

## Article VII. Board of Appeals

As Amended by Ordinance O-08-13  
Adopted September 3, 2013  
Effective September 24, 2013

## ARTICLE VII. BOARD OF APPEALS\*

### **Sec. 24-185. Created; composition; appointment and removal of members; compensation.**

There is hereby created and established a city board of appeals which shall consist of five (5) members and one alternate who shall be appointed by the mayor and confirmed by the city council for three-year terms. Members of the board may be removed for cause by the city council upon written charges and after public hearing. An alternate member shall act in the place of an absent or disabled board member. Members of the board may receive such compensation as deemed appropriate by the city council. The board shall elect a chairperson and vice-chairperson.

### **Sec. 24-186. Rules; meetings, oaths; witnesses; record of proceedings.**

(a) The board of appeals shall adopt rules of procedure governing conduct of its proceedings and matters under its jurisdiction. Meetings of the board shall be open to the public and shall be held at the call of the chairperson and at such other times as the board may determine. The chairperson, or in his absence the vice-chairperson, may administer oaths and compel the attendance of witnesses.

(b) The board shall keep minutes and, where appropriate, official transcripts, voice recordings and other records on matters coming before the board and showing the vote of each member upon each question or, if absent or failing to vote, indicating such fact, all of which shall be a public record and filed immediately in the office of planning and code administration.

### **Sec. 24-187. Powers and duties.**

The board of appeals shall have the following functions, powers and duties:

(a) *Administrative review.* To hear and decide appeals where it is alleged that there is an error in any final order, requirement, decision or determination made by any administrative official or department of the city government or the planning commission or historic district commission in the enforcement and administration of this chapter, the building code, subdivision regulations or any other ordinance or regulation which may hereafter be designated by the city council for such administrative review; provided, however, that appeals alleging error by the planning commission or historic district commission shall be by oral argument or written statement based solely on the evidence submitted and received in the planning commission or historic district commission proceedings.

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\* **State law reference** — Board of appeals, Subtitle 3, Title 4, *Land Use Article*, Anno. Code of Md

- (b) *Special exceptions.* To hear and decide only those special exceptions as the board of appeals is specifically authorized to pass on by the terms of this chapter.

The board of appeals is empowered to prescribe appropriate conditions and limitations upon the approval of special exceptions. Special exceptions approved by the board shall be implemented in accordance with the terms and/or conditions set forth in the board's decision and shall include the requirement that the petitioner shall be bound by all of his testimony and exhibits of record, the testimony of his witnesses and representations of his attorneys, to the extent that such evidence and representations are identified in the board's opinion approving the special exception. Violation of such conditions and limitations shall be deemed a violation of this chapter and, further, shall constitute grounds for revocation of such special exception.

- (c) *Variances.* To authorize on appeal in specific cases a variance from the strict application of the terms or requirements of this chapter. Variations or waivers under the traditional neighborhood design (TND) option are not variances subject to the board's jurisdiction.

In granting any variance the board may prescribe appropriate conditions and limitations in conformance with this chapter, Violations of such conditions and limitations shall be deemed a violation of this chapter and, further, shall constitute grounds for revocation of such variance.

These provisions shall not be construed to permit the board, under the guise of a variance, to authorize a use of land not otherwise permitted in the zone involved or permit a variance specifically prohibited by the terms of this chapter or grant a variance that will increase the intensity of an existing nonconforming use.

#### **24-188. General requirements and procedures.**

(a) Petitions filed for administrative review may be initiated by any person aggrieved by a final order, requirement, decision or determination as set forth in subsection (a) of section 24-187 of this Code. Such petition shall be filed within seventeen (17) days of the date of the action from which the appeal is filed, unless extended by law or by order of the board upon good cause shown not more than twenty-one (21) days after the date of the action appealed from. The filing of a petition for administrative review shall stay all proceedings in furtherance of the action appealed from unless such stay would cause immediate peril to life or property.

Petitions for a special exception or a variance may be filed by any person, entity or government agency with any financial, contractual or proprietary interest in the affected property. Should petitions be filed by one other than the owner of the property, those petitions must be filed with the owner's written consent.

(b) A petition for special exception, variance or administrative review shall be submitted to the board of appeals in writing on forms provided for this purpose and accompanied by a filing fee which shall be established from time to time by the city council. A petition shall not be accepted for filing which does not contain an appropriate application, filing fee and supporting material set forth in subsection (c) below.

(c) A petition for special exception, variance or administrative review shall be accompanied by the following materials and/or information:

(1) *Special exceptions.*

- a. Plans and drawings that comply with section 24-169(c).
- b. A statement explaining in detail how the special exception is to be operated, including hours of operation, number of anticipated employees, occupants and clientele, equipment involved and any special conditions or limitations which the petitioner proposes for adoption by the board.
- c. List of additional interested parties.
- d. If the petitioner is not the owner of the property involved, the lease, rental agreement or contract to purchase by which the petitioner's legal right to prosecute the petition is established.
- e. Applicable master plan maps reflecting proposed land use, zoning and transportation, together with any other portions of the applicable master plan deemed pertinent by the petitioner.
- f. All additional exhibits which the petitioner intends to introduce and/or the identification of exhibits intended to be introduced at the public hearing.
- g. A summary of what the petitioner expects to prove, including the names of petitioner's witnesses, summaries of the testimony of expert witnesses and the estimated time required for presentation of the petitioner's case. All expert reports shall be filed at least fifteen (15) days prior to the public hearing.
- h. A listing of the names and addresses of all persons required to receive notice pursuant to section 24-188(e) of this Code. If an abutting or confronting property is a condominium, cooperative or is owned by a homeowner's association then notice shall be given to the governing body and resident agent of the condominium cooperative or homeowner's association.
- i. Required fee (see fee schedule).

(2) *Variances.* Items a., c., f., g., h., and i of paragraph (1) above applicable to special exceptions.

(3) *Administrative review.*

- a. The action, document and all records upon which the appeal was filed or based.
- b. List of specific section or sections of the City Code relied upon or authorizing the review.
- c. Copies of additional exhibits or documents upon which the petitioner relies.
- d. Deposit for cost of official transcript of agency proceeding, if required, estimated on length of hearing. Balance to be paid by petitioner prior to scheduling of hearing date.
- e. List of parties.
  - i. For administrative review of Planning Commission or Historic District Commission decision, list of parties who participated in the proceeding.
  - ii. A listing of the names and addresses of all persons required to receive notice pursuant to section 24-188(e) of this Code. If an abutting or confronting property is a condominium, cooperative or is owned by a homeowner's association, then notice shall be given to the governing body and resident agent of the condominium, cooperative or homeowner's association.
- f. Required fee (see fee schedule).
- g. Copy of official zoning vicinity map with a one-thousand foot radius surrounding the subject property and other information to indicate general conditions of use and existing improvements on adjoining and confronting properties.

(d) All petitions for special exceptions shall be referred to the city manager or his designee and the planning commission for analysis, review and recommendations. Petitions for variances shall be referred to the city manager or his designee, but shall only be referred to the planning commission at the discretion and direction of the board of appeals. Comments and recommendations shall be forwarded to the board of appeals prior to the public hearing on the special exception or variance.

(e) Notice of a public hearing on any special exception, or variance or, when applicable, administrative review, shall be given by mail to the petitioner, the

owner of the property and all abutting and confronting property owners of the property under consideration at least twenty two (22) days prior to the date of the public hearing. Notice shall be published twenty two (22) days prior to the public hearing. In addition, notice of such hearing shall be posted by the petitioner with a sign provided by the board of appeals staff on the property under consideration:

- (1) At minimum, the sign shall contain the following information:
  - a. The title of "board of Appeals";
  - b. The type of petition pending;
  - c. The petition number;
  - d. The date, and place of the hearing; and
  - e. A phone number to call for additional information.
- (2) If the property has frontage on one or more improved streets, there shall be one sign posted for each one thousand (1,000) feet (or fraction) of frontage on each street. The sign(s) shall be posted on the property near the street right-of-way, so as to be visible from the improved portion of the street. When more than one sign is required to be posted along a street, the signs shall, where practicable, be evenly spaced along the street.
- (3) If the property does not have frontage on an improved public street, then one sign shall be placed on the property by the petitioner. This sign shall be near the boundary of the property and visible from an adjoining property. Another sign shall be placed by the petitioner near to, and visible from, the improved portion of the nearest, most-traveled street. This sign shall indicate it is not on the subject property.
- (4) The minimum size of each sign shall be two (2) feet in width by three (3) feet in height for all signs to be located abutting streets that are two (2) lanes or smaller. However, the minimum size of each sign shall be four (4) feet in width by three (3) feet in height, for all signs to be located abutting streets that are larger than two (2) lanes.
- (5) All signs posted shall be conspicuous and legible.
- (6) The petitioner shall be responsible for reasonable maintenance of all signs. In the event a sign is removed, falls down, or otherwise is not on the property or in the right-of-way during the pendency of and until the date of the hearing, it shall be the responsibility of the petitioner to re-post the sign.
- (7) The petitioner shall file a written statement in the record of posting.

(8) The sign shall remain posted until the board of appeals has issued its written opinion.

(f) The board shall hold a public hearing on all petitions for special exceptions, variance or administrative review with the exception of appeals alleging error by the planning commission or the historic district commission wherein administrative review shall be by oral argument or written statement based solely on the evidence submitted and received in the commission proceedings. The board's hearings shall be public and any party may appear in person or by agent or attorney. The conduct of the hearing shall be conducted pursuant to the board's rules of procedure. Hearings may be adjourned or continued from time to time at the board's discretion; provided, that any such adjournment or continuance shall be to a time and date certain.

(g) The board shall have authority to adopt, and amend from time to time, rules of procedure to govern the conduct of its proceedings.

(h) No petition for special exception or variance may be amended by petitioner after consideration by the planning commission so as to materially alter the original request or proposal unless done so upon the recommendation of the commission or with the prior consent of the board of appeals prior to the public hearing.

(i) The board of appeals shall maintain a record of its proceedings, including all exhibits filed and accepted, minutes of its proceedings and decisions and transcripts or voice recordings of all testimony presented

(j) The petitioner for a special exception, variance or administrative review shall have the burden of proof which shall include the burden of going forward with the evidence and the burden of persuasion on all issues of fact which are to be determined by the board of appeals.

**Sec. 24-189. Findings required.**

(a) *Administrative review.* A petition for administrative review may be granted when the board of appeals finds from the evidence of record that the final order, requirement, decision or determination which is the subject of the appeal was clearly erroneous or not in accordance with the law.

(b) *Special exceptions.* A special exception may be granted when the board of appeals finds from the evidence of record that the proposed use:

- (1) is a permissible special exception within the zone and that the petition complies with all procedural requirements set forth in this article;
- (2) Complies with all standards and requirements specifically set forth for such use as may be contained in this chapter and the development standards for the zone within which the intended use will be located;

- (3) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood; and will cause no objectionable noise, vibrations, fumes, odors, dust, toxicity, glare or physical activity;
- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structure or conversion of existing structures; as well as the intensity and character of activity, traffic and parking conditions and number of similar uses;
- (5) Will be consistent with the master plan or other planning guides or capital programs for the physical development of the district;
- (6) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area;
- (7) Will be served by adequate public services and facilities, including police and fire protection, water and sanitary sewer, storm drainage, public roads and other public improvements; and
- (8) When located in a residential zone where buildings or structures are to be constructed, reconstructed or altered shall, whenever practicable, have the exterior appearance of residential buildings and shall have suitable landscaping, screening or fencing.

(c) *Variances.*<sup>\*</sup> A variance from the terms of this chapter may be authorized by the board of appeals upon proof by the evidence of record.

#### **Sec. 24-190. Decisions of board.**

(a) The decision of the board of appeals on any matter considered under this article shall be by written resolution containing findings and conclusions and rendered within sixty (60) days from the date of the public hearing unless such time is extended by the board. The affirmative vote of a majority of the board present shall be required to grant a petition for special exception or petition for variance. The same majority vote of the board shall be required to reverse or affirm, in whole or in part, any order, requirement, decision or determination which is the subject of administrative review. If the necessary total of affirmative votes shall not be achieved, the petition shall be denied.

(b) All decisions of the board under this article shall be based solely upon the evidence of record.

(c) The decision of the board shall not preclude any department or agency of the city, when appropriate, to add specific conditions or requirements not

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\* If a conflict between this statute and State code exists, the State prevails.

inconsistent with the board's decision, which are necessary to comply with any state law, ordinances or regulations of the city, or where necessary to protect adjacent properties, the general neighborhood and residents, workers and visitors therein.

(d) The date of the decision is the date the resolution is signed. A copy of the board's decision shall promptly be mailed to all persons entitled to original notice of the hearing and to all persons appearing and testifying in person or by counsel.

#### **Sec. 24-190A. Rehearing and Reconsideration.**

(a) The board may reconsider its decisions or rehear any proceeding upon its own motion or upon request of any party, provided such motion or request is received not more than ten (10) days from the date the board rendered its decision. The board may promulgate additional rules with respect to reconsideration and rehearing.

(b) A request for reconsideration or rehearing must specifically state the basis upon which the party contends the board of appeals' decision should be reconsidered or reheard. The request may include a request for oral argument on the request. The party requesting reconsideration or rehearing must serve all parties who received the original opinion with a copy of the request at the same time the request is made to the board of appeals. The board shall post notice of the date the board will meet to consider and/or hear the reconsideration or rehearing request on the city's web site and at city hall.

(c) The board of appeals may grant reconsideration or rehearing only upon evidence:

- (1) of a clear showing that the action of the board of appeals did not conform to relevant law or its rules of procedure; or
- (2) an irregularity, mistake, or fraud; or
- (3) that certain pertinent and significant new evidence relevant to the board of appeals' decision could not reasonably have been presented at the hearing before the board of appeals or otherwise included in the record; or
- (4) of such other appropriate compelling bases as determined by the board of appeals.

(d) Within five (5) days of filing the request, any party may file a written response and request oral argument. All parties to the proceeding must be served a copy of the response. The board may grant oral argument in its discretion or may render a decision on the written request and response.

(e) Any decision on a request for rehearing or reconsideration not granted within twenty (20) days from the date received shall be deemed denied; provided,

however, if the board prior to the expiration of this twenty (20) day period believes additional time is required to take action on the request, the board by resolution may extend the effective date of the decision which is the subject of the request.

(f) The fact that a party raises an issue worthy of reconsideration does not itself require the board of appeals to reconsider a prior action.

(g) If a motion to reconsider has been duly adopted by the board of appeals, the prior final decision of the board shall be void and the record before the Board shall be automatically reopened. The Board shall schedule a hearing for a subsequent date and time, providing all parties of record at least ten (10) days advance written notice of the hearing.

(h) if a judicial appeal is filed by an aggrieved party prior to the board's decision on a request for reconsideration or rehearing, then the board of appeals shall be divested of jurisdiction to decide the request.

#### **Sec. 24-192. Compliance; revocation of special exception.**

(a) The board of appeals shall prescribe a time limit in which the special exception is required to be completed. The board of appeals shall conduct a public hearing upon the failure to complete the special exception within the prescribed time and following the public hearing may terminate the special exception. The board may, upon written request and for good cause shown, extend the time for completion of the special exception.

(b) The board of appeals is authorized to amend or modify the terms or conditions of a special exception upon the request of the special exception holder or upon recommendation of any city department or the planning commission, or pursuant to a show cause hearing provided in section 24-192 of this Code. No public hearing shall be required unless the proposed modification will substantially change the nature, character or intensity of the use or materially impact the neighborhood in which such use is located. If the board determines that a hearing is required, the notice and hearing provisions contained in section 24-188 of this Code shall apply.

(c) The board of appeals is authorized to amend or modify the terms or conditions of a special exception upon the request of the special exception holder or upon recommendation of any city department or the planning commission, or pursuant to a show cause hearing provided in section 24-192 of this Code. No public hearing shall be required unless the proposed modification will substantially change the nature, character or intensity of the use or materially impact the neighborhood in which such use is located. If the board determines that a hearing is required, the notice and hearing provisions contained in section 24-188 of this Code shall apply.

(d) After public hearing, the board may revoke a special exception upon finding from the evidence of record that the cessation of the use of the special

exception or activities constituting or necessary to the special exception have ceased for a period of at least six (6) month duration.

**Sec. 24-193. Appeals from Board decisions.**

Any person, taxpayer, board or department of the city aggrieved by any decision of the board of appeals may within thirty (30) days of the date of the board's decision appeal the decision to the circuit court for Montgomery County and thereafter to the appellate courts of this state for further review. Appeals shall be subject to the provisions of the Maryland Rules of Procedure governing administrative appeals.