

CITY OF GAITHERSBURG
BOARD OF APPEALS
RULES OF PROCEDURE

Adopted November 18, 2010



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BOARD OF APPEALS, RULES OF PROCEDURE**

Adopted: November 18, 2010

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1.0. General Information

1.1. Rules and Procedures of the Board of Appeals are supplementary to requirements set forth in the City Zoning Ordinance, Article VII, Chapter 24, Sections 24-185 through 24-193, as amended. All applicants, appellants and interested parties should consult the Zoning Ordinance for important procedural and substantive requirements, and inquire of the City Planning and Code Administration (301-258-6330) for further information and assistance.

1.2. Public meetings and hearings of the Board of Appeals shall generally be held in the Council Chambers of City Hall, 31 South Summit Avenue, Gaithersburg, Maryland.

1.3. The Board of Appeals shall consist of five (5) members and one (1) alternate member who shall serve in the absence of any regular member. Unless serving during the absence or disability of any regular Board of Appeals member, an alternate Board of Appeals member shall not vote or participate in discussion, examination or deliberations of the Board of Appeals involving a pending case. At least three (3) persons appointed to the Board of Appeals must be present to constitute a quorum for the conduct of a hearing.

1.4. Generally, meetings of the Board of Appeals will be held once a month on the second Thursday of the month. However, meetings may be held as often as necessary, at the call of the Chairperson or upon request of at least two (2) Board of Appeals members.

1.5. The City Planning and Code Administration, subject to the direction of the Board of Appeals and its Chairperson, shall conduct all correspondence of the Board of Appeals, send out all notices required by these rules, attend all hearings of the Board of Appeals and such other meetings as the Board of Appeals shall designate, keep the official records, minutes, and recorded tapes of the proceedings, compile all required records, maintain the necessary files and indexes and be responsible for drafting resolutions and securing the signature of the Chairperson.

1.6. In fulfilling its legislative mandate, the Board of Appeals may exercise the following powers:

- a. hold conferences with parties and or their legal representatives to clarify issues and expedite full and fair handling of a case;
- b. on motion by any party, or by the Board of Appeals, dispose of procedural requests, including but not limited to the following motions: to amend, to consolidate applications or petitions, or to reopen the record of any case in order to receive additional evidence or information;
- c. on motion by any party, or by the Board of Appeals, introduce into the record documentary or other evidence, provided that all parties are given reasonable notice;
- d. ask parties to submit proposed findings of fact and memoranda of law;

- e. require parties to provide additional information about the application;
- f. waive minor procedural defects or errors that do not affect substantive rights of the parties in order to proceed on the merits;
- g. take any other action necessary to carry out the intent of the Zoning Ordinance;
and
- h. exercise all other powers included in Article VII, Chapter 24 of the Code of the City of Gaithersburg.

2.0. Filing of Appeals, Petitions

2.1. All petitions to the Board of Appeals shall be filed with the City Planning and Code Administration on appropriate forms provided by the department. No petition shall be accepted by the City Planning and Code Administration for filing unless it contains complete and accurate information, meets all applicable requirements under Section 24-188 of the Zoning Ordinance, and is accompanied by the current processing fee set forth by resolution of the Mayor and City Council.

2.2. When the Board of Appeals finds that any information or documents required to be filed pursuant to Section 24-188 of the Zoning Ordinance are not sufficiently detailed to either present or make a final decision, the Board of Appeals may require additional information or documentation to be provided.

2.3. Reports of expert witnesses for any petitioner must be submitted not later than ten (10) days after the time of the initial filing unless permission to do so is granted by the Board of Appeals. Expert reports other than those of a petitioner must be submitted not later than fifteen (15) days before the public hearing.

2.4. The following prehearing requirements shall apply to all petition requests for special exception, variance or administrative review:

- a. The petitioner must file a prehearing statement at the Department of Planning and Code Administration in duplicate no later than fifteen (15) days prior to the date set for the hearing, with copies to all parties of record. The statement must include the following information:
 - (1) a statement of the grounds upon which the petition is based;
 - (2) copies of all reports, studies and other documents and plans intended to be introduced at the hearing;
 - (3) a summary of expert testimony and credentials which will be proffered at the hearing;
 - (4) identity of all witnesses who will testify; and
 - (5) estimated time required for presentation.
- b. Persons or associations intending to appear in opposition to a petition whether or not represented by counsel, must file a similar prehearing statement no later than seven (7) days prior to the date of the hearing. Nothing in this section should be construed to limit the rights of individual members of the public to submit testimony during the hearing or to submit pertinent written materials at any time while the record remains open.
- c. The information submitted in compliance with Sections 2.4. (a) and (b) above shall be construed as an intent only to submit such information or to provide

testimony from witnesses, but neither the petitioner nor the opposition are bound to introduce the same at the hearing.

- d. Failure by a party to comply with Section 2.4.(a) and/or (b) may be cause for refusal to accept the pre-hearing statement and/or postponement, continuation of the hearing, and/or decisions to leave the record open for a specified time to permit rebuttal evidence. Advertisements or transcript costs of a continued or postponed hearing must be paid by the party who failed to comply with the prehearing statement requirement and must be paid to the City prior to the issuance of the Board of Appeals' written opinion. In addition, the Board is empowered to dismiss an appeal or deny the introduction into the record any report, study or plans or prohibit the testimony of a party's witness who is not identified due to the failure of a party to comply with Section 2-4(a) and /or (b).

2.5. All petitions for special exception and variance shall be referred immediately to the required official or agency designated in Section 24-188 (d) for comment and recommendation.

2.6. In all matters before the Board of Appeals, documents required to be filed are available for review by all interested persons.

2.7. A petitioner may amend their petition without the consent of the Board of Appeals under the following circumstances:

- a. Any time prior to the submission of the prehearing statement required to be filed in Section 2.4. of these Rules;
- b. Amendments requested by the city planning commission or other city, county or state agency;
- c. Amendments which are consented to by all parties of record;
- d. Amendments to correct minor errors in petitioner's submission; or
- e. Amendments requested by the Board of Appeals during the hearing or at any time before the record is closed.

Any other amendments not specified above shall be filed only upon the consent of the Board of Appeals following a request to amend with due notice to all parties of record and an opportunity for other parties to respond in writing, orally at the hearing, or by continuing the hearing, as the Board of Appeals shall determine.

3.0. Official Records and Calendar

3.1. Upon filing the appropriate form, required information and documents, and paying the required filing fee, each case will be assigned, by the City Planning and Code Administration, a serialized case number and an official file shall be opened which shall contain all exhibits of record or references to exhibits which, due to size or bulk, cannot be maintained in the file. All exhibits shall be serially numbered and an exhibit list prepared.

3.2. Each case shall be placed upon the calendar of the Board of Appeals for public hearing by the City Planning and Code Administration in conformance with all applicable notice requirements.

3.3. Cases shall be heard in the order in which they appear on the calendar, unless the Chairperson shall find reasonable cause for changing the order of the hearing and that such change will not prejudice any party of record.

4.0. Notice of Hearings

4.1. Public notice of the scheduled hearing on any special exception, variance, or when applicable, an appeal involving administrative review, shall be given by ordinary mail, postage prepaid to the petitioner, the owner of the property, and owners of all properties (at the time of the filing of the petition) abutting and confronting the property, at least fifteen (15) days prior to the date of the public hearing. If an abutting and confronting property is owned by a condominium, cooperative or a homeowners' association, notice shall be sufficient if given to the governing body and resident agent of the condominium, cooperative or homeowners' association. In addition, notice shall be published at least fifteen (15) days prior to the public hearing in accordance with the Rule 4.4. Notice of such hearing shall be posted by the petitioner with sign(s) provided by the Board of Appeals staff on the property under consideration fifteen (15) days prior to the public hearing in accordance with the Rule 4.3.

4.2. At the time of mailing notices, pursuant to Subsection 4.1. above, written notice shall also be given to the following:

- a. persons who have requested notice;
- b. interested persons, community, civic or business organizations as may be determined by the Board of Appeals, the City Manager, or the City Planning and Code Administration.

4.3. In addition to notification by mail, as prescribed above, in the case of any special exception or variance request, a sign will be posted by the petitioner on the property not less than fifteen (15) days prior to the date of the public hearing in accordance with the following:

- a. At minimum, the sign shall contain the following information:
 - (1) the title of "Board of Appeals";
 - (2) the type of application pending;
 - (3) the application number;
 - (4) the date, and place of the hearing; and
 - (5) a phone number to call for additional information.
- b. If the property has frontage on one (1) or more improved streets, there shall be one (1) 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 (1) sign is required to be posted along a street, the signs shall, where practicable, be evenly spaced along the street.
- c. If the property does not have frontage on an improved public street, then one (1) 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.

- d. 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 lanes.
- e. All signs posted shall be conspicuous and legible.
- f. 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
- g. The petitioner shall file a written statement in the record of posting.
- h. The sign shall remain posted until the Board of Appeals has issued its written opinion.

4.4. Notice of public hearings, pursuant to Section 24-188(e) of the Zoning Ordinance, shall be published by the City Planning and Code Administration at least fifteen (15) days prior to the hearing, for any special exception or variance.

5.0. Hearings

5.1. It shall be the duty of the Board of Appeals to inquire fully into the facts of each case. In this respect, the Board of Appeals shall have the authority to:

- a. request the attendance of witnesses and submission of documents;
- b. regulate the course of any hearing;
- c. rule on offers of proof and receive relevant evidence;
- d. exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence;
- e. hold conferences for simplification of the issues by consent of the parties;
- f. dispose of, or rule upon, procedural requests and order hearings consolidated or reopened;
- g. call, examine, and cross-examine witnesses and admit or deny into the record documentary or other evidence;
- h. require any organization or group of people to designate a spokesperson to coordinate testimony and conduct examination of witnesses.

5.2. All evidence and exhibits shall be subject to admission into the record by the Board of Appeals. Evidence and exhibits shall be duly numbered, made a part of the record, and included in the case file. The Board of Appeals may require photographs or reproductions to be substituted in lieu of large or bulky exhibits.

5.3. The Board of Appeals may request that an attorney advisor and/or representative from City staff be present at any public meeting, public hearing or authorized executive session to render advice or assistance. Any advice or assistance rendered by an attorney advisor and/or representative from the City staff shall not be considered an *ex parte* communication.

5.4. The order of procedure for the presentation of evidence shall be as follows, with examination by the Board of Appeals at any time:

- a. presentation of the official record, notation of any objections to any part of the record, and other preliminary matters;
- b. presentation of evidence and testimony by the petitioner;
- c. presentation of evidence and testimony of interested administrative officials and staff;
- d. presentation of information and testimony by those in opposition to petitioner's

- request;
- e. testimony by other interested persons or organizations;
- f. rebuttal evidence by petitioner;
- g. formal receipt into evidence of the record by the Board of Appeals; and
- h. closing statements by each side.

5.5. Cross-examination of witnesses shall be permitted; however, questioning must be confined as closely as possible to the scope of the direct testimony of the witness. Repetitious questions and examination on irrelevant matters will not be permitted.

5.6. The petitioner shall have the burden of proof, which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact to be determined by the Board of Appeals.

5.7. The Chairperson, in his/her discretion, may impose reasonable time limitations on the presentation of evidence and testimony at a hearing, or on the length of the hearing, in order to facilitate the orderly and expeditious conduct of the hearing.

5.8. A hearing may be continued or adjourned from time to time. If the time and place of the continued or adjourned hearing is publicly announced at the scheduled hearing, no further notice shall be required.

5.9. The Chairperson may require a group or organization to designate a spokesperson to comply with 5.1(h).

5.10. Site visits by members of the Board of Appeals shall be permitted. Board of Appeals members conducting a site visit shall either recite orally into the record or place a written statement into the record reciting the time and date of the site visit, its location, the purpose of the visit and general observations. All parties of record shall be notified of the site visit and shall have an opportunity to respond at the hearing or in writing not less than five (5) days after receipt of the notice of the site visit. In order to accommodate any timely response, the record shall automatically be reopened for the purpose of receiving the response.

Casual travel by any site or observation of any site under consideration by the Board of Appeals for administrative review, special exception or variance, the purpose of which is unrelated to the matter under consideration, shall not be deemed as a site visit and need not be reported.

6.0. Decisions

6.1. All actions and decisions of the Board of Appeals on any matter requiring a public hearing shall be by written resolution. Each resolution shall show, among any other required contents, the members participating, and their respective votes in the case.

6.2. Any member of the Board of Appeals who was not present for all or any part of a hearing may only participate and vote on the petition, application or appeal if said member reads the transcript or listens to the recorded testimony, reviews the exhibits of record, reviews the minutes of any related public session, and so indicates by written statement in the case file.

6.3. The Board of Appeals shall decide any application for any matter not later than sixty (60) days from the date of the conclusion of the public hearing thereon, unless the Board of Appeals, by majority vote and entered in its minutes, extends such period of time and provides written notification to all parties.

6.4. Any resolution adopted, reflecting a decision on a special exception, variance or administrative review, shall be in writing and contain findings of fact and conclusions as to legal issues supported by the evidence of record. Notification of any such decision shall be given to all parties entitled to original notice of the hearing and to all persons appearing and testifying in person or by counsel by mailing a copy of the adopted resolution to those persons.

7.0. Rehearing and Reconsideration

7.1. The Board of Appeals may reconsider its decisions upon its own motion or upon the request of any aggrieved party; provided such request or motion is received in writing not more than ten (10) days from the date the Board of Appeals rendered its final decision. The request must specifically state the basis upon which the aggrieved party contends the Board of Appeals' decision should be reconsidered. The party requesting reconsideration or rehearing must serve all parties who received the original opinion with a notice specifying the substance of the request at the same time the request is made to the Board of Appeals. The Board of Appeals may grant a request to reconsider, provided sufficient grounds are demonstrated.

The Board of Appeals may grant reconsideration or rehearing only upon evidence:

- a. of a clear showing that the action of the Board of Appeals did not conform to relevant law or its rules of procedure; or
- b. of a case of an irregularity, mistake, or fraud; or
- c. indicating 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, together with a statement detailing why such information was not timely presented; or
- d. of such other appropriate compelling basis as determined by the Board of Appeals.

Prior to Board of Appeals action on a request for reconsideration or rehearing, any party may file a written response and request oral argument. All parties who received the original opinion must be served a copy of the response. The fact that a party raises an issue worthy of reconsideration does not itself require the Board of Appeals to reconsider a prior action.

7.2. 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.

7.3. 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.

8.0. Officers

8.1. The Board of Appeals shall annually elect a Chairperson and Vice Chairperson at its first meeting held following January 1st. The alternate Board of Appeals Member shall not be eligible to run for office.

8.2. The Chairperson shall preside at all meetings and hearings of the Board of Appeals. In the event of the absence or disability of the Chairperson, the elected Vice Chairperson shall preside.

8.3. In the event of the absence or disability of both the Chairperson and the Vice Chairperson, the member with the most seniority shall preside.

8.4. In the event that the Chairperson resigns, the Vice Chairperson will fill out the unexpired term of the Chairperson and an election for a Vice Chairperson shall be held at the next regularly scheduled meeting.

8.5. Any participating member may nominate someone for office. All nominations are required to be seconded.

8.6. Any member may nominate himself or herself. The nomination is required to be seconded.

9.0. Records and Minutes

9.1. The designated staff liaison to the Board of Appeals shall maintain and supervise the custody of all official records and minute books, which shall be kept posted to date. Official records of each case shall include records of testimony and exhibits submitted during the hearing and at such time, or times, the record may be open.

9.2. The staff liaison shall maintain official records of the petition case numbers, the name and address of the applicant, a short description by street, number, or otherwise, of the premises involved in the petition and, where appropriate, the nature of the petition and final disposition of the case.

9.3. The minutes shall record the resolution pertaining to each case acted on, together with 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.

9.4. A case file of each petition shall be maintained separate from the minutes. The case file will contain all exhibits, correspondence and materials pertinent to the particular case.

10.0. Communications

10.1. The Board of Appeals shall not consider any *ex parte* or private communication from any person or organization, whether oral or written, which may relate to the merits of any appeal, special exception or variance pending before the Board of Appeals. Any such communication must be noted in the record of the case and the parties shall be given an opportunity to comment thereon.

10.2. Nothing contained herein shall preclude the Board of Appeals from obtaining any advice, counsel or assistance from City staff provided said staff member, is not a party to or directly involved in a pending matter for which the advice, counsel, or assistance is sought.

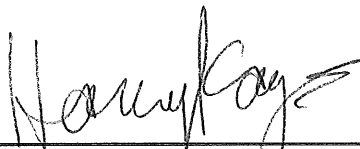
11.0. Rule Changes and Supplement

11.1. Suspension of Rules – The suspension of any rule of procedure shall require the unanimous concurrence of those members of the Board of Appeals present and voting.

11.2. Repeal or Amendment of Rules – Any member of the Board of Appeals who wishes to amend the rules must submit a motion, order or resolution to repeal or amend a rule of the Board of Appeals in writing to the Board of Appeals at least 45 days prior to a meeting, together with the written text of any proposed amendment. The repeal or amendment of any rules of the Board of Appeals shall require the presence of five (5) Board members, which may include the alternate, and shall be by the majority of the Board.

11.3. Robert's Rules of Order – These Rules of Procedure and the Zoning Ordinance of the City of Gaithersburg shall govern the operations of the Board of Appeals. To the extent that any action, practice or procedure is not covered by the Rules of Procedure or the Zoning Ordinance of the City of Gaithersburg, the rules of parliamentary practice and procedure, as set forth in the most current edition of Robert's Rules of Order, shall govern.

These Rules of Procedures adopted this
18th day of November, 2010
by the City Board of Appeals.

 11/18/2010

Harvey Kaye, Chairperson
Board of Appeals