City sought judicial review of decision of county board of zoning adjustment granting of a zoning variance from setback requirements for construction of a garage on property bordered by platted streets on three sides. The Madison County District Court modified board's findings to conform with statutorily required findings and affirmed board's decision. City appealed. The Court of Appeals reversed the decision and denied the variance.

#### **NUGGETS:**

1. In reviewing a decision of a board of zoning adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if the district court abused its discretion or made an error of law.
2. Where competent evidence supports the district court's factual findings in reviewing a decision of a board of zoning adjustment, the appellate court will not substitute its factual findings for those of the district court.
3. County board of zoning adjustment failed to make statutorily required findings to support granting zoning variance from setback requirements for construction of a garage on property bordered by platted streets on three sides; although board found that application of zoning standard would produce hardship for applicants, board did not make findings as to whether that hardship was "undue," whether it was shared by other properties, whether variance was a substantial detriment to adjacent property and community, or whether grounds for granting variance were based upon demonstrable and exceptional hardship, as opposed to purposes of convenience, profit or caprice.
4. Board of zoning adjustment is required to make a finding that a variance is warranted because of demonstrable and exceptional hardship as opposed to purposes of convenience, profit, or caprice.
5. Cassette recording of proceedings before county board of zoning adjustment, transcription of recording, documents memorializing various aspects of proceedings, photographs of applicant's house, schematic showing layout of applicant's property, generic presentation of setback requirements, district zoning map, definitions utilized in the city's zoning code, and bylaws of board did not contain competent evidence which

supported district court's modified factual findings in affirming grant of variance from setback requirements for construction of a garage.

The Court's holding specifically found:

- A. A board of adjustment is required to make a finding that a variance is warranted because of demonstrable and exceptional hardship as opposed to purposes of convenience, profit, or caprice.
- B. Neb.Rev.Stat. § 19-910 (Reissue 1997) requires that any grant of a variance be supported by evidence relating to each of the four factors enumerated by that statute: (1) The strict application of the zoning regulation would produce undue hardship; (2) such hardship is not shared generally by other properties in the same zoning district and the same vicinity; (3) the authorization of such variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance; and (4) the granting of such variance is based upon reason of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit, or caprice.

Hanchera v. Board of Adjustment, 269 Neb. 623, 694 N.W.2d 641 (2005)

**NUGGETS:**

- 1. A district court may disturb a decision of a board of adjustment if the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. In deciding whether a board's decision is supported by the evidence, the district court shall consider any additional evidence it receives.
- 2. In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a

decision of a board of adjustment, the district court abused its discretion or made an error of law.

3. Where competent evidence supports a district court's factual findings, an appellate court will not substitute its factual findings for those of the district court.
4. The failure to verify a petition is not a defect that defeats the jurisdiction of a court.
5. A new zoning ordinance will not have retroactive effect where a landowner, in good faith reliance on existing zoning, has substantially changed position either by causing substantial construction to be made or by incurring substantial expenses related to construction, or both.
6. The burden is upon the landowner asserting a right of nonconforming use to prove that his use existed prior to the effective date of the ordinance
7. "Good faith," as used in nonconforming-use cases, means without knowledge of the pendency of a restrictive ordinance.