

Article I. General Provisions

§ 148-3. Definitions and word usage.

VARIANCE

A relaxation of the terms of this chapter where such variance will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of the action of the applicant, a literal enforcement of this chapter would ~~result in unnecessary and undue hardship~~unreasonably restrict the utilization of the property. As used in this chapter, a variance is authorized only for the height, area and size of a structure or the size of yards and open spaces; establishment or expansion of a use otherwise prohibited shall not be allowed by variance, nor shall a variance be granted because of the presence of nonconformities in the zoning district or adjoining zoning districts.

Article XVII. Provisions for Appeal

§ 148-169. Board of Zoning Appeals.

A. A board (hereafter called the "Board") consisting of five members shall be appointed by the Circuit Court. Members of the Board may receive such compensation as may be authorized by the governing body. Members shall be removable for cause by the appointing authority upon written charges and after public hearing. Appointments for vacancies occurring otherwise than by expiration of term shall in all cases be for the unexpired term.

B. The term of office shall be for five years, except that of the first five members appointed, one shall serve for five years, one for four years, one for three years, one for two years and one for one year. One of the five appointed members may be an active member of the Commission.

[Amended 6-9-2011]

C. Any member of the Board shall be disqualified to act upon a matter before the Board with respect to property in which the member has a legal interest.

D. The Board shall choose annually its own Chairperson and Vice Chairperson, who shall act in the absence of the Chairperson.

E. ~~The non-legal staff of the governing body may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. The applicant, landowner or his agent or attorney may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. If any ex parte discussion of facts or law in fact occurs, the~~

party engaging in such communication shall inform the other party as soon as practicable and advise the other party of the substance of such communication. For purposes of this section, regardless of whether all parties participate, ex parte communications shall not include (i) discussions as part of a public meeting or (ii) discussions prior to a public meeting to which staff of the governing body, the applicant, landowner or his agent or attorney are all invited.

F. Any materials relating to a particular case, including a staff recommendation or report furnished to a member of the board, shall be made available without cost to such applicant, appellant or other person aggrieved under § 15.2-2314, as soon as practicable thereafter, but in no event more than three business days of providing such materials to a member of the board. If the applicant, appellant or other person aggrieved under § 15.2-2314 requests additional documents or materials be provided by the locality other than those materials provided to the board, such request shall be made pursuant to § 2.2-3704. Any such materials furnished to a member of the board shall also be made available for public inspection pursuant to subsection F of § 2.2-3707.

G. For the purposes of this section, “non-legal staff of the governing body” means any staff who is not in the office of the attorney for the locality, or for the board, or who is appointed by special law or pursuant to § 15.2-1542. Nothing in this section shall preclude the board from having ex parte communications with any attorney or staff of any attorney where such communication is protected by the attorney-client privilege or other similar privilege or protection of confidentiality

§ 148-170. Powers and duties.

[Added 8-13-1998]

The Board of Zoning Appeals shall have the following powers and duties:

A. To hear and decide appeals from any order, requirement, decision or determination made by an administrative officer in the administration or enforcement of this chapter or of any ordinance adopted pursuant thereto. The determination of the administrative officer shall be presumed to be correct. At a hearing on an appeal, the administrative officer shall explain the basis for his determination after which the appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence. The board shall consider any applicable ordinances, laws, and regulations in making its decision. For purposes of this section, determination means any order, requirement, decision or determination made by an administrative officer. Any appeal of a determination to the board shall be in compliance with this section, notwithstanding any other provision of law, general or special.

B. ~~To authorize~~ Notwithstanding any other provision of law, general or special, to grant upon appeal or original application in specific cases ~~such a~~ variance, as defined in § 15.2-2201~~2~~, from the terms of this chapter as will not be contrary to the public interest when, owing to special conditions, a literal enforcement of the provisions will result in unnecessary hardship; provided that ~~the spirit of this chapter shall be observed and substantial justice done, as~~

follows: the burden of proof shall be on the applicant for a variance to prove by a preponderance of the evidence that his application meets the standard for a variance as defined in § 15.2-2201 and the criteria set out in this section.

~~(1) When a property owner can show that his or her property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of this chapter or where by reason of exceptional topographic conditions or other extraordinary situation or condition of such piece of property or of the condition, situation or development of property immediately adjacent thereto, the strict application of the terms of this chapter would effectively prohibit or unreasonably restrict the utilization of the property, or where the Board is satisfied, upon the evidence heard by it, that the granting of such variance will alleviate a clearly demonstrable hardship approaching confiscation, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of this chapter. Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, and:~~

- ~~(a) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance;~~
- ~~(b) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area;~~
- ~~(c) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance;~~
- ~~(d) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and~~
- ~~(e) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A4 of § 15.2-2286 at the time of the filing of the variance application.~~

~~(2) No such variance shall be authorized by the Board unless it finds:~~

- ~~(a) That the strict application of this chapter would produce undue hardship.~~
- ~~(b) That such hardship is not shared generally by other properties in the same zoning district and the same vicinity.~~
- ~~(c) That the authorization of such variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.~~

~~(3)~~(2) No such variance shall be ~~authorized~~considered except after notice and hearing as required by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the Board may give such notice by first-class mail rather than by registered or certified mail.

~~(4) No variance shall be authorized unless the Board finds that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to this chapter.~~

~~(5)~~(3) In ~~authorizing~~granting a variance, the Board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary in the public interest and may require a guaranty~~ee~~ or bond to ensure that the conditions imposed are being and will continue to be complied with.

C. To hear and decide appeals from the decision of the Zoning Administrator. No such appeal shall be heard except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the Board may give such notice by first-class mail rather than by registered or certified mail.

D. To hear and decide applications for interpretation of the district map where there is any uncertainty as to the location of a district boundary. After notice to the owners of the property affected by any such question, and after public hearing with notice as required by § 15.2-2204, the Board may interpret the map in such way as to carry out the intent and purpose of this chapter for the particular section or district in question. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the Board may give such notice by first-class mail rather than by registered or certified mail. The Board shall not have the power to change substantially the locations of district boundaries as established by ordinance.

E. No provision of this section shall be construed as granting any board the power to rezone property.

F. To hear and decide applications for special exceptions as may be authorized in this chapter. The Board may impose such conditions relating to the use for which a permit is granted as it may deem necessary in the public interest, including limiting the duration of a permit, and may require a guaranty or bond to ensure that the conditions imposed are being and will continue to be complied with. No special exception may be granted except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the Board may give such notice by first-class mail rather than by registered or certified mail.

G. To revoke a special exception if the Board determines that there has not been compliance with the terms or conditions of the permit. No special exception may be revoked except after notice and hearing as provided by § 15.2-2204. However, when giving any required notice to the owners, their agents or the occupants of abutting property and property immediately across the street or road from the property affected, the Board may give such notice by first-class mail rather than by registered or certified mail.

§ 148-171. Rules and regulations.

A. The Board shall adopt such rules and regulations as it may consider necessary.

B. Meetings of the Board shall be held at the call of its Chairperson or at such times as a majority of the Board may determine.

C. The Chairperson or, in his or her absence, the Acting Chairperson may administer oaths and compel the attendance of witnesses.

D. The Board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact. It shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the Board and shall be a public record.

E. All meetings of the Board shall be open to the public.

F. A quorum shall be at least three members and the Board shall offer an equal amount of time in a hearing on the case to the applicant, appellant or other person aggravated under §15.2-2314, and the staff of the local governing body.

G. A favorable vote of three members of the Board shall be necessary to reverse any order, requirement, decision or determination of any administrative official or to decide in favor of the applicant or any matter upon which the Board is required to pass.

§ 148-172. Appeal to the Board.

A. An appeal to the Board may be taken by any person aggrieved or by any office, department, board or bureau of the County of any municipality therein affected by any decision of the Zoning Administrator. Such appeal shall be taken within 30 days after the decision appealed from by filing with the Zoning Administrator and with the Board a notice of appeal specifying the grounds thereof. The Zoning Administrator shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed was taken.

B. An appeal shall stay all proceedings in furtherance of the action appealed from unless the Zoning Administrator certifies to the Board that, by reason of facts stated in the certificate, a stay would in his or her opinion cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order granted by the Board or

by a court of record, on application and on notice to the Zoning Administrator and for good cause shown.

C. In no event shall a written order, requirement, decision or determination made by the Zoning Administrator or other administrative officer be subject to change, modification or reversal by any Zoning Administrator or other administrative officer after 60 days have elapsed from the date of the written order, requirement, decision or determination, where the person aggrieved has materially changed his or her position in good faith reliance on the action of the Zoning Administrator or other administrative officer, unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the Zoning Administrator or other administrative officer or through fraud. The 60 day limitation period shall not apply in any case where, with the concurrence of the attorney for the governing body, modification is required to correct clerical or other nondiscretionary errors.

[Added 8-13-1998]

§ 148-173. Appeal procedure.

A. Appeals shall be mailed to the Board, c/o the Zoning Administrator, and a copy of the appeal mailed to the Secretary of the Commission. A third copy should be mailed to the individual official, department or agency concerned, if any.

B. Appeals requiring an advertised public hearing shall be accompanied by a certified check made payable to the Treasurer of Northumberland County in an amount as set forth in the Fee Schedule. *Editor's Note: See Ch. 68, Fee Schedule.*

[Amended 7-12-2001]

§ 148-174. Public hearing.

[Amended 8-13-1998]

The Board shall, within 60 days from the receipt of a completed application, fix a time for the hearing of an application or appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within 90 days. In exercising its powers, the Board may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination of an administrative officer or to decide in favor of the applicant on any matter upon which it is required to pass under this chapter or to effect any variance from this chapter. The Board shall keep minutes of its proceedings and other official actions, which shall be filed in the office of the Board and shall be public records. The Chairperson of the Board or, in his or her absence, the Acting Chairperson may administer oaths and compel the attendance of witnesses.

§ 148-175. Decision of the Board.

A. Any person or persons jointly or severally aggrieved by any decision of the Board or any taxpayer or any officer, department, board or bureau of the County or any municipality therein may present to the Circuit Court a petition specifying the grounds on which aggrieved within 30 days after the filing of the decision in the office of the Board.

B. Upon the presentation of such petition, the Circuit Court shall allow a writ of certiorari to review the decision of the Board and shall prescribe therein the time within which a return thereto must be made and served upon the realtor's attorney, which shall not be less than 10 days and may be extended by the Circuit Court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on the application, on notice to the Board and on due cause shown, grant a restraining order.

C. The Board shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

D. ~~If, upon the hearing, it shall appear to the Circuit Court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a Commissioner to take such evidence as it may direct and report the same to the Court, with his or her findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the Circuit Court shall be made.~~ The Circuit Court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

E. Costs shall not be allowed against the Board, unless it shall appear to the Circuit Court that it acted in bad faith or with malice in making the decision appealed from.

F. In the event that the decision of the Board is affirmed and the Court finds that the appeal was frivolous, the Court may order the person or persons who requested the issuance of the writ of certiorari to pay the costs incurred in making the return of the record pursuant to the writ of certiorari. If the petition is withdrawn subsequent to the filing of the return, the Board may request that the Court hear the matter on the question of whether the appeal was frivolous. [Added 8-13-1998]