

### ***DIVISION 3. BOARD OF ADJUSTMENT***

#### **Sec. 44-108. Established.**

Pursuant to the provisions of the applicable state statutes, as amended, a board of adjustment, hereinafter referred to as the board of adjustment, is hereby established in the town.

(LDC 1982, ch. 15, § 15-2; Ord. No. 2002-2, § 1(6-5), 4-2-2002)

#### **Sec. 44-109. Appointment.**

The board of adjustment shall consist of five residents who shall be appointed by the town council. In addition to the regular members of the board of adjustment, the town council shall be authorized to appoint two alternate members. Said alternate members may be called upon to sit upon said board of adjustment in the temporary absence or disability of any regular member, or may act when a member is otherwise disqualified in a particular case, and during such participation, shall have the rights and responsibilities of a regular member. No member or alternate member of the board of adjustment shall be a paid or elected official or employee of the town.

(LDC 1982, ch. 15, § 15-2.1; Ord. No. 2002-2, § 1(6-5.1), 4-2-2002)

#### **Sec. 44-110. Term of office; removal for cause; vacancies.**

- (a) The term of office shall be for three years and shall be staggered so that not more than two terms expire within any one year by applying the procedure for appointing planning board members referenced in division 2 of this article. Alternate members shall be appointed for a term of three years.
- (b) Members of the board of adjustment shall be removable for cause after filing of written charges, a public hearing, and a majority vote of the town council.
- (c) Appointments to fill vacancies shall be for the unexpired term or term of the member whose term becomes vacant. Such appointments to fill vacancies shall be made in the same manner as the original appointment and shall be made within 30 days after the vacancy occurs.

(LDC 1982, ch. 15, § 15-2.2; Ord. No. 2002-2, § 1(6-5.2), 4-2-2002)

#### **Sec. 44-111. Procedures.**

- (a) The board of adjustment shall establish rules and regulations for its own operation consistent with the provisions of applicable state statute and this chapter.
- (b) The board of adjustment shall elect a chairperson and vice-chairperson. The chairperson shall be the presiding member of the board of adjustment and the vice-chairperson shall be the presiding member in the chairperson's absence or disqualification. The board of adjustment shall appoint a secretary who may be a member of the board of adjustment or an employee of the town. The terms of all officers elected and appointed shall be for one year with eligibility for reelection or reappointment.

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- (c) The board of adjustment shall meet at regular intervals, at the call of the chairperson, at the written request of three or more regular members or within 30 days after receipt of a matter to be acted upon by the board of adjustment. Three members of the board of adjustment shall constitute a quorum.
  - (d) The chairperson, or in his absence the acting chairperson, may administer oaths and compel the attendance of witnesses.
  - (e) All meetings of the board of adjustment shall be public. A record of all its resolutions, transactions, findings and determinations shall be made, which shall be a public record on file with the office of the town clerk.
- (LDC 1982, ch. 15, § 15-2.3; Ord. No. 2002-2, § 1(6.5.3), 4-2-2002)

#### **Sec. 44-112. Decisions.**

The concurring vote of a majority of the members of the board of adjustment shall be necessary to reverse any order, requirement, decision, or determination of the planning director or to decide in favor of the appellant in respect to any matter upon which it is required to pass under the terms of this chapter or to effect any variations of this chapter.

(LDC 1982, ch. 15, § 15-2.4; Ord. No. 2002-2, § 1(6.5.4), 4-2-2002)

#### **Sec. 44-113. Powers and duties.**

The board of adjustment shall have the following powers and duties:

- (1) To hear and decide appeals where it is alleged there is an error in any order, requirement, decision or determination made by the planning director in the enforcement of this chapter.
- (2) To authorize upon appeal in specific cases such variance from the terms of this chapter as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this chapter will result in unnecessary hardship.

(LDC 1982, ch. 15, § 15-2.5; Ord. No. 95-11, § 4(6-5.5(3)), 10-1-1996; Ord. No. 2002-2, § 1(6.5.5), 4-2-2002)

#### **Sec. 44-114. Appeals.**

Appeals to the board of adjustment may be taken by any person aggrieved by any officer, board or commission of the town affected by any decision of the administrative official under any provision of this chapter.

- (1) *Staying of work on premises.* An appeal to the board of adjustment stays all work on the premises and all proceedings in furtherance of the action appealed, unless the official from whom the appeal was taken shall certify to the board of adjustment, by reason of acts stated in the certificate, a stay would cause imminent peril to life or property. In such case, proceedings or work shall not be stayed except by a restraining order which may be granted by the board of adjustment to a court of record on application, on notice of the officer from whom the appeal is taken and on due cause shown.
- (2) *Procedure.*
  - a. Any person appealing any decision of an administrative official shall make such appeal within 30 days after rendition of the order. Requirement, decision or determination appealed from in writing to the board of adjustment and file the same, and ten copies thereof, with supporting facts and data with the planning director. This does not, however, restrict the filing of a request for a variance by any person at any time as provided for elsewhere in this article.

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- b. Upon receipt of the appeal, the planning director shall forthwith examine such appeal or request application and endorse his recommendation thereon together with all documents, plans, papers or other materials constituting the record upon which the action appealed was taken and transmit same to the board of adjustment. Concurrently, the planning director shall transmit a copy of said appeal together with all documents, plans, papers, or other materials constituting the record to the town attorney for his review and opinion. The town attorney shall present his opinion to the board of adjustment with respect to two items as follows:
    - 1. As to whether the appeal is, in fact, an appeal and within the province of the board of adjustment.
    - 2. The merits of the appeal proper if requested by the board of adjustment.
  - (3) *Hearing of appeal.* Before rendering a decision upon an appeal, the board of adjustment shall hold a public hearing. The board of adjustment shall fix a reasonable time of day for the hearing, give public notice thereof, as well as due notice to the parties involved. Upon the hearing, any party may appear in person or by agent or by attorney.

(LDC 1982, ch. 15, § 15-2.6; Ord. No. 2002-2, § 1(6.5.6), 4-2-2002)

#### **Sec. 44-115. Variances.**

- (a) The board of adjustment shall authorize upon appeal such variance from the terms of this article as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this article would result in unnecessary and undue hardship. In order to authorize any variance from the terms of this article, the board of adjustment must and shall find:
  - (1) That the variance is in fact, a variance as set forth within this article and within the province of the board of adjustment upon the opinion of the town attorney.
  - (2) That special conditions and circumstances exist which are peculiar to the land, structure, or building involved, and which are not applicable to other lands, structures or buildings in the same zoning district.
  - (3) That the special conditions and circumstances do not result from the actions of the applicant.
  - (4) That granting the variance requested will not confer on the applicant any special privilege that is denied by this article to other lands, buildings, or structures in the same zoning district.
  - (5) That literal interpretation of the provisions of this article would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of this article and would work unnecessary and undue hardship on the applicant.
  - (6) That the variance granted is the minimum variance that will make possible the reasonable use of the land, building, or structure.
  - (7) That the granting of the variance will be in harmony with the general intent and purpose of this article, and that such variance will not be detrimental to the public welfare.
- (b) In granting any variance, the board of adjustment may prescribe appropriate conditions and safeguards in conformity with this article. Violations of such conditions and safeguards, when made a part of the terms under which the variance is granted, shall be deemed a violation of this article. The board of adjustment may prescribe a reasonable time limit within which the action for which the variance is required shall be begun or completed or both. Under no circumstances shall the board of adjustment grant a variance to permit a use not generally or by special exception permitted in the zoning district involved or any use expressly or by implication prohibited by the terms of this article on the zoning district. No nonconforming use of

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neighboring lands, structures or buildings in the same zoning districts shall be considered grounds for the authorization of a variance.

(Ord. No. 2002-2, § 1(6-5.7), 4-2-2002)

**Sec. 44-116. Judicial remedy by circuit court.**

Any person jointly or severally aggrieved by any decision of the board of adjustment or any officer, department, board of commission of the town may apply to the circuit court in the judicial circuit where the board of adjustment is located for judicial relief within 30 days after rendition of the decision by the board of adjustment. The proceedings in the circuit court shall consist either by trial de novo, which shall be governed by the state rules of civil procedure, and by petition for writ or certiorari which shall be governed by the state appellate rules. The election of remedies shall lie with the appellant.

(Ord. No. 95-11, § 4(6-5.8), (6-5.9), 10-1-1996; Ord. No. 2002-2, § 1(6-5.8), 4-2-2002)

**Secs. 44-117—44-145. Reserved.**