BOARD OF ADJUSTMENT OF
THE TOWN OF DEWEY-HUMBOLDT
REGULAR MEETING
Monday, November 21, 2011, 2:00 P.M.

BOA REGULAR MEETING **COUNCIL CHAMBERS, TOWN HALL**
2735 S. HWY 69 **DEWEY-HUMBOLDT, ARIZONA**

AGENDA

The issues that come before the Board of Adjustment are often challenging and potentially divisive. In order to make sure we benefit from the diverse views to be presented, the Board believes that the meeting be a safe place for people to speak. With this in mind, the Board asks that everyone refrain from clapping, heckling and any other expressions of approval or disapproval. Please turn off all cell phones. The Board meeting may be broadcast via live streaming video on the internet in both audio and visual formats. A majority/quorum of the Dewey-Humboldt Town Council may be in attendance at this meeting, but no Council deliberation will occur. During recess of a BOA Hearing, a BOA Member shall not communicate with any BOA Member or applicant, witness or the Planning Administrator. **NOTICE TO PARENTS:** Parents and legal guardians have the right to consent before the Town of Dewey-Humboldt makes a video or voice recording of a minor child. A.R.S. § 1-602.A.9. Dewey-Humboldt Council Meetings are recorded and may be viewed on the Dewey-Humboldt website. If you permit your child to participate in the Council Meeting, a recording will be made. You may exercise your right not to consent by not permitting your child to participate or by submitting your request to the Town Clerk that your child not be recorded.

1. **Call To Order.**
2. **Pledge of Allegiance.**
3. **Roll Call.** Board Members Judy Davidson, and Frank Davidson; Vice Chair Jack Hamilton, and Chair Lydia Chapman.
4. **Consent Agenda.**
   - **4.1.** Approval of minutes from the October 21, 2011 meeting.
5. **Discussion Agenda – Unfinished Business.** Discussion and Possible Action on matters not previously presented to the Board.
   - **5.1.** Review of Planning and Zoning Handbook "Boards of Adjustment".
   - **5.2.** "Norse v. Santa Cruz" pp 20084-20090. Discuss 1st Amendment Rights; Judges' opinions; D-H experiences applicable to conduct of Board of Adjustment (BOA) at hearings.
   - **5.3.** "Boards of Adjustment" pp 2-11 from September 27th Arizona Planners Association (APA) Conference. Application to BOA hearings, and on worksheets preceding; discuss written findings.
6. **Discussion Agenda – New Business**
   - **6.1.** Invite new Town Manager to January 2012 meeting. Discussion.
7. **Recommendations for Future Meeting Items.**

THIS CONCLUDES THE LEGAL ACTION PORTION OF THE AGENDA.

8. **Adjourn.**

For Your Information:

Next Town Council Meeting: Tuesday, December 6, 2011 at 6:30 p.m.
Next Town Council Work Session: Tuesday, December 13, 2011 at 2:00 p.m.
Next Planning & Zoning Commission Meeting: Thursday, December 8, 2011 at 6:00 p.m.

If you would like to receive Town Council agendas via email, please sign up at AgendaList@dhaz.gov and type Subscribe in the subject line, or call 928-632-7362 and speak with Judy Morgan, Town Clerk.

Certification of Posting

The undersigned hereby certifies that a copy of the attached notice was duly posted at the following locations: Dewey-Humboldt Town Hall, 2735 South Highway 69, Humboldt, Arizona, Chevron Station, 2735 South Highway 69, Humboldt, Arizona, Blue Ridge Market, Highway 69 and Kachina Drive, Dewey, Arizona, on the _____ day of _____, 2011, at _____ p.m. in accordance with the statement filed by the Town of Dewey-Humboldt with the Town Clerk, Town of Dewey-Humboldt.

By: _____, Town Clerk's Office.

TOWN OF DEWEY-HUMBOLDT
BOARD OF ADJUSTMENT
REGULAR MEETING MINUTES
OCTOBER 21, 2011, 2:00 P.M.

A REGULAR MEETING OF THE DEWEY-HUMBOLDT BOARD OF ADJUSTMENT WAS HELD ON FRIDAY, OCTOBER 21, 2011, AT TOWN HALL, 2735 S. HIGHWAY 69, DEWEY-HUMBOLDT, ARIZONA. CHAIRPERSON, LYDIA CHAPMAN PRESIDED.

1. **Call To Order.** The meeting was called to order at 2:00 p.m.
2. **Pledge of Allegiance**. Made.
3. **Roll Call.** Board of Adjustment Members Frank Davidson, Judy Davidson, Vice Chair Jack Hamilton, and Chair Lydia Chapman were present. Note: Odis Brockman's resignation was received prior to the meeting.
4. **Consent Agenda.**

4.1. Approval of minutes from the August 26, 2011 meeting.

Judy Davidson made a motion to approve the minutes from August 26, 2011, seconded by Jack Hamilton. The motion passed unanimously.

5. **Discussion Agenda – Unfinished Business.** Discussion and Possible Action on matters not previously presented to the Board.

5.1. Review changes for "Rules of Procedure."

Made changes to the Rules of Procedure. Article V item 5 added to it so principles in the proceedings could ask questions with certain restrictions. Article V item 6 & 7 the words (shall) will be changed to (will).

5.2. Clarify past controversial words and phrases; make any new changes necessary.

5.3. Approve "Procedures."

Judy Davidson made the motion to approve Rules of Procedure as amended. Jack Hamilton seconded. The vote was unanimous for approval.

5.4. Discuss Robert's Rules, "Calling out of order."

Only chairperson can rule when a person is out of order.

6. **Discussion Agenda – New Business**

6.1 Study and discussion of materials from Arizona Planning Association Conference September 28, 2011 (materials will be distributed to members at the meeting).

a. Discuss handout -"Boards of Adjustment Case Studies," by Frank Cassidy, Marana Town Attorney.

Handed out packet on **Board of Adjustment Case Studies.** This came from the meeting that Lydia attended for Board of Adjustment training. Committee reviewed cases in the studies.

6.2. "Duties of Board Members" – A discussion of appropriate preparation and participation.

All members came prepared for meeting by reading packets ahead of time.

At 3:10 p.m. the Board recessed for a break. They returned back out of recess at 3:21 p.m.

7. **Recommendations for Future Meetings and Discussion.**
   7.1 November Meeting – Read and prepare "Boards of Adjustment, Powers and Limitations." (Materials from AZPA Conference, September 28, 2011).

   Homework was given to Judy and Frank Davidson so they would have the same information that the rest of the committee has.

   7.2 Extend time for training for the benefit of the Davidson's.

8. **Adjourn.** The meeting was adjourned at 4:10 p.m.

_____
Lydia Chapman, Chairperson

ATTEST:

_____
Jack Hamilton, Vice Chairman

We decline the City's invitation to rewrite First Amendment law to extinguish the rights that citizens have when they attend public meetings.

B

We also decline the City's invitation to rewrite the rule announced in *Norwalk*. 900 F.2d at 1424-26. There, we held that a city's "Rules of Decorum" are not facially over-broad where they only permit a presiding officer to eject an attendee for actually disturbing or impeding a meeting. *Id.*

In this case, the City argues that cities may define "disturbance" in any way they choose. Specifically, the City argues that it has defined any violation of its decorum rules to be a "disturbance." Therefore, it reasons, *Norwalk* permits the City to eject anyone for violation of the City's rules—rules that were only held to be facially valid to the extent that they require a person actually to disturb a meeting before being ejected. We must respectfully reject the City's attempt to engage us in doublespeak. Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption. The City cannot define disruption so as to include non-disruption to invoke the aid of *Norwalk*.

C

[14] The city officials are not entitled to absolute immunity. Local legislators are absolutely immune from liability under § 1983 for their legislative acts. *See Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). But "not all governmental acts by . . . a local legislature[ ] are necessarily legislative in nature." *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54. Thus, we must determine whether the actions of the Council members, when

"stripped of all considerations of intent and motive," were legislative rather than administrative or executive. *Id.* at 55.

[15] In this Circuit, we have developed a four-part test to determine whether an action is legislative in nature. We consider "(1) whether the act involves ad hoc decisionmaking, or the formulation of policy; (2) whether the act applies to a few individuals, or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation." *Kaahumanu v. Cnty. of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003) (internal quotation marks omitted). "Whether an act is ad hoc can depend on whether it is aimed at a few people or many, and whether an act bears all the hallmarks of traditional legislation can depend on whether it is ad hoc." *Id.* at 1220 n.4.

[16] In this case, we are dealing with city officials who ejected one individual from City Council meetings. Separately, and with regard to his argument for municipal liability, Norse argues that the officials were formulating policy. We need not determine whether the ejections "effectuate[d] policy," however, *see id.* at 1220, because the second, third, and fourth factors clearly point to this being an administrative rather than legislative act. Thus, Krohn, Kennedy, and Fitzmaurice are not entitled to absolute immunity for their part in removing Norse from the meetings. Although the record is incomplete, it appears that in both 2002 and 2004 Norse was singled out for expulsion and arrest. Mayors Krohn and Kennedy did not take any formal legislative action, but rather ordered Norse out of the room. And both expulsions lacked the hallmarks of the legislative process. With respect to the 2002 arrest, Krohn ordered Norse to leave on Fitzmaurice's motion without any debate. The motion was predicated on the "dignity" of the council rather than the council's performance of its obligations to the citizens of Santa Cruz. *See id.* at 1223. And with respect to the 2004 arrest, the record does not reveal a motion based even on dignity, let alone a legislative decisionmaking process. Thus the decisions to expel Norse were

administrative, not legislative, so the defendants are not entitled to absolute immunity. *See Vacca v. Barletta*, 933 F.2d 31 (1st Cir. 1991) (holding that the Chair of a school committee was not absolutely immune from suit over his actions in removing another committee member from a meeting).

D

[17] The district court dismissed the case against Santa Cruz based on its determination that Norse's constitutional rights were not violated. The City urges us to affirm this dismissal on the basis that Norse failed to allege any facts that could support municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Norse argues that municipalities can be liable under § 1983 for single decisions taken by municipal policymakers. But the question of whether the two ejections constituted an act or acts of official government policy is a question of fact appropriately decided on a more fully-developed record. The City is not entitled to summary judgment on this question.

E

As against officer Baker, Norse alleges claims of false arrest and excessive force. The City argues that Baker is immune from suit if reasonable officers in his position could have disagreed on the issue of probable cause. We agree with the City. The existence of probable cause is dispositive as to false arrest and excessive force claims.

[18] "To prevail on [a] § 1983 claim for false arrest . . . [a plaintiff must] demonstrate that there was no probable cause to arrest him." *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) (per curiam). Moreover, a government official is entitled to qualified immunity on a false arrest claim if a reasonable officer in his position could have believed that probable cause existed. *See Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009). While

Norse alleges in his pleadings that there was no probable cause to arrest him in 2002 or 2004, he nonetheless alleges facts that could have led a reasonable officer to believe that probable cause existed for his arrest. In both 2002 and 2004, Norse actually spoke verbally, in violation of the Rules of Decorum, in response to Council members' attempts to eject him from the Council chambers. Based on these facts, a reasonable officer could have believed that probable cause existed to arrest Norse for violation of California Penal Code § 403, disturbance of a public assembly or meeting. Therefore, Baker is entitled to judgment on the false-arrest claim.

Norse also alleges he was subject to excessive force. An excessive-force claim that arises in the context of an arrest is properly characterized as one invoking the protections of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 394 (1989). "To determine if a Fourth Amendment violation has occurred, we must balance the extent of the intrusion on the individual's Fourth Amendment rights against the government's interests to determine whether the officer's conduct was objectively reasonable based on the totality of the circumstances." *Espinosa v. City & Cnty. of S.F.*, 598 F.3d 528, 537 (9th Cir. 2010). The only force alleged in the complaint was Baker's order that Norse place his hands behind his back at the 2002 meeting. Even though Norse was being arrested for, at most, a minor misdemeanor offense, we cannot say that a reasonable officer in Baker's position would have known that this limited use of force was unreasonable: Norse had refused to leave the meeting of his own accord, a fact also alleged in the complaint, and a reasonable officer could have believed that probable cause existed for the arrest. Therefore, judgment must be entered in favor of Baker on the claims asserted against him.

IV

For the foregoing reasons, we reverse the dismissal of Norse's § 1983 claim as to his First Amendment claims. We

affirm the dismissal of Norse's claims against Baker. We remand with instructions for the district court to rule on Norse's pending motion in limine to exclude evidence of Council meetings other than the 2002 and 2004 meetings mentioned in his complaint, and to hold the trial that it had originally scheduled for March 26, 2007. In accordance with our precedent, the district court may entertain a post-trial motion for judgment as a matter of law on the issue of qualified immunity after the facts are resolved at trial. *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1083 (9th Cir. 2009).

We need not, and do not, reach any other issues urged by the parties. Each party shall bear its own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED WITH INSTRUCTIONS.

Chief Judge KOZINSKI, with whom Judge REINHARDT joins, concurring:

I join Judge Thomas's opinion because it's clearly right. I write only to observe that, even after the procedural irregularities that deprived Norse an opportunity to present evidence, it's clear that the council members aren't entitled to qualified immunity. In the Age of YouTube, there's no need to take my word for it: There is a video of the incident that I'm "happy to allow . . . to speak for itself." *Scott* v. *Harris*, 550 U.S. 372, 378 n.5 (2007); *see* http://www.youtube.com/watch?v=ZOssHWB6WBI (last visited Nov. 16, 2010). This video (also found in the record) clearly shows that Norse's sieg heil was momentary and casual, causing no disruption whatsoever. It would have remained entirely unnoticed, had a city councilman not interrupted the proceedings to take umbrage and insist that Norse be cast out of the meeting. Councilman Fitzmaurice clearly wants Norse expelled because the "Nazi

salute" is "against the dignity of this body and the decorum of this body" and not because of any disruption. But, unlike der Führer, government officials in America occasionally must tolerate offensive or irritating speech. *See Cohen* v. *California*, 403 U.S. 15 (1971); *Duran* v. *City of Douglas, Ariz.*, 904 F.2d 1372, 1378 (9th Cir. 1990).

The Supreme Court long ago explained that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). Even in a limited public forum like a city council meeting, the First Amendment tightly constrains the government's power; speakers may be removed only if they are actually disruptive.

We've said so twice. In *White* v. *City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990), we explained that speech must "disrupt[,] disturb[ ] or otherwise impede[ ] the orderly conduct of the Council meeting" before the speaker could be removed. *Id.* at 1426. And in *Kindt* v. *Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995), we upheld a spectator's ejection from a public meeting only because he was "disrupting the proceedings by yelling and trying to speak when it was not time for" discussion. *Id.* at 271. Had he been given a chance, Norse could no doubt have presented lots more evidence that he never disrupted the Santa Cruz council meeting, but what would have been the point? The video speaks for itself: Norse raises his hand in a brief, silent protest of the mayor's treatment of another speaker. The mayor ignores Norse's fleeting gesture until Councilman Fitzmaurice throws a hissy fit.

"Listeners' reaction to speech is not a content-neutral basis for regulation. . . . Speech cannot be . . . punished or banned[ ] simply because it might offend a hostile" member of the Santa Cruz City Council. *Forsyth Cnty., Ga.* v. *Nationalist Movement*, 505 U.S. 123, 134-35 (1992). The council members should have known that the government may *never* suppress

viewpoints it doesn't like. *See Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Though defendants point to Norse's reaction to Councilman Fitzmaurice as the "disruption" that warranted carting him off to jail, Norse's calm assertion of his constitutional rights was not the least bit disruptive. The First Amendment would be meaningless if Councilman Fitzmaurice's petty pique justified Norse's arrest and removal.

Even viewing the facts most favorably to the city council members, their behavior amounts to classic viewpoint discrimination for which they're not entitled to qualified immunity. And that's what the district court should have held when it set about resolving qualified immunity as a matter of law. If it was going to take it upon itself to grant summary judgment to anyone on that issue, it should have been to Norse. On remand, the district court can set things right by holding, as a matter of law, that the city council members are not entitled to qualified immunity, and proceeding to assess damages.

Boards of Adjustment Powers and Limitations

APA Conference
September 28, 2011

What every BOA member knows about variances

- Uniqueness for zoning purposes requires that subject property have an inherent characteristic that is not shared by neighboring properties

What every BOA member knows about variances.

- These Characteristics are:
  - shape (narrowness, shallowness)
  - topography

What every BOA member knows about variances (Cont.)

- The requested variance is the minimum necessary to overcome the unique condition of the property.
- The requested variance is not detrimental to neighboring properties.

What every BOA member knows about variances (Cont.)

- Boards cannot rewrite zoning code!
- Code revisions need to remain in the hands of the Planning and Zoning Commission and Council.

What does this mean to a board member?

- The location of a house on the property that restricts the buildable area on the property is not a factor to be considered in the decision on whether to grant or deny.
- Put another way, the previous owners actions are "self imposed" for variance purposes.

What does this mean to a board member? (Continued)

- The need for a variance must result from the application of zoning standards, not from the action or inaction of the property owner.
- In other words, the condition causing need for a variance must not be self inflicted by the owner or previous owner.

What every BOA member knows about appeals.

- The BOA can affirm, affirm with conditions or reject the administrator's decision / interpretation.

What every BOA member knows about appeals. (Cont.)

- The Board of Adjustment should reverse a decision if it finds that the decision was due to any of the following:
  - Abuse of the administrator's discretion;
  - Administrator exceeded his/her authority;
  - Legal error

What every BOA member knows about appeals. (Cont.)

- Legal error
- Fraud or bad faith
- Lack of evidence
- Otherwise affirm or affirm with conditions.

What does this mean to BOA members?

- BOA's have quite a bit of latitude in decision making on appeal.
- These decisions can be overturned by the Arizona Superior Court if the BOA fails to follow the administrator guidelines provided in the previous slides.

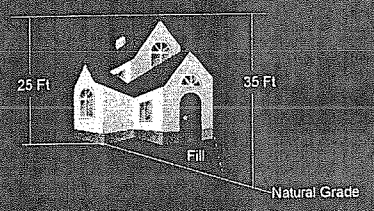
What does this mean to BOA members? (Continued)

- For Arizona municipalities Court review is based on an abuse of discretion standard.
- For Counties the review is De Novo (The Court reviews the case all over again from the beginning).

Height Variance

- Can a variance for additional height be granted?
- Maybe . . .

Here is what I mean?



Based on topography this can work

Height variance

- This does not work on a flat area as provided in *Ivancovich v. City of Tucson Bd. of Adjustment*, 22 Ariz. App. 530 (1974), Otherwise known as the Levy's Department Store case.

Postage Stamp Lots

- You have a 2 acre parcel.
- Only 3000 ft^2 building envelope.
- Previous owner built a small house in the 3000 ft^2.
- New Owner wants larger home on the same lot.

Postage Stamp Lots (Continued)

- Other owners in the zoning district have 10,000 ft^2 to 12,000 ft^2 buildable area.
- Many homes in the district are larger than 3,000 ft^2.
- Many homes in the area are also smaller than 2,000 ft^2.

Postage Stamp Lots (Continued)

- My thought is that this is why we have Boards of Adjustment.
- This is a case where there is no wrong decision.

Garage turned into living space.

- It is an older neighborhood full of ranch style homes.
- Garages and carports are being turned into living space.
- After one of these conversions a resident comes in for a variance to build a new garage.

Garage turned into living space. (Continued)

- Some of the lots in the neighborhood have room for this second garage.
- This lot does not unless relief is granted from the setbacks.
- The lot is otherwise relatively flat.

Garage turned into living space. (Continued)

- This is technically self imposed.
- Boards sometimes grant this type of variance.
- A common reason is that the family has outgrown their home.

Setbacks Changed

- 5 or so years ago an area was annexed into Town.
- When Town zoning was applied the side yard setbacks went from 5 to 10 feet.
- Upon annexation many homes in the annexed area became nonconforming uses.

Setbacks Changed (Continued)

- One of these nonconforming homes is now looking to expand the nonconforming garage.
- the expansion would not reach further into the setback but would expand the nonconforming area.

Setbacks Changed (Continued)

- The yellow line is the setback

Setbacks Changed (Continued)

- The desire is to lengthen the garage.
- Most common reason:
  - They now have children of driving age;
  - Need storage;
  - Adult child moved back home.

Setbacks Changed (Continued)

- This may be an emotional matter but it is technically self imposed.
- Statutorily expansion is allowed for commercial expansion.
- Not so for residential, but some municipalities allow by code.

Beautiful Specimen Plant

- You have a vacant, flat 10,000 sq ft parcel of land.
- Right in the center is a 30 ft tall saguaro with 15 arms.
- The setbacks are such that development would require removal of the saguaro.

Beautiful Specimen Plant (Cont.)

- The applicant wants to develop the site and save the saguaro.
- Moving the saguaro would cost more than $100,000.
- The variance request is to build 20 ft into the 25 ft rear setback.

Beautiful Specimen Plant (Cont.)

- What is the issue?
- A plant is not a condition of the land.
- There are laws outside of zoning that may deal with protection of plants.
- These laws are not the subject of a variance, but the temptation is to grant the variance.

Administrator Appeal

- Both commercial and residential development is allowed on the same property.
- The zoning provides that the residential must be protected from the commercial.

Administrator Appeal (Cont.)

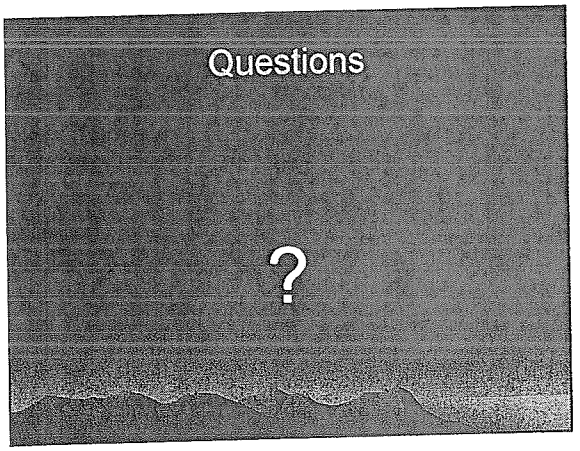
- In a written interpretation your Zoning Administrator has said that:
  - A small berm between the two is sufficient protection.
  - A neighbor does not like this and has appealed thinking the berm is not sufficient protection.

Administrator Appeal (Cont.)

- The zoning code does not explain what is meant by "protection".
- Under State law it is the duty of the Zoning Administrator to interpret zoning code.

Administrator Appeal (Cont.)

- What do you do?


Questions
?

BOARDS OF ADJUSTMENT

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BOARDS OF ADJUSTMENT

1. A Brief Introduction

1.1. Purpose of the Board

The purpose of a board of adjustment is to provide a quasi-judicial body[1] to the residents of an area that they can ask for relief from the sometimes-harsh effects of zoning laws. The board can soften the requirements of the zoning code in cases where its strict and literal application would impose an unfair burden on a particular individual or group. The board does this by making decisions about the zoning administrator's enforcement of the zoning code, the location of zoning districts, and the application of the zoning code in a particular case. Thus, the board serves a vital decision-making role concerning the zoning code. In Arizona, boards of adjustment are provided for cities and towns,[2] counties,[3] and airports.[4]

1.2. Composition of the Board

The composition of any board of adjustment is dictated by statute. For cities and towns, boards must contain from five to seven members.[5] If so desired, a council may designate itself as the board of adjustment, but it need not do so. Generally, the Board sets its own procedures for conducting business,[6] but as a public body[7] its meetings must be open to the public[8] and its minutes must be made available for public inspection.[9]

2. Functions of the Board of Adjustment

2.1. Appeals

One of the most important functions of the Board of Adjustment is to hear appeals of residents from decisions made by the Planning and Zoning Administrator, or some other administrative official.[10] People who may appeal these decisions are those "aggrieved" by them, but officers, departments, boards or bureaus may also make an appeal to the Board.[11] An "aggrieved" person need not be the landowner subject to the zoning decision, but can be an adjoining landowner,[12] or a person who feels that a zoning ordinance has been wrongly interpreted.[13]

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[1] *Lane v. City of Phoenix*, 816 P.2d 934 (Ariz. App. 1991); *Arkules v. Board of Adjustment of Town of Paradise Valley*, 728 P.2d 657 (Ariz. App. 1986); *see also* McQuillin, *Law of Municipal Corporations* § 25.230 (3rd Ed.)
[2] ARS § 9-462.06
[3] ARS § 11-807
[4] ARS § 28-8473
[5] ARS § 9-462.06(A)
[6] ARS § 9-462.06(C)
[7] ARS § 38-431(5)
[8] ARS §§ 38-431.01(A), 9-462.06(B); *Outdoor Circle v. Harold K.L. Castle Trust Estate*, 675 P.2d 784 (Hawaii App. 1983) (land use commission); *see also Mueller v. City of Phoenix ex rel. Phoenix Bd. of Adjustment II*, 435 P.2d 472 (Ariz. 1967) (meetings were open, but open meeting law not cited); McQuillin, § 25.218.80
[9] ARS §§ 38-431.01(D), 9-462.06(B)
[10] ARS § 9-462.06(C); *see also* McQuillin, § 25.235
[11] ARS § 9-462.06(D);
[12] *Buckelew v. Town of Parker*, 937 P.2d 368 (App. Div. 1 1996), *review denied*
[13] *P.F. West, Inc. v. Superior Court of State of Ariz., In and For Pima County*, 676 P.2d 665 (Ariz. App. 1984)

2.1.1. Procedure for Appeal to the Board

The appellant must first file a notice of appeal specifying the grounds for the appeal.[14] The notice must be filed with both the official whose decision is being appealed and with the Board of Adjustment;[15] this form is generally completed on a form provided by the Clerk. The notice of appeal should state the basis for the appeal with enough detail to provide the Board and interested members of the public with enough information to determine the issues raised.[16] Once the official who made the decision receives the notice of appeal, he or she must send all records concerning the decision to the Board.[17] The Board must then hear the appeal within "a reasonable time",[18] and must give notice of the hearing by publication in a newspaper and by posting on or near the property affected.[19] The notice must be sufficient to inform those in the area, so they can make reasonable inquiries and determine if their property would be affected and to what extent.[20]

While a decision is on appeal to the Board of Adjustment, the decision is stayed, unless the official who made the decision certifies to the Board that doing so would "cause imminent peril to life or property."[21] Such certification must state the facts forming the basis for the official's opinion.[22] In cases where the decision is not stayed, the appellant may give notice to the official affected and apply to the Board, or to the Pima County Superior Court, for a restraining order.[23] The decision will not be stayed if the appellant has already asked the Board for the same relief and been denied.[24] In those cases, the appellant may apply to the Pima County Superior Court within 30 days for an order to stay the decision.[25]

The appeal hearing is conducted according to procedures established by the Board.[26] Those procedures may be in any format that the Board finds appropriate and convenient for conducting its business,[27] but they cannot defeat the purposes of the Board[28] or be too hasty or unfair to the appellant.[29] The procedures may include swearing in and hearing witnesses and taking evidence,[30] but the formal rules of evidence that apply in court need not be used.[31] If there are witnesses whose testimony is required, the Chairman may issue them subpoenas, and may require them to produce relevant documentary evidence.[32] If witnesses are sworn in, the Chairman,[33] or in his or her

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[14] ARS § 9-462.06(D)
[15] Ibid.
[16] *Neal v. City of Kingman*, 817 P.2d 937 (Ariz. 1991)
[17] ARS § 9-462.06(D)
[18] ARS § 9-462.06(F)
[19] ARS §§ 9-462.06(F), 9-462.04; *see also Bennett v. Arizona State Board of Public Welfare*, 388 P.2d 166 (Ariz. 1963) (administrative boards must provide notice and opportunity to be heard)
[20] *Arkules*, supra; *East Camelback Homeowners Ass'n v. Arizona Foundation for Neurology & Psychiatry*, 500 P.2d 906 (Ariz. App. 1972), *supp.*, 505 P.2d 286 (Ariz. App. 1973)
[21] ARS § 9-462.06(E)
[22] Ibid.
[23] Ibid.
[24] ARS § 9-462.06(E)
[25] ARS § 9-462.06(E), (K)
[26] ARS § 9-462.06(C); *see also* McQuillin, § 25.256
[27] Ibid.
[28] *Maldonado v. Arizona Dept. of Economic Sec.*, 897 P.2d 1362 (Ariz. App. Div. 1 1994)
[29] *City of Phoenix v. Superior Court in and for Maricopa County*, 515 P.2d 1175 (Ariz. 1973)
[30] ARS § 9-462.06(B)
[31] ARS § 9-462(B); *East Camelback*, supra; *see also* McQuillin, § 25.256
[32] ARS § 12-2212(A); *see also* 16 ARS Rules of Civil Procedure, Rule 45
[33] ARS §§ 9-462.06(B), 12-2212(A)

absence the acting Chairman, shall administer the oath. An oath is not required for the Board to hear a witness' testimony.[34] If a subpoenaed witness fails to appear for the hearing or to bring required documents, the Chairman may submit an affidavit to the Pima County Superior Court detailing the matter, and the Superior Court will commence contempt proceedings against the witness.[35]

If the appellant desires, he or she is allowed to produce witnesses on his or her behalf and to cross-examine adverse witnesses.[36] If the appellant does not ask to cross-examine witnesses, he or she does not need to be given the opportunity.[37] Of course, the appellant must personally be given the opportunity to be heard.[38]

The Board is not limited to reviewing the evidence that was presented to the official who made the decision – the Board may examine any evidence pertinent to the issue, whether or not the official was aware of it.[39] The Board may also accept hearsay[40] or circumstantial evidence[41] in making its decision. The Board may not rely on conjecture or speculation. All decisions must have a reasonable basis in facts and inferences deducible from those facts.[42] Once all testimony is heard and all evidence is examined, the Board makes its decision.

2.1.2. <u>The Legal Standard for Appeal to the Board</u>

The Board of Adjustment should reverse a decision if it finds that the decision was due to any of the following:[43]

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[34] *Burns v. Davis*, 1999 WL 595159 (Ariz.App. Div. 1 1999); *East Camelback*, supra
[35] ARS § 12-2212(B)
[36] *Bennett*, supra
[37] *City of Phoenix*, supra
[38] *Murphy v. Town of Chino Valley*, 789 P.2d 1072 (Ariz. App. 1989); *Bennett*, supra
[39] *Murphy*, supra
[40] *Brown v. Arizona Dept. of Real Estate*, 890 P.2d 615 (Ariz. App. Div. 1 1995); *Begay v. Arizona Dept. of Economic Sec.*, 626 P.2d 137 (Ariz. App. 1981); *Phelps Dodge Corp. v. Ford*, 203 P.2d 633 (Ariz. 1949)
[41] *Justice v. City of Casa Grande*, 567 P.2d 1195 (Ariz. App. 1977)
[42] *Treadway v. Industrial Commission*, 213 P.2d 373 (Ariz. 1950)
[43] *See generally* McQuillin, § 25.309

2.1.2.1. An abuse of the official's discretion

A decision is said to be an abuse of discretion if it violates the intent and the policy of the statute that granted the decision-making authority.[44] If an appellant can demonstrate that the decision was unreasonable, arbitrary, capricious, unfair, or discriminatory,[45] then the decision should be reversed.[46] In some situations, though, an official has no discretion. If an official denies a permit or certificate of approval that the law states must be granted when an applicant satisfies certain requirements, then the official's decision must be reversed.[47]

2.1.2.2. Exceeding the official's power or authority

A public official or agency can only make decisions within the limits imposed on it by the statute or ordinance that granted it authority and any decision beyond those limits is invalid.[48]

2.1.2.3. An error of law

A decision may be appealed if it was based on an erroneous interpretation of statutes, ordinances, or regulations,[49] or if it was based on the wrong statutes, ordinances, or regulations.[50]

2.1.2.4. Fraud or bad faith

Fraud, malice or bad faith can invalidate an official decision, whether they have influenced the context of the decision or the manner in which it was reached.[51]

2.1.2.5. Lack of evidence

A zoning decision that lacks any reasonable basis in fact is invalid.[52] Decisions based on arbitrary judgment calls should be reversed.[53] If the Board finds, however, that there is sufficient evidence to support the decision, it should be upheld.[54]

2.1.3. <u>Guidelines from Neighboring Boards of Adjustment</u>

2.1.3.1. Tucson

Tucson has a very complex system for appeals of land use decisions, reflecting its larger area of responsibility. There are six types of appeal,[55] only one of which is heard by the Board of Adjustment.[56] The Board hears appeals of the Zoning

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[44] McQuillin, § 25.310

[45] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 97 S.Ct. 555 (U.S. Ill. 1977) (decision based on racial discrimination is invalid)

[46] *M & M Auto Storage Pool, Inc. v. Chemical Waste Management, Inc.*, 791 P.2d 665 (Ariz. App. 1990); *Book Cellar, Inc. v. City of Phoenix*, 678 P.2d 517 (Ariz. App. 1983); *Town of Paradise Valley v. Gulf Leisure Corp.*, 557 P.2d 532 (Ariz. App. 1976); *see also* McQuillin, § 25.316

[47] McQuillin, § 25.315

[48] *Ivancovich v. City of Tucson Bd. of Adjustment*, 529 P.2d 242 (Ariz. App. 1974); *Nicolai v. Board of Adjustment of City of Tucson*, 101 P.2d 199 (Ariz. 1940); *see also Gulf Leisure*, supra; McQuillin, § 25.310

[49] *Minor v. Cochise County*, 608 P.2d 309 (Ariz. 1980); *P.F. West*, supra; ARS § 9-462.06(G)(1)

[50] *Sclavenitis v. City of Cherry Hills Village Bd. of Adjustment and Appeals*, 751 P.2d 661 (Colo. App. 1988); *see also Gulf Leisure*, supra; McQuillin, § 25.314

[51] *Sulphur Springs Val. Elec. Co-op., Inc. v. City of Tombstone*, 407 P.2d 76 (Ariz. 1965); *Manning v. Reilly*, 408 P.2d 414 (Ariz. App. 1965); *see also Gulf Leisure*, supra; McQuillin, § 25.313

[52] *Arkules*, supra; *Davis County v. Clearfield City*, 756 P.2d 704 (Utah App. 1988); *see also* McQuillin, § 25.312

[53] *Maranatha Min., Inc. v. Pierce County*, 801 P.2d 985 (Wash. App. Div. 2 1990)

[54] *National Heritage, Inc. v. Pritza*, 728 P.2d 737 (Colo. App. 1986)

[55] TLUC § 5.4.4

[56] TLUC §§ 5.1.7.3.A, 5.4.4.5

Administrator's interpretation or enforcement of the Land Use Code,[57] determination of zone boundary locations,[58] and certain decisions made by the Planning Director.[59] The Tucson Land Use Code also has specific provisions for providing not only published notice[60] and posted notice,[61] but also for mailed notice[62] and notice to the general area.[63]

2.1.3.2. Scottsdale

The Scottsdale Board of Adjustment hears appeals from the Zoning Administrator's interpretation of the zoning code.[64]

2.2. Variances

Another critical function served by the Board of Adjustment is to hear and decide on applications for variances.[65] A variance, sometimes called a deviation, modification, alteration, exception, or exemption,[66] serves to soften the harsh effect of strict application of the zoning code in a particular case.[67] When rigid application of the zoning code to a certain property would cause the property owner hardship, due to special circumstances applicable to the property, then the owner may be granted a variance.[68]

2.2.1. Procedure for Application for a Variance

A person who desires a variance must generally submit a written application to the Board. The application is generally filed with the Clerk on forms provided by the jurisdiction, and is accompanied by plans and elevations indicating the nature of the project and evidence that the applicant can complete the work. An applicant must also pay a filing fee as set by the jurisdiction. Once an application is received, the Board must hold a public hearing on the variance within a timeframe set in either policy or code. Then staff notifies all property owners within 300 feet of the hearing, publishes notice in the newspaper, and posts notice on the applicant's property. As with appeals to the Board, the Board may require additional witnesses or evidence at variance hearings.[69]

2.2.2. The Legal Standard for Granting a Variance

Variances should only be granted in exceptional cases.[70] A variance may only be granted if the Board finds that based on sufficient evidence special circumstances apply to the property to justify a departure from some aspect of the zoning code, in order for the applicant to fully realize property rights enjoyed by other property owners nearby.[71] A variance may not be granted if the property owner created the special circumstances,[72] if

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[57] TLUC § 5.1.7.3.A
[58] TLUC § 5.1.7.3.A, C
[59] TLUC §§ 5.1.7.3.D, E, 5.4.4.5
[60] TLUC § 5.4.5.7.C
[61] TLUC § 5.4.5.7.B
[62] TLUC § 5.4.5.7.A.1
[63] TLUC § 5.4.5.7.A.2.b
[64] SCC § 1.801
[65] ARS § 9-462.06(G)(2)
[66] McQuillin, § 25.159
[67] McQuillin, § 25.160
[68] *Arkules*, supra.
[69] *See* § 2.1.1 ¶ 3 and fn. 32-42, supra
[70] *Ivancovich*, supra
[71] ARS § 9-462.06(G)(2); *Arkules*, supra; *see also* McQuillin, § 25.160
[72] ARS § 9-462.06(H)(2); *Burns v. SPA Automotive, Ltd.*, 753 P.2d 193 (Ariz. App. Div. 2 1988)

the variance would constitute a grant of special privileges to the property owner,[73] or if the variance would change the terms of the zoning ordinance or allow a prohibited use.[74] Each of these issues will be detailed separately.

2.2.2.1. Sufficient Evidence

As noted above, the formal rules of evidence that apply in court need not be used in Board of Adjustment hearings.[75] The Board is free to consider any evidence it deems relevant to the issue,[76] including hearsay[77] or circumstantial evidence.[78] Such evidence cannot consist of speculation or unfounded rumor. All evidence must have a reasonable basis in fact or inferences deducible from fact.[79]

2.2.2.2. Special Circumstances

Special circumstances are those that are unique to a particular property, including its size, shape, topography, location and surroundings.[80] Special circumstances must be applicable only to the property in question, and not to all the other properties in the area. The special circumstances also cannot be applicable to the property owner rather than to the property.[81]

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[73] ARS § 9-462.06(G)(2); ARS Const. Art. 4, Pt. 2, § 19
[74] ARS § 9-462.06(H)(1); *Nicolai*, supra; *Ivancovich*, supra
[75] ARS § 9-462(B); *East Camelback*, supra; *see also* McQuillin, § 25.256
[76] *Murphy*, supra
[77] *Brown*, supra; *Begay*, supra; *Phelps Dodge*, supra
[78] *Justice*, supra
[79] *Treadway*, supra
[80] ARS § 9-462.06(G)(2)
[81] *Arkules*, supra; *Ivancovich*, supra

2.2.2.3. Enjoyment of Property Rights

The special circumstances must be such that, if a variance is not granted, they will interfere with substantial property rights or privileges that are enjoyed by other property in the same area with the same classification.[82] This means that if the strict limits of the zoning classification were applied to the property, the owner would not realize the same privileges as his or her neighbors.[83] This does not mean, however, that a variance should be granted to suit the personal taste of the property owner.[84]

2.2.2.4. Self-imposed Special Circumstances

Special circumstances will not be considered if they were intentionally created by the property owner.[85] Furthermore, a variance may not be granted simply to allow the property owner a greater financial reward from the property.[86] Thus, if a property owner is receiving a reasonable financial return on his or her property, but could make even more money if certain zoning restrictions were relaxed, then a variance should not be granted.[87] It is important to note that circumstances created by the previous property owner are applicable to the current owner.

2.2.2.5. Grant of Special Privileges

The Arizona Constitution forbids any law which will grant "any special or exclusive privileges, immunities, or franchises" to any person or business.[88] Thus, a variance may not be granted if it constitutes a special privilege.[89] A special privilege is a benefit that is given to one person or entity that is not also given to others who are similarly situated.[90] That is the reason for the "special circumstances" requirement for the grant of a variance. The finding of special circumstances indicates that the applicant is not situated similarly to his or her neighbors. Thus, a variance is necessary for the property owner to rightfully enjoy his or her property. If the applicant seeks a variance that would allow him or her privileges greater than those given to others in the same circumstances, then the variance should not be granted.[91]

2.2.2.6. Detriment to Nearby Property Owners

A variance also should not be granted if it would be detrimental to the applicant's neighbors, others residing in the area, or the public in general.[92] The Board should weigh the applicant's need for the variance against the public welfare and the interests of others that may be affected by it. If the need to protect those other interests outweighs the applicant's need, then the variance should not be granted.[93] If

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[82] ARS § 9-462.06(G)(2)

[83] *Santa Cruz County v. Southern Arizona Christian Assembly, Inc.*, 528 P.2d 1266 (Ariz. App. 1974)

[84] *Burroughs v. Town of Paradise Valley*, 724 P.2d 1239 (Ariz. App. 1986) (property owner has no vested interest in building a Frank Lloyd Wright-designed house); *Arkules*, supra (property owner not allowed a variance for a particular house color in violation of regulation)

[85] ARS § 9-462.06(H)(2); *Rivera v. City of Phoenix*, 925 P.2d 741 (Ariz. App. Div. 1 1996); *Burns*, supra

[86] *Haynes v. City of Tucson*, 784 P.2d 715 (Ariz. App. 1989)

[87] *Haynes*, supra; *Ivancovich*, supra; *see also Cardon Oil Co. v. City of Phoenix*, 593 P.2d 656 (Ariz. 1979) (a decrease in property value due to rezoning does not constitute a taking per se)

[88] AZ Const. Art. 2 § 9, Art. 4 Pt. 2 § 19(13) ; *Lerma v. Keck*, 921 P.2d 28 (Ariz. App. Div. 1 1996); *see also* U.S. Const. Amend. 14

[89] ARS § 9-462.06(G)(2)

[90] *Arizona Center For Law In Public Interest v. Hassell*, 837 P.2d 158 (Ariz. App. Div. 1 1991)

[91] *Arkules*, supra; *Haynes*, supra

[92] Se *Rivera*, supra; McQuillin, §§ 25.160, 25.170, 25.176

[93] *Third & Catalina Associates v. City of Phoenix*, 895 P.2d 115 (Ariz. App. Div. 1 1994); *Watanabe v. City of Phoenix*, 683 P.2d 1177 (Ariz. App. 1984)

the applicant's need is greater, though, or the impact on others' interests is small, then the variance should be granted.

2.2.2.7. Change in Zoning

A variance may not be granted if it would effectively constitute rezoning of the property.[94] This occurs when the variance allows a use prohibited by the zoning ordinance. Such "use variances" are prohibited.[95] A variance also may not change the "essential character" of the area,[96] or it likewise will be held invalid.

2.2.2.8. Conditional Variances

The Board should impose any reasonable conditions on a variance that it feels will ensure that a special privilege is not granted and that nearby property is not detrimentally affected.[97] Such conditions should ensure that the intent of the zoning code is followed.[98] Of course, such conditions must be rationally related to the public interest, and cannot be arbitrary.[99] Permissible conditions include time limits on the validity of the variance[100] and restrictions on the amount of development allowed near boundary lines or outside of setback minimums,[101] among others. Generally a violation of a variance condition is treated the same as a violation of the zoning ordinance and enforced accordingly.

2.2.3. Guidelines from Neighboring Boards of Adjustment

2.2.3.1. Tucson

Tucson's Land Use Code specifies that a variance should be granted only if, due to special circumstances, "the property cannot reasonably be developed in conformity with the provisions of" the code.[102] The Tucson code requires that any variance be the "least modification possible" that will grant relief to the applicant.[103] It also provides that a variance shall not be granted if it will impair the "adequate supply of light and air to adjacent property, substantially increase congestion, or substantially diminish or impair property values within the neighborhood."[104]

2.2.3.2. Scottsdale

In dealing with harm to those near the applicant's property, the Scottsdale code prohibits any variance that will be "detrimental to persons residing or working in the vicinity, to adjacent property, to the neighborhood or to the public in general."[105]

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[94] ARS § 9-462.06(H)(1); *see also* McQuillin § 25.171
[95] *Cardon*, supra; *Ivancovich*, supra; *Nicolai*, supra
[96] *Santa Cruz County*, supra
[97] ARS § 9-462.06(G)(2); *ee also* McQuillin, § 25.176
[98] McQuillin, § 25.176
[99] *Fidelity Nat. Title Ins. Co. v. Pima County*, 831 P.2d 426 (Ariz. App. Div. 2 1992); *Pioneer Trust Co. of Arizona v. Pima County*, 811 P.2d 22 (Ariz. 1991)
[100] *Fidelity Nat.*, supra
[101] McQuillin, §§ 25.176, 25.179.10
[102] TLUC § 5.1.7.3.B.1.d
[103] TLUC § 5.1.7.3.B.1.g
[104] TLUC § 5.1.7.3.B.1.f
[105] SCC § 1.805(1)(D)

2.3. Location of Zoning Districts (Some Jurisdictions)

This section falls under "other powers and duties," can be a major function of a Board of Adjustment, and is seldom used. Many times a boundary decision would fall under the Zoning Administrator's purview initially and those decisions are always subject to appeal to the Board anyway. However, when Boards are tasked with boundary determinations they have no authority to assign a zoning classification to a particular district, or to change the zoning classification of a district – that power is reserved to the Council. But when the Council has zoned a district and a dispute arises as to its location or boundaries, the Board can be the named as the body to resolve the dispute.

2.3.1. General Standard for Determining District Locations

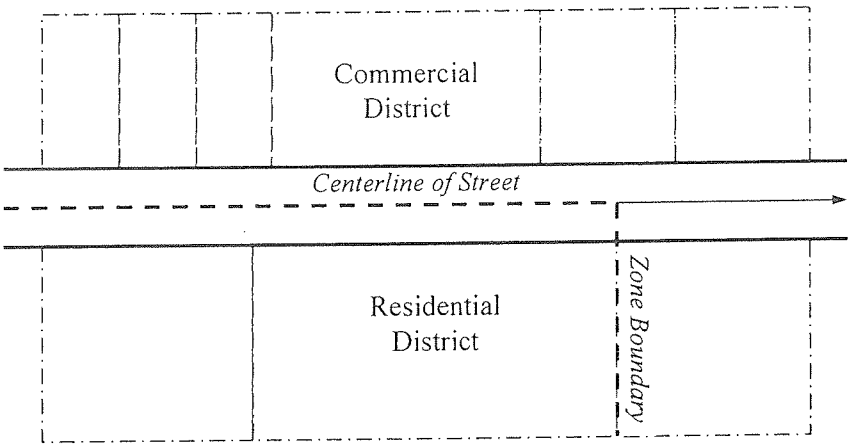
In determining the location of a zoning district boundary, the Board of Adjustment is tasked do its best to ascertain where the Council intended to place it. Of course, in doing so, the Board should follow the guidelines established. If the Board concludes that the people in the area have customarily considered a certain line to be the boundary line, then that line may be considered, but the intent of the Council in placing a zoning district boundary in a particular location governs. Thus, the Board may not make its own decision about where the location of a zoning district boundary ought to be, but must do its best to determine where the Council intended to establish the boundary.

The Board should consider the best evidence it can find to discover the Council's intent. If the Board can determine the location of a district by reference to a clear and unambiguous description of it in a written document, or to the results of a survey, then the Board should follow that guidance. However, if two equally clear documents describe different lines, then the one that governs is the one to which the ordinance creating the district refers. Additionally, the Board should consider the surveys and legal descriptions available to the Council at the time the district was established, and should not rely on subsequent documents, even if they are more complete or extensive. The Board may accept the results of a re-survey so long as it is based on the original survey and does not change the Council's intended location. A re-survey is also acceptable where the original survey or legal description has been lost, as long as it is based on the field notes of the original survey or some similar guidance. References to fixed objects in location descriptions should be given more weight than references to distances. If the location of a district corner cannot be determined by reference to a fixed point, then it should be determined by extending the lines forming the boundaries of the district until they meet. In the end, the determination of a district location is left to the Board's best judgment.

2.3.2. District Boundaries, guidelines from Tucson

Tucson's Land Use Code provides a simple method for determining zone boundaries. It states that zone boundary lines should follow lot lines to the centerline of streets or rights-of-way.[106] Because this description is not always easy for Board members to apply, the code provides an illustration similar to the one below.[107]

[106] TLUC § 1.3.4
[107] TLUC Illustration 1.3.4


Commercial
District
Centerline of Street
Residential
District
Zone Boundary