

**SECTION 1100 – BOARD OF APPEALS**Sections

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**1101 Establishment**

- A. The Board of Appeals of the Town of Windham is established pursuant to the authority of 30-A M.R.S.A. § 2691.

**1102 Organization**

- A. The members of the Board shall be residents of the Town.
- B. The Board shall consist of five (5) members. In addition, said Board shall have one (1) alternate member who shall have all the rights of a full member except said alternate may vote only in the absence of a full member.
- C. The term of each member shall be three (3) years, except that initial appointment of members shall be made for one (1), two (2) and three (3) years respectively.
1. In the event that a member is replaced prior to the expiration of his/her term, the replacement member shall commence a new three (3) year term.
- D. A member of the municipal officers, or his spouse, shall not be a member of the Board.
- E. When there is a vacancy, the municipal officers shall appoint a person to serve for the unexpired term.
- F. The Board shall elect a Chair and Vice Chair from their own membership.
1. Elections shall be governed by the Board of Appeals bylaws.
- G. Any question of whether a particular issue involves a conflict of interest sufficient to disqualify a member from voting on that issue shall be decided by a majority vote of the Board members, excluding the member who is being challenged.
- H. The municipal officers may dismiss a member of the Board for cause before the member's term expires.

- I. A Secretary to the Board shall be appointed by the appropriate town officials.

### **1103 Procedure**

#### **A. Meetings**

1. Regular Meetings: The Board of Appeals shall meet at least once a month, unless no applications are pending.
2. Special Meetings: The Chairman shall also call meetings of the board when requested to do so by a majority of the members or by the municipal officers, and at other times as called by the Chairman.
3. Quorum: A quorum of the Board necessary to conduct an official Board meeting shall consist of at least three (3) members.
4. Voting: A majority vote of the quorum is required to constitute an action (passage or denial) on any motion before the Board. Should a Board of Appeals member need to be recused due to a conflict once a quorum is established and a meeting is in session, the meeting may proceed and the Board of Appeals may take action on any motion before the Board with less than three (3) voting members present. In this event, the applicant shall have the right to have a vote postponed to the next Board of Appeals meeting.
5. Evidence: The board may receive any oral or documentary evidence but shall not provide as a matter of policy for the exclusion of irrelevant, immaterial or unduly repetitions evidence.
  - (a) Every party has the right to present the party's case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct any cross-examination that is required for a full and true disclosure of the facts.
6. All Board of Appeals meetings are public hearings.

#### **B. Records**

1. The secretary shall maintain a permanent record of all Board meetings and all correspondence of the board.
2. The Secretary is responsible for maintaining those records which are required as part of the various proceedings which may be brought before the board. Required records shall include the following:
  - (a) Transcript of testimony, if any, and exhibits, together with all papers and requests filed in the proceeding.
  - (b) All decisions of the board.

- (1) Decisions shall include a statement of findings and conclusions, as well as the reasons or basis therefore, upon all the material issued of fact, law or discretion presented and the appropriate order, relief or denial thereof.
  3. All records to be maintained or prepared by the secretary are public records.
  4. The records shall be filed in the municipal clerk's office and may be inspected at reasonable times.
  5. Notice of any decision shall be mailed or hand delivered to the petitioner, his representative or agent within seven (7) days of the board's decision.
- C. Consulting and Review Fees
1. If the Code Enforcement Officer determines that ordinary and customary expenses associated with review of the application are higher than the application fee set by the Town Council, then the applicant shall be billed and shall pay to the Town prior to final approval said expenses, including but not limited to costs associated with notification of abutters, advertising of public meetings, and staff time dedicated to review of the development.
  2. Consulting and Review Fees
    - (a) Notwithstanding any other provision(s) of the Town's Land Use Ordinance, Sections 100 through 1100 (the "Code"), to the contrary, and in addition to such fees as are otherwise specified by the Code, the Town shall assess fees to cover 100 percent of its costs related to independent geotechnical, hydrologic, engineering, legal, and similar professional consulting services incurred in the review and post-approval inspections of site plan applications. Such fees shall be subject to the following limitations:
      - (1) Such fees shall only be as expressly provided by this Sec. 1103.C.2.;
      - (2) The Board of Appeals or Code Enforcement Officer may request the services of the consultation. Such consultation shall be limited to reasonable and necessary review, as allowed by the pertinent ordinance, which exceeds the expertise of Town staff or their ability to review the application materials within the time limits otherwise required by law or Ordinance.
      - (3) Such fees shall be assessed only to recover costs directly associated with review of the application submitted by the applicant to whom they are assessed;
      - (4) Such fees shall be reasonable in amount, based upon the consulting time involved and the complexity of the review;

- (5) The results of the consultation for which such fees are assessed shall be available for public review, but such results shall be deemed to have been made solely for the benefit of the Town of Windham and shall remain its property; and
  - (i) Such fees shall be assessed for the privilege of review and shall be payable without regard to consultation results or the outcome of the application.
- (6) An escrow account shall be established with the Town by the applicant to guarantee payment if required by the Code Enforcement Officer or Board of Appeals pursuant to this Subsection 1103.C.2. The original deposit shall be an amount specific to the application, as accorded in the Town's fee schedule. If the balance in the escrow account shall be drawn down by 75 percent, the Town shall notify the applicant and require that an additional amount be deposited to cover the cost of remaining work before any such remaining work is undertaken. The Town shall continue to notify the applicant and require that any such additional amount(s) be deposited whenever the balance of the account is drawn down by 75 percent of the original deposit. Any excess amount deposited with the Town in advance shall be promptly refunded to the applicant after final action on the application.
- (7) Any dispute regarding the application of this Subsection. 1103.C or the amount required to be paid, either in advance or upon completion, may be appealed in writing within 10 days to the Town Manager. The Town Manager, after due notice and investigation and for good cause shown, may affirm, modify, or reverse the disputed decision or reduce the amount assessed.
- (8) In an effort to minimize the use of outside or independent consulting, the provisions of this Subsection 1103.C shall be subject to the following additional limitations:
  - (i) The Code Enforcement Officer, based on his/her work load and in his/her sole discretion, may immediately refer to outside or independent consulting any major site plan. The Town shall charge for this review based on the billing rates of the retained consultant. The first four (4) hours of the review shall be paid for with the project's application fee. Review work beyond the initial four (4) hours shall be paid for with the escrow established in Subsection 1103.C above.

#### D. Public Hearings

1. The Board shall hold a public hearing for all appeals as prescribed herein.
  - (a) At least seven (7) days before the hearing, the Code Enforcement Officer or his Assistant shall notify, by mail, the owners of properties abutting the property for which the appeal or application is made.

- (1) The owners of properties shall be considered to be the parties listed by the Assessor or those against whom those taxes are assessed.
  - (b) At least seven (7) days prior to the hearing notice of the hearing shall be placed at least twice in a newspaper of general circulation.
  - (c) Failure to receive this notice shall not invalidate the proceedings herein prescribed.
2. The applicant or his representative must appear before the Board to present the proposal and to answer questions.
  3. Interested parties, such as adjacent property owners, will also be permitted to speak for or against the appeal.
  4. The Code Enforcement Officer or his assistant shall attend all hearings and shall present to the Board all plans, photographs or other factual materials which are appropriate to an understanding of the case.
- E. Reconsideration
1. The board may reconsider a decision if the following regulations are met.
    - (a) A request to the board to reconsider a decision must be filed within 10 days of the decision that is to be reconsidered.
    - (b) A vote to reconsider and the action taken on that reconsideration must occur and be completed within 45 days of the date of the vote on the original decision.
    - (c) The board may conduct additional hearings and receive additional evidence and testimony.
    - (d) Notwithstanding this Subsection 1103.E, appeal of a reconsidered decision must be made within 15 days after the decision on reconsideration.
- F. Reapplication
1. After a decision has been made by the Board of Appeals, a new appeal of similar import shall not be entertained by the Board until one (1) year shall have elapsed from the date of said decision, except that,
    - (a) The Board may entertain a new appeal if the Board believes that, owing to a mistake of law or misunderstanding of fact, an injustice was done or it finds that a change has taken place in some essential aspect of the case sufficient to warrant a reconsideration of the appeal.

### G. Appeals of a Board Decision

1. Any party may take an appeal, within forty-five (45) days of the date of the vote on the original decision, to Superior Court from any order, relief or denial in accordance with Maine Rules of Civil Procedure Rule 80B.

## 1104 Jurisdiction

- A. In addition to the power granted by 30-A M.R.S.A. §4353, the Board of Appeals shall have the following authority:
1. Administrative Appeal. Subject to the provisions of this chapter, to hear and decide appeals from orders, decisions, determinations or interpretations made by the Code Enforcement Officer. The hearing on all administrative appeals shall be de novo.
  2. Variance. Subject to the provisions of this chapter, to hear and grant or deny applications for variances from the terms of the Land Use Ordinance.
  3. Conditional Use. To hear and grant or deny applications for conditional use permits in accordance with the provisions of Section 512 Conditional Use. (*See Sec. 500 Performance Standards*).
  4. Nonconforming Use. To hear and grant or deny the following applications:
    - (a) The expansion of a nonconforming non-residential use in accordance with the provisions of Subsection 203.A.1.
    - (b) The change of a nonconforming use in accordance with the provisions of Subsection 203.C.
  5. Home Occupation. To hear and grant or deny applications for a Home Occupation 2 use in accordance with the provisions of Section 520.

## 1105 Administrative Appeal

- A. Any person and any municipal official or board of officials aggrieved by a decision of the Code Enforcement Officer may file an application with the Board of Appeals.
- B. Appeal Deadline. An appeal of a decision made by the Code Enforcement Officer must be filed within thirty (30) days of the date of the decision.
- C. Submission Requirements
1. A complete application form.
  2. An application fee as established in the Town of Windham Fee Schedule. (*See Appendix A Fee Schedule*)
  3. Location Plan and Site Plan, if required by the Code Enforcement Officer or Board of Appeals.

4. All required information must be submitted to the Town of Windham at least fourteen (14) days prior to the Board meeting at which the applicant wishes to be heard.

## 1106 Variance

### A. Standards Applicable to All Variances:

1. Succession. Approved variances shall run with the land and thus pass from the owner of a property to the next owner of said property.
2. Submission Requirements
  - (a) A complete application form.
  - (b) An application fee as established in the Town of Windham Fee Schedule. (*See Appendix A Fee Schedule*)
  - (c) Location Plan and Site Plan, if required by the Code Enforcement Officer or Board of Appeals
  - (d) All required information must be submitted to the Town of Windham at least fourteen (14) days prior to the Board meeting at which the applicant wishes to be heard.
3. The Board of Appeals shall require that attention be given to the following wherever applicable:
  - (a) Location, character and natural features.
  - (b) Fencing and screening.
  - (c) Landscaping, topography and natural drainage.
  - (d) Vehicular access, circulation and parking.
  - (e) Pedestrian circulation.
  - (f) Signs and lighting.
4. Prohibited Variances. A use variance shall not be granted to permit a use or structure not specifically allowed as either a permitted use or conditional use in the applicable zoning district.
5. Conditions of Approval. In granting appeals under this section, the Board of Appeals may impose such conditions as it deems necessary in furtherance of the intent and purpose of this chapter.
6. Sunset Provision. The right of any variance from the terms of this chapter granted by the Board of Appeals shall expire if the work or change permitted under the variance is not:
  - (a) Begun within six (6) months of the date of the Board's vote, or
  - (b) Substantially completed within one (1) year of the date of the Board's vote.
7. Recording. If the Board grants a variance under this section, a certificate indicating the name of the current property owner, identifying the property by reference to the last recorded deed in its chain of title and indicating the fact that a variance, including

any conditions on the variance, has been granted and the date of the granting, shall be prepared in recordable form.

- (a) The applicant shall record this certificate in the Cumberland County Registry of Deeds within 90 days of the date of the final written approval of the variance or the variance is void.
  - (b) A receipt from the Registry of Deeds containing the recording number must be provided to the Department of Code Enforcement prior to the issuance of any building permits.
  - (c) For the purpose of this subsection, the date of the final written approval shall be the date stated on the written approval.
- B. Variance. Except as provided in Subsections 1106.C (Disability Variance) or 1106.D (Variance from Dimensional Standards), the Board may grant a variance only when strict application of the ordinance to the petitioner and the petitioner's property would cause undue hardship. The term, "Undue Hardship" as used in this subsection means:
1. That the land in question cannot yield a reasonable return unless the variance is granted;
  2. That the need for a variance is because of unique circumstances of the property (such as location of existing structures, topographical features, etc.) and not to the general conditions of the neighborhood;
  3. That the granting of a variance will not change the essential character of the locality; and
  4. That the hardship is not the result of action taken by the current owner or a prior owner.
- C. Disability Variance. The Board of Appeals may grant a variance to an owner of a dwelling for the purpose of making that 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 subsection 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.
  2. The Board may impose conditions on the variance, including, but not limited to:
    - (a) Limiting the variance to the duration of the disability, or
    - (b) Limiting the variance to the time that the person with the disability lives in the dwelling.

3. For the purposes of this subsection, a disability has the same meaning as a physical or mental handicap under 5 M.R.S.A. § 4553 and 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.
- D. Variance from Dimensional Standards. The Board of Appeals may grant a variance from the dimensional standards of the Land Use Ordinance 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:
1. The need for a variance is due to the unique circumstances of the property and not the general condition of the neighborhood;
  2. 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;
  3. The practical difficulty is not the result of action taken by the petitioner or a prior owner;
  4. No other feasible alternative to a variance is available to the petitioner;
  5. The granting of a variance will not unreasonably adversely affect the natural environment; and
  6. The property is not located in whole or in part within shoreland areas as described in 30 M.R.S.A. § 435.
  7. The dimensional standard for which the variance is granted is limited to ordinance provisions relating to lot area, lot coverage, frontage or setback requirements.

As used in this subsection, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements.

As used in this subsection, "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner.

Under its home rule authority, a municipality may, in an ordinance adopted pursuant to this subsection, adopt additional limitations on the granting of a variance from the dimensional standards of a zoning ordinance. A zoning ordinance also may explicitly delegate to the municipal reviewing authority the ability to approve development proposals that do not meet the dimensional standards otherwise required, in order to promote cluster development, to accommodate lots with insufficient frontage or to provide for reduced

setbacks for lots or buildings made nonconforming by municipal zoning. As long as the development falls within the parameters of such an ordinance, the approval is not considered the granting of a variance. This delegation of authority does not authorize the reduction of dimensional standards required under the mandatory shoreland zoning laws, 38 M.R.S.A. chapter 3, subchapter 1, article 2-B.