

**APPENDIX A – ZONING AND LAND USE CODE**  
**ARTICLE IX. APPEALS AND VARIANCES**

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**ARTICLE IX. APPEALS AND VARIANCES**

**Sec. 1. Applicability.**

The procedures and standards set forth in this Article shall apply to appeals and variances that are brought before the Board of Appeals under this Code and, except as otherwise provided in Article X, to applications for conditional use permits pursuant to Article X.

(Ord. No. 89-3, 4-7-89; Ord. No. 20-10g, 11-05-20)

**Sec. 2. Appeal procedures.**

(a) *Petition.*

- (1) A written petition for an appeal shall be filed in the office of the director of code enforcement within the applicable time period as set out in this Code. In the event no specific time period is provided for in this Code, the petition shall be filed within 30 days of the action from which the appeal is taken. When the appeal is taken from a failure or refusal to act, the petition shall be filed within 60 days after the action was first requested. The petition shall be on forms provided by the city for that purpose and shall be addressed to the board of appeals. A nonrefundable application fee, as established from time to time by the city council to cover administrative costs and the costs of a hearing, shall accompany each petition.
- (2) The petition for appeals shall contain the following information:
  - a. Street address of the property in question;
  - b. The legal name and address of the petitioner;
  - c. The legal name and address of the owner of the property involved;
  - d. The legal name and address of the applicant for any permit which is the subject of the appeal, if different from the owner;
  - e. Description of the property in question;
  - f. Petitioner's description of what is intended to be done;
  - g. A drawing, which is substantially to scale, of the site, showing existing and proposed buildings, roads, drives, parking areas and utilities, the actual relationship of these facilities to each other and the boundaries of the parcel and the location of buildings or abutting lots which are within 50 feet of the property line of the site. Where development approval is required by Article XIII of the Code, this drawing shall meet the requirements of Article XIII, subsection 3(h)(3).
  - h. A statement of the reason or reasons why the petitioner believes the appeal should be granted;
  - i. If the appeal challenges the issuance of a permit, a description of the permit which was issued.

(b) *Scheduling.*

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- (1) All hearings shall be held within 30 days of the receipt of a complete petition for appeal, unless otherwise agreed between the petitioner and the board of appeals at the hearing of which public notice has been given pursuant to subsection (c) of this section.
- (c) *Public notice.* Before taking action on a petition for appeal, the Board of Appeals shall hold a public hearing. The office of the director of code enforcement shall notify, by regular mail, the following parties of the subject matter, time, date and place of the hearing at least seven days before the date of such hearing:
  - (1) Each member of the Board of Appeals;
  - (2) The petitioner, the development department, the mayor and city council, the director of code enforcement, and the owner of the property which is the subject matter of the appeal, if other than the petitioner;
  - (3) The owners of property within 300 feet of all the frontage on both sides of the street and all landowners whose property touches upon the lot involved in the appeal.

The owners of property shall be considered to be the parties listed by the chief assessor as those against whom taxes are assessed. Failure of any property owner to receive said notice shall not necessitate another hearing and shall not invalidate any action by the Board of Appeals.
- (d) *Representation.*
  - (1) Anyone may appear personally at a public hearing or be represented by an agent or an attorney. When the petitioner is not represented by an attorney, the board shall provide to the petitioner a copy of the provisions of this Code applicable to the appeal.
  - (2) The petitioner, either personally or through an agent or attorney, must appear at the hearing at which the petition is to be heard. Failure to appear shall require that the board dismiss the petition and provide the petitioner with written notice thereof.
  - (3) A continuance may be granted to a petitioner or other party in interest where good cause is shown.
- (e) *Conduct of hearing.* All interested persons shall be given a reasonable opportunity to have their views expressed at any hearing.
- (f) *Action by the board.* Within 45 days of the hearing of which public notice was given pursuant to subsection (c) of this section, the board shall render its decision, granting the appeal, granting it subject to conditions or denying it. The failure of the board to act within 45 days shall be deemed a denial of the appeal, unless such time period is mutually extended in writing by the petitioner and the board. Within five days of such decision or the expiration of such period, whichever first occurs, the secretary shall mail notice of such decision or failure to act to the petitioner and, if the appeal was granted, shall notify the director of code enforcement, listing all conditions imposed by the board.

(Ord. No. 20-10g, 11-05-20)

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**Sec. 3. Standards for the granting of appeals and variances.**

- (a) *Appeals.* The Board of Appeals shall grant an appeal only when it finds that the following standards have been met:
- (1) *Administrative appeals.* That the code enforcement official erred in either his interpretation of the Code or in the application of the Code to the particular circumstances of the application. If the Board of Appeals finds that the code enforcement official correctly interpreted and applied the provisions of this Code, the Board shall affirm his decision. If the Board finds that the code enforcement official erred in the interpretation or application of the Code, the decision of the code enforcement official shall be reversed and the Board shall make an official interpretation of the Code to be used by the code enforcement official.
  - (2) *Appeals of staff decisions on development reviews.* That the Staff Review Committee erred in the interpretation or application of the approval criteria set forth in Article XIII. If the Board finds that the Staff Review Committee correctly interpreted and applied the provisions of this Code, the Board shall affirm its decision. If the Board finds that the Committee erred in its decision, the decision of the Committee shall be reversed and the Board shall approve, approve with conditions or deny the application.
  - (3) *Appeals of Historic Preservation Review Board actions on certificates of appropriateness.* That the Historic Preservation Review Board erred in the application of the approval criteria set forth in Article XV. If the Board of Appeals finds that the Historic Preservation Review Board correctly interpreted and applied the provisions for granting a certificate of appropriateness, the Board of Appeals shall affirm its decision. If the Board of Appeals finds that the Historic Preservation Review Board erred in its decision, the decision of the review Board shall be reversed and the Board of Appeals shall approve, approve with conditions, or deny the application.
- (b) *Variances.*
- (1) *General.* Except as provided in parts 2 through 6 of this subsection, the Board of Appeals shall grant a variance only when it finds that the strict application of a provision of this Code to the petitioner and his property would cause undue hardship. The term "undue hardship" as used in this subsection means:
    - a. The land in question cannot yield a reasonable return unless a variance is granted, including where strict application of the zoning ordinance would result in the practical loss of all beneficial use of the land;
    - b. The need for the variance is due to unique circumstances of the property and not to the general conditions of the neighborhood;
    - c. The granting of the variance will not alter the essential character of the locality;
    - d. The hardship is not the result of action taken by the petitioner or a prior owner;
    - e. The granting of the variance will not result in undue impact on adjacent

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properties due to the placement of buildings or structures, location of storage, parking or service areas, diversion of surface water or blocking of solar access; and

- f. The granting of the variance will not impede the ability of public safety services to reach or service the property or adjacent properties.
- (2) *Disability variance; vehicle storage.* The Board of Appeals may grant a disability variance to an owner of a dwelling only in the following circumstances:
- a. *Accessibility.* For the purpose of making the dwelling accessible to a person with a disability who resides in or regularly uses the dwelling.
    1. The Board shall restrict any variance granted under this section solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability.
      - i. For the purposes of this section, the term “structures necessary for access to or egress from the dwelling” is defined to include railing, wall, or roof systems necessary for the safety or effectiveness of the structure.
    2. The Board may impose conditions on the variances granted pursuant to this section including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling.
  - b. *Storage and parking of a noncommercial vehicle.* To allow an owner of a dwelling who resides in the dwelling and who is a person with a permanent disability to construct a place of storage and parking for a noncommercial vehicle owned by that person.
    1. For the purposes of this subsection, “noncommercial vehicle” mean a motor vehicle as defined in Title 29-A section 101, subsection 42 with a gross vehicle weight of no more than 6,000 pounds, bearing a disability registration plate issued pursuant to Title 29-A, section 521 and owned by the person with the permanent disability.
    2. The width and length of the structure may not be larger than 2 times the width and length of the noncommercial vehicle.
    3. The owner shall include in an application to the Board proposed plans for such structure.
    4. The person with the permanent disability shall prove by a preponderance of the evidence that the person’s disability is permanent.
  - c. All medical records submitted to the board and any other documents submitted for the purpose of describing or verifying a person's disability are confidential. For purposes of this subsection, "disability" has the same

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meaning as a physical or mental disability under Title 5, section 4553-A.

- (3) *Code enforcement officer; authority for disability structures permits.* Notwithstanding Article IX, Section 3(b), the code enforcement office may issue a permit to an owner of a dwelling for the purpose of making a dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. If the permit requires a variance, the permit is deemed to include that variance solely for the installation of equipment or the construction of structures necessary for access to or egress from the dwelling for the person with a disability. The code enforcement officer may impose conditions on the permit, including limiting the permit to the duration of the disability or to the time that the person with a disability lives in the dwelling. All medical records submitted to the code enforcement officer and any other documents submitted for the purpose of describing or verifying a person's disability are confidential.

For the purposes of this section, the term "structures necessary for access to or egress from the dwelling" includes ramps and associated railings, walls or roof systems necessary for the safety or effectiveness of the ramps.

For the purposes of this section, "disability" has the same meaning as a physical or mental disability under Title 5, section 4553-A.

- (4) *Setback variance for single-family dwellings.* The Board of Appeals shall grant a variance from setback requirements only under the following conditions:
- a. The strict application of the ordinance to the petitioner and the petitioner's property would cause undue hardship;
    - 1. The term "undue hardship" as used in this subsection means:
      - i. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;
      - ii. The granting of the variance will not alter the essential character of the locality;
      - iii. The hardship is not the result of action taken by the applicant or a prior owner;
      - iv. The granting of the variance will not substantially reduce or impair the use of abutting property; and
      - v. The granting of the variance is based upon demonstrated need, not convenience, and no other feasible alternative is available.
  - b. The request for a variance is for a single-family dwelling that is the primary year-round residence of the petitioner;
  - c. The variance does not exceed twenty percent (20%) of the prescribed setback requirement, provided that a variance under this subsection may exceed 20% of a setback requirement, except for minimum setbacks from a wetland or water body required within shoreland zones by rules adopted

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pursuant to Title 38, chapter 3, subchapter I, article 2-B, if the petitioner has obtained the written consent of an affected abutting landowner;

- d. The variance will not cause the area of the dwelling to exceed the maximum permissible lot coverage.
- (5) *Variance from dimensional space and bulk standards.* The Board of Appeals shall grant a variance from the dimensional space and bulk standards of the Zoning and Land Use Code when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty and when the following conditions exist:
- a. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood;
  - b. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties;
  - c. The practical difficulty is not the result of action taken by the petitioner or a prior owner;
  - d. No other feasible alternative to a variance is available to the petitioner;
  - e. The granting of a variance will not unreasonably adversely affect the natural environment; and
  - f. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.
- (6) *Variance from shoreland zoning standards.* The Board of Appeals shall grant a variance within mandated shoreland zoning areas only when it forwards the variance request to the DEP Commissioner as per (b) below, and then finds that the granting of the variance, in addition to meeting the standards contained in Section 3(b)(1), also:
- a. Standards for Variance from Shoreland Zoning
    - i. Will not result in unsafe or unhealthful conditions;
    - ii. Will not result in erosion or sedimentation;
    - iii. Will not result in water pollution;
    - iv. Will not result in damage to spawning grounds, fish, aquatic life, bird and other wildlife habitat;
    - v. Will conserve shoreland vegetation;
    - vi. Will conserve visual points of access to waters as viewed from public facilities;
    - vii. Will conserve actual points of public access to waters;
    - viii. Will conserve natural beauty; and
    - ix. Will avoid problems associated with floodplain development and use, such

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as erosion, increased risk of flood damage to upstream properties or increased flood damage.

- b. Preliminary Review by DEP Commissioner. A copy of each variance request, including the application and all supporting information supplied by the applicant, shall be forwarded by the municipal officials to the Commissioner of the Department of Environmental Protection at least twenty (20) days prior to action by the Board of Appeals. Any comments received from the Commissioner prior to the action by the Board of Appeals shall be made part of the record and shall be taken into consideration by the Board of Appeals.
- (7) *Variance from the floodplain management standards of Article XIV.* The Board of Appeals shall grant a variance from the floodplain management standards of Article XIV only when it finds that the granting of the variance, in addition to meeting the standards contained in subsection (b)(1), also:
- a. Will not result in an increase in flood levels during the base flood discharge;
  - b. Is supported by good and sufficient cause;
  - c. Will not result, should a flood comparable to the base flood occur, in increased flood heights, additional threats to public safety, public expense, or create nuisances, cause fraud or victimization of the public or conflict with existing local laws and ordinances;
  - d. Will not cause a conflict with other state, federal or local laws or ordinances; and
  - e. Is limited to the minimum necessary, considering the flood hazard, to afford relief, and the Board of Appeals may impose such conditions to a variance as it deems necessary.
- (7a) *Variance for new construction and improvements within the floodplain.* The Board of Appeals shall grant a variance for new construction, substantial improvements, or other development for the conduct of a functionally dependent use only when it finds that the standards in subsection b(6) have been met and that:
- a. Other criteria of Article XIV, subsection 6(k) are met; and
  - b. The structure or other development is protected by methods that minimize flood damage during the base flood and create no additional threats to public safety.
- (7b) *Variance for historic structures within the floodplain.* The Board of Appeals may grant a variance for the reconstruction, rehabilitation, or restoration of structures listed on the National Register of Historic Places or a state inventory of historic places upon the determination that the proposed repair, reconstruction, rehabilitation, or restoration, in addition to meeting the standards of subsection b(6), will not preclude the structure's continued designation as a historic structure and that the variance is the minimum necessary to preserve the historic character



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and design of the structure.

- (7c) *Disclaimer.* Any applicant who meets the criteria of Article IX, Section 3(6)() subsections (a) through (c) shall be notified by the Board of Appeals in writing over the signature of the chairman of the Board of Appeals that:
- a. The issuance of a variance to construct a structure below the base flood level will result in greatly increased premium rates for flood insurance up to amounts as high as \$25.00 per \$100.00 of insurance coverage;
  - b. Such construction below the base flood level increases risks to life and property; and
  - c. The applicant agrees in writing that the applicant is fully aware of all the risks inherent in the use of land subject to flooding, assumes those risks and agrees to indemnify and defend the municipality against any claims filed against it that are related to the applicant's decision to use land located in a floodplain and that the applicant individually releases the municipality from any claims the applicant may have against the municipality that are related to the use of land located in a floodplain.
- (7d) *Report to Code Enforcement.* The Board of Appeals shall submit to the code enforcement official a report of all variance actions, including justification for the granting of the variance and an authorization for the code enforcement official to issue a flood hazard development permit, which includes any conditions to be attached to said permit.
- (7e) *Appeals to Superior Court.* Any aggrieved party who participated as a party during the proceeding before the Board of Appeals may take an appeal to Superior Court in accordance with State laws within forty-five days from the date of any decision of the Board of appeals.

(Ord. No. 89-3, 4-7-89; Ord. No. 90-10, 10-4-90; Ord. No. 91-1, 3-19-91; Ord. No. 93-9, 6-17-93; Ord. No. 94-17, 11-17-94; Ord. No. 94-19, 1-12-95; Ord. No. 98-6, 7-2-98; Ord. No. 98-12, 11-19-98; Ord. No. 99-10, 5-6-99; Ord. No. 02-01, 2-21-02; Ord. No. 06-05, 4-20-06; Ord. No. 13-04, 06-20-13; Ord. No. 20-10g, 11-05-20; Ord. No. 21-08d, 10-21-21)

**Sec. 4. Burden of proof.**

The burden of proof is on the petitioner to demonstrate satisfaction of all standards imposed for the granting of an appeal.

**Sec. 5. Conditions of approval.**

In granting any appeal, the board of appeals may impose conditions on that approval that it finds necessary to ensure full satisfaction of the standards imposed for the granting of the appeal and other applicable provisions of this Code. Violations of these conditions shall be a violation of this Code. Such conditions may include, but are not limited to, specifications for the following:

- (1) Vegetation, buffering, and screening;

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- (2) Increased setbacks and yards, and access restrictions;
- (3) Hours of use and operational controls;
- (4) Location of signs, parking and lighting;
- (5) Conservation easements and other deed restrictions;
- (6) Professional maintenance and inspection of facilities or improvements necessary to ensure adequate maintenance and inspection;
- (7) Off-site improvements of roads, utilities or drainage facilities.

**Sec. 6. Limit of variances.**

The board of appeals shall limit the terms of any variance granted to that which is necessary to relieve the proven hardship.

**Sec. 7. Reapplication.**

If the board of appeals denies an appeal, the petitioner may not have a petition seeking the same or similar relief heard within 90 days of the denial unless the board finds at a duly noticed public hearing, substantial new evidence has been brought forward or that an error of law or mistake of fact was made. If the board so finds, the board shall proceed to hear the second petition on the merits. If the board does not so find, the second petition shall be dismissed.

**Sec. 8. Notification of state.**

The office of the director of code enforcement shall notify the state department of environmental protection of any variance granted by the board of appeals in areas covered by mandatory shoreline zoning.

**Sec. 9. Duration of permission.**

Any right, including but not limited to variances, miscellaneous appeals and changes or extensions of nonconforming uses, secured by action of the board of appeals, shall expire if the work or change involved is not begun within six months and substantially completed within one year of such action. However, the board may grant one or more extensions of time, each not to exceed one year, if, prior to the expiration of the applicable time, the petitioner files a written request with the board stating the reason for such request. Notwithstanding the above, the board may grant an extension of time not to exceed two additional years on the date of action on an appeal if the petition for appeal requests such extension. In all cases, the burden of proof shall be on the petitioner to demonstrate that, under the circumstances, the work or change involved cannot reasonably be begun, or substantially completed, within the applicable time.

**Sec. 10. Floodplain notification.**

Any petitioner who is granted a variance in a flood hazard area shall be notified by the board of appeals in writing that:

- (1) The construction of a structure below the base flood level may result in greatly

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increased premium rates for flood insurance; and

- (2) Such construction below the base flood level increases risks to life and property.

Prior to the granting of any such variance, the petitioner must file with the board of appeals a written statement that he is fully aware of all the risks inherent in the use of land subject to flooding, that he assumes those risks and agrees to indemnify and defend the city against any claims filed against it that are related to the petitioner's decision to use land located in a floodplain and that the petitioner individually releases the city from any claims the petitioner may have against the city that are related to the use of land located in a floodplain.

**Sec. 11. Effect of granting of appeal.**

The granting of an appeal shall merely authorize the preparation, filing and processing of applications for any permits or approvals which may be required by the codes and ordinances of the city including, but not limited to, a building permit, a certificate of occupancy or a development approval. It shall not authorize the petitioner to proceed with the project unless proper permits and approvals are obtained.

**Sec. 12. Effect of granting a variance for single-family detached dwelling and mobile homes on individual residential lot.**

Unless specifically limited by conditions imposed in accordance with Article IX Section 6 by the board of appeal's upon the granting of a space or bulk variance for a single-family detached dwelling or mobile home on an individual residential lot, subsequent additions or improvements to the lot shall not require other variances but shall be subject to all other use and space and bulk standards, existing as of the time of subsequent additions or improvements, for the district in which the lot is located.

(Ord. No. 03-12, 9-4-03; Ord. No. 17-09, 09-14-17)