

Department of Commerce

2008 BOARDS & COMMISSIONS CONFERENCE

BOARD OF ADJUSTMENT: POWERS & LIMITATION

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1. FUNCTIONS OF THE BOARD

- 1.1 VARIANCE
- 1.2 INTERPRETATION
- 1.3 USE PERMIT
- 1.4 ADMINISTRATIVE VARIANCE
- 1.5 CONSENT AGENDA

2. EX PARTE INFORMATION

- 2.1 COMMUNICATION OUTSIDE OF THE HEARING
- 2.2 RELYING ON INFORMATION NOT IN THE RECORD

3. CRITERIA FOR GRANTING VARIANCES

- 3.1 STATUTORY CRITERIA
 - 3.1.1 CITIES AND TOWNS – ARIZ. REV. STAT. § 9-462.06
 - 3.1.2 COUNTIES – ARIZ. REV. STAT. § 11-807
- 3.2 IMPLICATIONS OF VARYING FROM STATUTORY CRITERIA

4. CONDUCT OF MEETING

- 4.1 MEETING PROCEDURES
- 4.2 STAFF REPORTS
 - 4.2.1 REQUEST
 - 4.2.2 CODE ENFORCEMENT ACTIVITY
 - 4.2.3 PUBLIC COMMENT
 - 4.2.4 SITE LOCATION, CONTEXT
 - 4.2.5 HISTORY – DEVELOPMENT, ZONING, COMMUNITY VISION & VALUE
 - 4.2.6 FINDINGS STATEMENT
- 4.3 APPROPRIATE QUESTIONS TO BE ASKED AT HEARINGS

5. FINDINGS

5.1 IMPORTANCE OF FINDINGS

5.2 BOARD STATEMENT OF FINDINGS

5.2.1 AT TIME OF APPROVAL

5.2.2 INCLUDE IN MINUTES

5.2.3 SEPARATE WRITTEN FINDINGS

6. HOW TO AVOID LITIGATION

6.1 APPLICATION REQUIREMENTS

6.2 HEARING PROCEDURES

6.3 RECORDS RETENTION

7. REAL LIFE EXAMPLES

ATTACHMENTS

A. STATUTORY PROVISIONS

B. *ARIZONA LAND USE LAW*, CHAPTER 9, ZONING ADJUSTMENTS

ATTACHMENT A

STATUTE FOR CITIES AND TOWNS

§ 9-462.06. Board of adjustment

A. The legislative body shall, by ordinance, establish a board of adjustment, which shall consist of not less than five nor more than seven members appointed by the legislative body in accordance with provisions of the ordinance, except that the ordinance may establish the legislative body as the board of adjustment. The legislative body may, by ordinance, delegate to a hearing officer the authority to hear and decide on matters within the jurisdiction of the board of adjustment as provided by this section, except that the right of appeal from the decision of a hearing officer to the board of adjustment shall be preserved.

B. The ordinance shall provide for public meetings of the board, for a chairperson with the power to administer oaths and take evidence, and that minutes of its proceedings showing the vote of each member and records of its examinations and other official actions be filed in the office of the board as a public record.

C. A board of adjustment shall hear and decide appeals from the decisions of the zoning administrator, shall exercise such other powers as may be granted by the ordinance and adopt all rules and procedures necessary or convenient for the conduct of its business.

D. Appeals to the board of adjustment may be taken by persons aggrieved or by any officer, department, board or bureau of the municipality affected by a decision of the zoning administrator, within a reasonable time, by filing with the zoning administrator and with the board a notice of appeal specifying the grounds thereof. The zoning administrator shall immediately transmit all records pertaining to the action appealed from to the board.

E. An appeal to the board stays all proceedings in the matter appealed from, unless the zoning administrator certifies to the board that, in the zoning administrator's opinion by the facts stated in the certificate, a stay would cause imminent peril to life or property. Upon such certification proceedings shall not be stayed, except by restraining order granted by the board or by a court of record on application and notice to the zoning administrator. Proceedings shall not be stayed if the appeal requests relief which has previously been denied by the board except pursuant to a special action in superior court as provided in subsection K of this section.

F. The board shall fix a reasonable time for hearing the appeal, and shall give notice of hearing by both publication in a newspaper of general circulation in accordance with [§ 9-462.04](#) and posting the notice in conspicuous places close to the property affected.

G. A board of adjustment shall:

1. Hear and decide appeals in which it is alleged there is an error in an order, requirement or decision made by the zoning administrator in the enforcement of a zoning ordinance adopted pursuant to this article.

2. HEAR AND DECIDE APPEALS FOR VARIANCES FROM THE TERMS OF THE ZONING ORDINANCE ONLY IF, BECAUSE OF SPECIAL CIRCUMSTANCES APPLICABLE TO THE PROPERTY, INCLUDING ITS SIZE, SHAPE, TOPOGRAPHY, LOCATION, OR SURROUNDINGS, THE STRICT APPLICATION OF THE ZONING ORDINANCE WILL DEPRIVE SUCH PROPERTY OF PRIVILEGES ENJOYED BY OTHER PROPERTY OF THE SAME CLASSIFICATION IN THE SAME ZONING DISTRICT. ANY VARIANCE GRANTED IS SUBJECT TO SUCH CONDITIONS AS WILL ASSURE THAT THE ADJUSTMENT AUTHORIZED SHALL NOT CONSTITUTE A GRANT OF SPECIAL PRIVILEGES INCONSISTENT WITH THE LIMITATIONS UPON OTHER PROPERTIES IN THE VICINITY AND ZONE IN WHICH SUCH PROPERTY IS LOCATED.

3. Reverse or affirm, wholly or partly, or modify the order, requirement or decision of the zoning administrator appealed from, and make such order, requirement, decision or determination as necessary.

H. A board of adjustment may not:

1. Make any changes in the uses permitted in any zoning classification or zoning district, or make any changes in the terms of the zoning ordinance provided the restriction in this paragraph shall not affect the authority to grant variances pursuant to this article.

2. GRANT A VARIANCE IF THE SPECIAL CIRCUMSTANCES APPLICABLE TO THE PROPERTY ARE SELF-IMPOSED BY THE PROPERTY OWNER.

I. If the legislative body is established as the board of adjustment, it shall exercise all of the functions and duties of the board of adjustment in the same manner and to the same effect as provided in this section.

J. In a municipality with a population of more than one hundred thousand persons according to the latest United States decennial census, the legislative body, by ordinance, may provide that a person aggrieved by a decision of the board or a taxpayer, officer or department of the municipality affected by a decision of the board may file, at any time within fifteen days after the board has rendered its decision, an appeal with the clerk of the legislative body. The legislative body shall hear the appeal in accordance with procedures adopted by the legislative body and may affirm or reverse, in whole or in part, or modify the board's decision.

K. A person aggrieved by a decision of the legislative body or board or a taxpayer, officer or department of the municipality affected by a decision of the legislative body or board may, at any time within thirty days after the board, or the legislative body, if the board decision was appealed pursuant to subsection J of this section, has rendered its decision, file a complaint for special action in the superior court to review the legislative body or board decision. Filing the complaint does not stay proceedings on the decision sought to be reviewed, but the court may, on application, grant a stay and on final hearing may affirm or reverse, in whole or in part, or modify the decision reviewed.

ATTACHMENT A

STATUTE FOR COUNTIES

§ 11-807. Boards of adjustment; powers; appeals

A. There shall be one or more boards of adjustment composed of not less than three nor more than five members each, one of which shall be appointed in and shall have jurisdiction in each supervisorial district in which the zoning ordinance has been applied. The members of each board shall be appointed for staggered terms of four years each. They shall be residents and taxpayers of the district from which appointed.

B. The board of adjustment may:

1. Interpret the zoning ordinance when the meaning of any word, phrase or section is in doubt, when there is dispute between the appellant and enforcing officer, or when the location of a district boundary is in doubt.

2. ALLOW A VARIANCE FROM THE TERMS OF THE ORDINANCE WHEN, OWING TO PECULIAR CONDITIONS, A STRICT INTERPRETATION WOULD WORK AN UNNECESSARY HARDSHIP, IF IN GRANTING SUCH VARIANCE THE GENERAL INTENT AND PURPOSES OF THE ZONING ORDINANCE WILL BE PRESERVED.

C. Appeals to an adjustment board may be taken by any person who feels that there is error or doubt in the interpretation of the ordinance or that due to unusual circumstances attaching to the person's property an unnecessary hardship is being inflicted on the person. The appeal shall state whether it is a plea for an interpretation or a variance and the grounds for the appeal.

D. Any person aggrieved in any manner by an action of a board of adjustment may within thirty days appeal to the superior court, and the matter shall be heard de novo.

ATTACHMENT B

**ARIZONA
LAND USE
LAW**

Fifth Edition

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**State Bar of Arizona
Continuing Legal Education
2008**

CHAPTER 9

ZONING ADJUSTMENTS

9.1 Statutory Provisions.

9.1.1 Municipalities.

9.1.1.1 The legislative body is required to establish by ordinance a board of adjustment, except that the ordinance may designate the legislative body as the board of adjustment. The legislative body may also delegate to a hearing officer the authority to hear and decide matters within the jurisdiction of the board of adjustment, as long as the hearing officer's decision may be appealed to the board. A.R.S. § 9-462.06(A). *See also* A.R.S. § 9-462.08 (relating to the appointment of a zoning hearing officer).

9.1.1.2 A board of adjustment hears and decides appeals from decisions of the zoning administrator, hears requests for variances from the zoning ordinance, and exercises such other powers as may be granted by the zoning ordinance. A.R.S. § 9-462.06(C), (D), and (G). The zoning administrator is the municipal official charged with the responsibility of enforcing the zoning ordinance. A.R.S. § 9-462.05(C). In some cities, the zoning administrator serves as the hearing officer who conducts the initial hearings on zoning adjustment matters. *See, e.g.*, § 307, City of Phoenix Zoning Ordinance.

Neal v. City of Kingman, 167 Ariz. 574, 810 P.2d 572 (App. 1990), *vacated in part*, 169 Ariz. 133, 817 P.2d 937 (1991)(a board of adjustment has the authority, implied through the powers conferred by statute, to determine whether a permittee has acquired a vested right in a particular improvement)

9.1.1.3 In some cities, the board of adjustment also hears and decides applications for conditional use permits. A conditional use is a use that is specifically provided for in the zoning ordinance subject to approval by a designated body which may be the board of adjustment, planning commission, or municipal legislative body. The essential difference between a conditional use permit and a variance is that a variance is authorization to use property in a manner prohibited by the zoning ordinance, while a conditional use permit allows property to be put to a use which the ordinance expressly permits. Statutory authorization for conditional use permits is set forth in A.R.S. § 9-462.01(C)(1).

9.1.1.4 In some Arizona cities a conditional use permit is designated a “special permit” or “special use permit” and is essentially equivalent to a change of zone.

Bartolomeo v. Town of Paradise Valley, 129 Ariz. 409, 631 P.2d 564 (App. 1981)

Town of Paradise Valley v. Gulf Leisure Corp., 27 Ariz. App. 600, 557 P.2d 532 (1976)

9.1.1.5 A variance from the zoning ordinance may be granted only if, because of special circumstances applicable to the property, including its size, shape, topography, location or surroundings, the strict application of the zoning ordinance would deprive such property of privileges enjoyed by other property in the same classification in the same zoning district. A.R.S. § 9-462.06(G)(2).

Haynes v. City of Tucson, 162 Ariz. 509, 784 P.2d 715 (App. 1989)

9.1.1.6 Any variance granted is subject to the imposition of conditions to assure that the adjustment authorized will not grant special privileges that are inconsistent with limitations imposed on other properties in the vicinity. A.R.S. § 9-462.06(G)(2).

9.1.1.7 A board of adjustment may not grant a use variance or grant a variance if the special circumstances applicable to the property are self-imposed by the property owner. A.R.S. § 9-462.06(H).

9.1.1.8 An appeal to the board of adjustment stays enforcement of the zoning ordinance unless a stay would cause imminent peril to life or property or the appeal requests relief which has previously been denied by the board (i.e., serial appeals seeking the same relief). If the zoning administrator certifies that a stay would cause an imminent peril, enforcement may be stayed only through a superior court restraining order. A.R.S. § 9-462.06(E).

9.1.1.9 In a municipality with a population of more than 100,000 persons, the city council, by ordinance, may provide that an appeal may be taken from the board of adjustment to the city council within 15 days after the board has rendered its decision. The city council is authorized to prescribe procedures for hearing appeals. A.R.S. § 9-462.06(J). Prior to the 1995 amendment to the statute, the Arizona Court of Appeals held that in hearing an appeal from a board of adjustment, a city council is bound by the record presented to the board and that the city council may not consider new evidence or reweigh the evidence previously presented to the board.

Lane v. City of Phoenix, 169 Ariz. 37, 816 P.2d 934 (App. 1991) (in considering an appeal from a board of adjustment, a city council functions in a quasi-judicial capacity)

Thomas v. City of Phoenix, 171 Ariz. 69, 828 P.2d 1210 (App. 1991)

9.1.1.10 A special action challenging a decision of the board of adjustment or the city council may be filed within 30 days of the date the decision is rendered. Filing the complaint does not stay enforcement of the ordinance, but the court may, on application, grant a stay and on final hearing shall affirm or reverse, in whole or in part, or modify the decision reviewed. A.R.S. § 9-462.06(K). In a city with a population of more than one hundred thousand persons, a special action challenging a decision by the board of adjustment may be taken in lieu of, or in addition to, an appeal to the city council. A.R.S. § 9-462.06(K).

9.1.2 Counties.

9.1.2.1 Counties are required to establish one or more boards of adjustment. A.R.S. § 11-807(A).

9.1.2.2 A board of adjustment is empowered to interpret the zoning ordinance and grant variances. A.R.S. § 11-807(B).

9.1.2.3 A variance may be granted when, owing to peculiar conditions, a strict interpretation would work an unnecessary hardship, if in granting such variance the general interest and purposes of the zoning ordinance will be preserved. A.R.S. § 11-807(B)(2).

9.1.2.4 Any person aggrieved in any manner by an action of a board of adjustment may within 30 days appeal to the superior court, and the matter shall be heard de novo. A.R.S. § 11-807(D).

9.2 Board of Adjustment Proceedings.

9.2.1 Jurisdiction.

Actions in excess of the board's jurisdiction are null and void.

Nicolai v. Board of Adjustment, 55 Ariz. 283, 101 P.2d 199 (1940) (a board of adjustment is prohibited from granting a use variance)

Arkules v. Board of Adjustment of Town of Paradise Valley, 151 Ariz. 438, 728 P.2d 657 (App. 1986) (board lacked jurisdiction to grant a variance that did not satisfy statutory requirements)

9.2.2 Nature of Proceedings.

9.2.2.1 Although structured much like an administrative agency, the board of adjustment acts in a quasi-judicial capacity.

Austin Shea (Arizona) 7th Street and Van Buren, L.L.C. v. City of Phoenix, 213 Ariz. 385, 142 P.3d 693 (App. 2006 (a board of adjustment acts in a quasi-judicial capacity))

Neal v. City of Kingman, 167 Ariz. 574, 810 P.2d 572 (App. 1990), *vacated in part*, 169 Ariz. 133, 817 P.2d 937 (1991)

Arkules v. Board of Adjustment of Town of Paradise Valley, 151 Ariz. 438, 728 P.2d 657 (App. 1986)

9.2.2.2 A county board of adjustment sits as an appellate administrative body.

P. F. West, Inc. v. Superior Court, 139 Ariz. 31, 676 P.2d 665 (App. 1984)

9.2.2.1 Grant of a variance by a county board of adjustment has been characterized as being an administrative decision.

Perper v. Pima County, 123 Ariz. 439, 600 P.2d 52 (App. 1979)

9.2.3 Standing to Appeal to the Board of Adjustment.

Appeals to a county board of adjustment may be maintained by any person who feels there is an error or doubt in the interpretation of a zoning ordinance without any requirement that such person make a showing of special damages.

P. F. West, Inc. v. Superior Court, 139 Ariz. 31, 676 P.2d 665 (App. 1984)

9.2.4 De Novo Hearing.

Hearing before board of adjustment is not limited to review of evidence presented to zoning administrator; de novo hearing is proper.

Murphy v. Town of Chino Valley, 163 Ariz. 571, 789 P.2d 1072 (App. 1989)

9.2.5 Oaths at Hearings.

The failure to administer an oath to witnesses who testify before the board does not invalidate the proceedings.

East Camelback Homeowners Ass'n v. Arizona Foundation for Neurology & Psychiatry, 18 Ariz. App. 121, 500 P.2d 906 (1972), *supp.*, 19 Ariz. App. 118, 505 P.2d 286 (1973) (administration of oaths is discretionary under statute)

9.2.6 Cross-Examination of Witnesses.

9.2.6.1 Although no cases directly address the right to cross-examine witnesses before the board of adjustment, the courts of Arizona have held in relation to other administrative bodies that the right to examine adverse witnesses is a fundamental attribute of procedural due process.

Bennett v. Arizona State Board of Public Welfare, 95 Ariz. 170, 388 P.2d 166 (1963)

9.2.6.2 One who does not request the right to cross-examine witnesses before the board of adjustment cannot be heard to complain that such right has been denied.

City of Phoenix v. Superior Court, 110 Ariz. 155, 515 P.2d 1175 (1973) (record disclosed that respondent was not prevented from cross-examining his opposing witnesses nor did he ask to do so)

9.2.7 Notice.

A notice of a board of adjustment hearing is adequate if it affords an opportunity to any person, by the exercise of reasonable diligence, to determine if his property would be affected and to what extent.

Arkules v. Board of Adjustment of Town of Paradise Valley, 151 Ariz. 438, 728 P.2d 657 (App. 1986)

East Camelback Homeowners Ass'n v. Arizona Foundation for Neurology & Psychiatry, 18 Ariz. App. 121, 500 P.2d 906 (1972), *supp.*, 19 Ariz. App. 118, 505 P.2d 286 (1973)

9.2.8 Rehearing.

If authorized by local rule, a board of adjustment has authority to rehear a case. The appeal period is tolled by a rehearing request.

Austin Shea (Arizona) 7th Street and Van Buren, L.L.C. v. City of Phoenix, 213 Ariz. 385, 142 P.3d 693 (App. 2006) (a board of adjustment may rehear a matter if authorized to do so by a rule falling within the standards set forth in the legislative act)

Boyce v. City of Scottsdale, 157 Ariz. 265, 756 P.2d 934 (App. 1988)

9.2.9 Qualified Privilege for Speakers at Board Hearings.

Allegedly defamatory statements made during a board of adjustment public hearing are subject to a qualified privilege. To avoid forfeiture of the privilege, the statements must have some relation to the subject matter of the hearing and should be made primarily for the purpose of furthering the public interest entitled to protection. The privilege may also be lost through abuse. Abuse of the privilege may be established by demonstrating the existence of either excessive publication or actual malice.

Burns v. Davis, 196 Ariz. 155, 993 P.2d 1119 (App. 1999)

9.3 Variances.

9.3.1 Standards for Granting.

9.3.1.1 A variance may be granted only where there are special circumstances applicable to the property.

Arkules v. Board of Adjustment of Town of Paradise Valley, 151 Ariz. 438, 728 P.2d 657 (App. 1986) (request for variance from ordinance requiring house colors to blend with mountain background had nothing to do with size, shape, topography, or location of the property and did not constitute a special circumstance within meaning of statute)

9.3.1.2 Any hardship which would justify the grant of a variance must relate to the use of the land as opposed to the owner. A personal hardship does not justify a variance.

Arkules v. Board of Adjustment of Town of Paradise Valley, 151 Ariz. 438, 728 P.2d 657 (App. 1986) (permission to change the color in violation of a mountain building regulation was not necessary to relieve the property owner from a demonstrable hardship but rather to serve as a personal convenience)

9.3.1.3 A hardship that has been willfully and intentionally created does not justify the granting of a variance. Special circumstances or hardships are not created by the owner or applicant when they arise directly out of the application of the ordinance to circumstances or conditions beyond the control of the party involved.

Rivera v. City of Phoenix, 186 Ariz. 600, 925 P.2d 741 (App. 1996) (property owner did not meet condition for obtaining a variance because he created his own problem by providing the city with an erroneous site plan)

Burns v. SPA Automotive, Ltd., 156 Ariz. 503, 753 P.2d 193 (App. 1988) (need of car dealer for additional signage to individually display three automobile manufacturers' logos was a self-imposed hardship that did not justify a variance)

9.3.1.4 Need for an "adequate financial return" is not a legitimate basis for a variance.

Haynes v. City of Tucson, 162 Ariz. 509, 784 P.2d 715 (App. 1989)

9.3.2 Use Variance.

9.3.2.1 A municipal board of adjustment is prohibited from granting a use variance, *i.e.*, a use that is not permitted in a particular zoning district. A.R.S. § 9-462.06(H)(1).

Cardon Oil Co. v. City of Phoenix, 122 Ariz. 102, 593 P.2d 656 (1979)

Nicolai v. Board of Adjustment, 55 Ariz. 283, 101 P.2d 199 (1940) (board of adjustment may not change use established in zoning ordinance by authorizing prohibited use as a "variance")

9.3.2.2 In one case, it was stated that a county board of adjustment may grant a use variance if the record shows that (i) the land in question cannot yield a reasonable return if used only for a purpose allowed in the particular zoning district, (ii) the plight of the owner is due to unique circumstances and not the general conditions in the neighborhood, and (iii) the use to be authorized by the variance will not alter the essential character of the area. However, the facts of this case indicate that the discussion of use variances is dicta and that the appeal court was in reality affirming the granting of a special use permit, as opposed to a variance, by the trial court.

Santa Cruz County v. Southern Arizona Christian Assembly, Inc., 22 Ariz. App. 507, 528 P.2d 1266 (1974)

9.3.3 Area Variance.

9.3.3.1 "Area" variances involve such matters as setbacks, frontage requirements, height limitations, lot size restrictions, density regulations, and yard requirements.

Ivancovich v. City of Tucson Board of Adjustment, 22 Ariz. App. 530, 529 P.2d 242 (1974)

9.3.3.2 Based on language contained in a zoning ordinance, the court of appeals held in one case that a less stringent standard should be applied to the grant of an "area" variance than to the grant of a "use" variance.

Ivancovich v. City of Tucson Board of Adjustment, 22 Ariz. App. 530, 529 P.2d 242 (1974)

But see Cardon Oil Co. v. City of Phoenix, 122 Ariz. 102, 593 P.2d 656 (1979) (court points out that the statute prohibits the granting of a use variance); and *Arkules v. Board of Adjustment of Town of Paradise Valley*, 151 Ariz. 438, 728 P.2d 657 (App. 1986) (court applies statutory standards for granting a variance, and draws no distinction between use and area variances)

9.3.4 Discretion of Board of Adjustment to Grant.

9.3.4.1 The grant of a variance is within the sound discretion of the board of adjustment and is not a matter which can be mandated by the courts.

See Desert Outdoor Advertising, Inc. v. City of Oakland, 506 F.3d 798, (9th Cir. 2007) (variance standards applicable to ordinance that banned construction of new advertising signs anywhere in the city did not vest city officials with unbridled discretion to permit or deny the display of signs in violation of the First Amendment)

Cardon Oil Co. v. City of Phoenix, 122 Ariz. 102, 593 P.2d 656 (1979)

9.3.4.2 The power to grant a variance is to be exercised sparingly and only under exceptional circumstances.

Ivanovich v. City of Tucson Board of Adjustment, 22 Ariz. App. 530, 529 P.2d 242 (1974)

9.4 Interpretation of Zoning Regulations.

9.4.1 Authority of Board of Adjustment.

In authorizing the creation of boards of adjustment, the legislature could have believed that reasonably intelligent people, even though without formal legal training, could interpret zoning ordinances, particularly if assisted by legal counsel.

Minor v. Cochise County, 125 Ariz. 170, 608 P.2d 309 (1980)

See Murphy v. Town of Chino Valley, 163 Ariz. 571, 789 P.2d 1072 (App. 1989) (local board of adjustment is the body most aware of community customs and practices, and is best able to decide whether a particular use is a permitted accessory use)

See also P. F. West, Inc. v. Superior Court, 139 Ariz. 31, 676 P.2d 665 (App. 1984) (recognizes county board's interpretive authority)

9.4.2 Administrative Interpretations.

The courts should give weight to the construction of a zoning ordinance by the officials charged with the duty of administering and enforcing it.

Kubby v. Hammond, 68 Ariz. 17, 198 P.2d 134 (1948) (court should give great weight to contemporaneous construction of a zoning ordinance by the officials charged with the duty of enforcing it)

Redelsperger v. City of Avondale, 207 Ariz. 430, 87 P.3d 843 (App. 2004) (although a city's interpretation of its zoning ordinance should be accorded some weight, it is not binding on the courts)

Jones v. Coconino County, 201 Ariz. 368, 35 P.3d 422 (App. 2001) (although administrative interpretation of an ordinance is not binding on the court, such an interpretation should be accorded some weight in determining the proper meaning and application of the ordinance)

Peabody v. City of Phoenix, 14 Ariz. App. 576, 485 P.2d 565 (1971) (construction of a zoning ordinance by those with the duty of administering and enforcing it is particularly persuasive)

Arizona Foundation for Neurology & Psychiatry v. Sienerth, 13 Ariz. App. 472, 477 P.2d 758 (1970) (in cases of ambiguous language, a court should acquiesce in a longstanding administrative interpretation)

9.5 Review of Decisions of the Board of Adjustment.

9.5.1 Statutory Appeal Procedures.

9.5.1.1 Municipalities.

(1) A statutory special action is the vehicle to review board of adjustment decisions.

A.R.S. § 9-462.06(K)

Schoenberger v. Board of Adjustment, 124 Ariz. 528, 606 P.2d 18 (1980)

(2) An appeal from the board of adjustment is not a trial de novo, and the court is limited to a review of the record before the board.

City of Phoenix v. Superior Court, 110 Ariz. 155, 515 P.2d 1175 (1973) (holding based on previous statute; the same rule should apply to the present statute)

Pingitore v. Town of Cave Creek, 194 Ariz. 261, 981 P.2d 129 (App. 1998) (App. 1998)

Gannett Outdoor Company of Arizona v. City of Mesa, 159 Ariz. 459, 768 P.2d 191 (App. 1989) (superior court abused discretion in considering matters not presented to board of adjustment)

See Book Cellar v. City of Phoenix, 139 Ariz. 332, 678 P.2d 517 (App. 1983)

But see Neal v. City of Kingman, 167 Ariz. 574, 810 P.2d 572 (App. 1990), *vacated in part*, 169 Ariz. 133, 817 P.2d 937 (1991) (trial de novo of vested rights issue was appropriate where board refused to consider the issue)

(3) The record from the board of adjustment is sufficient for review unless there are errors of such magnitude that the record precludes an intelligent understanding of the testimony.

Murphy v. Town of Chino Valley, 163 Ariz. 571, 789 P.2d 1072 (App. 1989) (although not all the board's deliberations were in the record, the Court of Appeals was able to review the testimony to determine whether there was sufficient evidence to support the board's decision under any legal theory)

(4) The 30-day time limit for challenging board of adjustment decisions set forth in A.R.S. § 9-462.06(K) does not apply to a claim that the board exceeded its powers in granting a variance that did not satisfy statutory criteria.

Arkules v. Board of Adjustment of Town of Paradise Valley, 151 Ariz. 438, 728 P.2d 657 (App. 1986) (grant of a variance that does not satisfy statutory criteria is void and may be challenged after expiration of appeal period)

(5) The superior court cannot decline to accept jurisdiction of a statutory special action challenging a board of adjustment decision.

Circle K Convenience Stores, Inc. v. City of Phoenix, 178 Ariz. 102, 870 P.2d 1198 (App. 1993) (statutory special actions are not at all discretionary and they are not subordinate to a right of appeal; they are the right of appeal)

Book Cellar, Inc. v. City of Phoenix, 139 Ariz. 332, 678 P.2d 517 (App. 1983)

(6) A special action challenging a decision by the board of adjustment is in the nature of certiorari, not mandamus.

Circle K Convenience Stores, Inc. v. City of Phoenix, 178 Ariz. 102, 870 P.2d 1198 (App. 1993) (court may not award attorney's fees not authorized under A.R.S. § 9-462.06(K))

U.S. Parking Systems v. City of Phoenix, 160 Ariz. 210, 772 P.2d 33 (App. 1989) (appellant could not "bootstrap" itself into a position to receive attorneys' fees by couching complaint in terms of mandamus action)

(7) A request for rehearing to board of adjustment tolls thirty-day time limit for challenging board action.

Boyce v. City of Scottsdale, 157 Ariz. 265, 756 P.2d 934 (App. 1988)

9.5.1.2 Counties.

An appeal from the board of adjustment is a trial de novo in superior court.

P. F. West, Inc. v. Superior Court, 139 Ariz. 31, 676 P.2d 665 (App. 1984)

Santa Cruz County v. Southern Arizona Christian Assembly, Inc., 22 Ariz. App. 507, 528 P.2d 1266 (1974)

9.5.2 Standing to Appeal from the Board of Adjustment.

An adjacent property owner who suffers no special damages from the granting of a variance cannot seek judicial review of a decision to grant a variance.

Perper v. Pima County, 123 Ariz. 439, 600 P.2d 52 (App. 1979)

9.5.3 Necessary Parties.

Board of adjustment and property owner directly subject to board action are necessary parties in any appeal of the board's decision.

Murphy v. Town of Chino Valley, 163 Ariz. 571, 789 P.2d 1072 (App. 1989)

9.5.4 Standard of Review.

9.5.4.1 Comparison to certiorari.

The court's authority on review from a municipal board of adjustment is greater than common law certiorari.

Austin Shea (Arizona) 7th Street and Van Buren, L.L.C. v. City of Phoenix, 213 Ariz. 385, 142 P.3d 693 (App. 2006)

Whiteco Outdoor Advertising v. City of Tucson, 193 Ariz. 314, 972 P.2d 647 (App. 1998)

City of Phoenix v. Superior Court, 110 Ariz. 155, 515 P.2d 1175 (1973)

Arkules v. Board of Adjustment of Paradise Valley, 161 Ariz. 598, 780 P.2d 431 (App. 1989), *op. mod.*, 32 Ariz. Adv. Rep. 86 (in a special action challenging a decision by the board of adjustment, the superior court has jurisdiction to enforce its judgment, including issuance of an injunction in an appropriate case)

Blake v. City of Phoenix, 157 Ariz. 93, 754 P.2d 1368 (App. 1988)

Book Cellar, Inc. v. City of Phoenix, 139 Ariz. 332, 678 P.2d 517 (App. 1983)

East Camelback Homeowners Ass'n v. Arizona Foundation for Neurology & Psychiatry, 18 Ariz. App. 121, 500 P.2d 906 (1972), *supp.*, 19 Ariz. App. 118, 505 P.2d 286 (1973)

Levis v. Board of Adjustments, 6 Ariz. App. 494, 433 P.2d 811 (1967)

(1) The trial court is limited in reviewing municipal board of adjustment decisions to determining whether the board acted in excess of its jurisdiction, acted in an arbitrary or capricious manner, or abused its discretion.

M & M Auto Storage Pool, Inc. v. Chemical Waste Management, Inc., 164 Ariz. 139, 791 P.2d 665 (App. 1990)

Murphy v. Town of Chino Valley, 163 Ariz. 571, 789 P.2d 1072 (App. 1989)

Blake v. City of Phoenix, 157 Ariz. 93, 754 P.2d 1368 (App. 1988)

Watanabe v. City of Phoenix, 140 Ariz. 575, 683 P.2d 1177 (App. 1984)

Book Cellar, Inc. v. City of Phoenix, 139 Ariz. 332, 678 P.2d 517 (App. 1983)

(2) If, upon examination of the record, the superior court finds undue haste, unfair procedures, mistakes of law, etc., the court may return the record to the board with instructions to give the aggrieved person more time and fairer procedures and to apply correct rules of law in accordance with the court's opinion.

City of Phoenix v. Superior Court, 110 Ariz. 155, 515 P.2d 1175 (1973)

Book Cellar, Inc. v. City of Phoenix, 139 Ariz. 332, 678 P.2d 517 (App. 1983)

9.5.4.2 Presumption of validity.

There is a presumption of validity in favor of the board's determination and one who attacks such decision is met with the presumption that it is correct and carries the burden of showing the decision to be against the weight of evidence, unreasonable, erroneous, or illegal as a matter of law.

Rivera v. City of Phoenix, 186 Ariz. 600, 925 P.2d 741 (App. 1996)

Mueller v. City of Phoenix, 102 Ariz. 575, 435 P.2d 472 (1967)

Pingitore v. Town of Cave Creek, 194 Ariz. 261, 981 P.2d 129 (App. 1998) (App. 1998 (*Note: This case is subject to further review.*))

Ivancovich v. City of Tucson Board of Adjustment, 22 Ariz. App. 530, 529 P.2d 242 (1974)

9.5.4.3 Fairly debatable rule.

The court will not substitute its judgment for that of the board, even where the question is fairly debatable and one in which the court would have reached a different conclusion had it been the original arbiter of the issues.

Mueller v. City of Phoenix, 102 Ariz. 575, 435 P.2d 472 (1967)

Pingitore v. Town of Cave Creek, 194 Ariz. 261, 981 P.2d 129 (App. 1998) (App. 1998)

Blake v. City of Phoenix, 157 Ariz. 93, 754 P.2d 1368 (App. 1988)

9.5.4.4 Evidence.

(1) In considering a special action to review a decision of the board of adjustment, the superior court may not weigh the evidence in the record in order to determine the correctness of the decision, but may consider such evidence only insofar as it may tend to show jurisdiction or lack thereof to render the decision.

Mueller v. City of Phoenix, 102 Ariz. 575, 435 P.2d 472 (1967)

Blake v. City of Phoenix, 157 Ariz. 93, 754 P.2d 1368 (App. 1988)

Ivancovich v. City of Tucson Board of Adjustment, 22 Ariz. App. 530, 529 P.2d 242 (1974)

(2) The board must be upheld if there is credible evidence to support the decision.

Mueller v. City of Phoenix, 102 Ariz. 575, 435 P.2d 472 (1967)

Pingitore v. Town of Cave Creek, 194 Ariz. 261, 981 P.2d 129 (App. 1998) (App. 1998)

M & M Auto Storage Pool, Inc. v. Chemical Waste Management, Inc., 164 Ariz. 139, 791 P.2d 665 (App. 1990)

Murphy v. Town of Chino Valley, 163 Ariz. 571, 789 P.2d 1072 (App. 1989)

Gannett Outdoor Company of Arizona v. City of Mesa, 159 Ariz. 459, 768 P.2d 191 (App. 1989)

Blake v. City of Phoenix, 157 Ariz. 93, 754 P.2d 1368 (App. 1988)

Arkules v. Board of Adjustment of Town of Paradise Valley, 151 Ariz. 438, 728 P.2d 657 (App. 1986)

Burroughs v. Town of Paradise Valley, 150 Ariz. 570, 724 P.2d 1239 (App. 1986)

Ivancovich v. City of Tucson Board of Adjustment, 22 Ariz. App. 530, 529 P.2d 242 (1974)

East Camelback Homeowners Ass'n v. Arizona Foundation for Neurology & Psychiatry, 18 Ariz. App. 121, 500 P.2d 906 (1972), *supp.*, 19 Ariz. App. 118, 505 P.2d 286 (1973)

(3) Findings of fact on which the jurisdiction of the board of adjustment depends must be supported by evidence. The sufficiency of evidence supporting a finding of fact upon which jurisdiction depends is reviewable on certiorari.

Mueller v. City of Phoenix, 102 Ariz. 575, 435 P.2d 472 (1967)

9.5.4.5 Statutory interpretations.

Trial court and appellate court are free to draw own conclusion on issues of legal interpretation.

Jones v. Coconino County, 201 Ariz. 368, 35 P.3d 422 (App. 2001)

City of Tempe v. Outdoor Systems, Inc., 201 Ariz. 106, 32 P.3d 31 (App. 2001)

Pingitore v. Town of Cave Creek, 954 P.2d 261, 981 P.2d 129 (App. 1998).

Whiteco Outdoor Advertising v. City of Tucson, 193 Ariz. 314, 972 P.2d 647 (App. 1998)

Murphy v. Town of Chino Valley, 163 Ariz. 571, 789 P.2d 1072 (App. 1989)

9.5.4.6 Waiver of claim.

Generally, failure to raise an issue before a municipal board of adjustment constitutes waiver, unless the issue is jurisdictional.

Neal v. City of Kingman, 167 Ariz. 574, 810 P.2d 572 (App. 1990), *vacated in part*, 169 Ariz. 133, 817 P.2d 937 (1991)(issue not waived where applicant attempted to present claim but was prevented from doing so)

9.5.5 Appellate Review.

9.5.5.1 Same standard of review as used by superior court.

Appellate court is bound by the same standard of review as the superior court in reviewing board of adjustment decision.

City of Phoenix v. Superior Court, 110 Ariz. 155, 515 P.2d 1175 (1973)

Murphy v. Town of Chino Valley, 163 Ariz. 571, 789 P.2d 1072 (App. 1989)

Gannett Outdoor Company v. City of Mesa, 159 Ariz. 459, 768 P.2d 191 (App. 1989)

9.5.5.2 Review of superior court decision.

Appellate court may substitute its opinion for that of the superior court in reviewing board of adjustment decisions inasmuch as the court of appeals is reviewing the same record.

Austin Shea (Arizona) 7th Street and Van Buren, L.L.C. v. City of Phoenix, 213 Ariz. 385, 142 P.3d 693 (App. 2006)

M & M Auto Storage Pool, Inc. v. Chemical Waste Management, Inc., 164 Ariz. 139, 791 P.2d 665 (App. 1990)

Arkeles v. Board of Adjustment of Town of Paradise Valley, 151 Ariz. 438, 728 P.2d 657 (App. 1986)

Sevilla v. Sweat, 9 Ariz. App. 183, 450 P.2d 424 (1969)

9.5.5.3 Issues that can be addressed by appellate court.

Appellate court is limited to reviewing issues decided by the superior court.

Boyce v. City of Scottsdale, 157 Ariz. 265, 756 P.2d 934 (App. 1988)

9.5.5.4 Review of trial court remand order.

A superior court order remanding a matter to a board of adjustment is an appealable order.

M & M Auto Storage Pool, Inc. v. Chemical Waste Management, Inc., 164 Ariz. 139, 791 P.2d 665 (App. 1990)