

ZONING HEARING BOARD PROCEDURES

NAVIGATING THE ZONING HEARING PROCESS



WHAT IS A ZONING HEARING BOARD?

The Zoning Hearing Board (ZHB) is a quasi-judicial body that hears and renders decisions regarding specific types of land use actions. The ZHB functions like a court, although formal court procedures are not necessarily required. The Pennsylvania Municipalities Planning Code (MPC) provides a specific set of rules that must be followed for applications submitted to the ZHB.

REASONS FOR A HEARING

ZHBs review applications for specific reasons as outlined in the MPC, including:

- Applications for a variance or a use by special exception
- Challenges to the validity of a land use ordinance, including those raising procedural questions or alleging defects in the enactment process
- Appeals to a determination from a zoning officer, municipal engineer, or agency on preliminary opinions, floodplain determinations, transfers of development rights, or administration of sedimentation and erosion control or stormwater management

REMINDERS FOR THE BOARD

- If a hearing is not held within 60 days of receiving an application, it is deemed to be approved
- Board members may not communicate directly or indirectly with anyone regarding the issue unless all parties are given the opportunity to participate

ZONING HEARING BOARD PROCEDURES

BEFORE THE HEARING

- Applicant must file application, pay fees, and provide required information
- ZHB solicitor, municipal solicitor, elected officials, and appropriate staff must be notified
- The hearing must be scheduled within 60 days of receipt of the application; if not, an extension must be agreed upon in writing
- The hearing must be advertised per Public Notice Requirements under MPC 908(1)
- Written notice conspicuously posted on the affected tract at least one week prior to the public hearing
- Property owners and interested parties provided written notice of the hearing
- Packet including the application and all pertinent documents prepared for ZHB members

CONDUCTING THE HEARING

- There must be a quorum of the ZHB or hearing officer present, or alternate members must be appointed to hear the case
- Court stenographer must be present
- Parties to the application must file written entry of appearance
- If hearing not complete in one session, all subsequent hearings must be scheduled within 45 days of the prior hearing
- Applicant presentation must be completed within 100 days of the first hearing
- Opposition to the application must be completed within 100 days of the first hearing held after the applicant presentation

POST-HEARING ACTION

- ZHB or hearing officer must render a written decision or findings within 45 days of the last hearing
- Within one day of the written decision or findings, they must be personally delivered or mailed to the applicant with the findings of fact and conclusions based on the findings
- ZHB must communicate to all interested parties that a decision has been rendered and indicate where it can be reviewed

ADDITIONAL RESOURCES

The Governor's Center for Local Government Services provides technical assistance on a variety of planning, land use, and development matters to planning commissions, zoning officers, zoning hearing boards, and other local government officials. For more information visit dced.pa.gov/planning.



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VARIANCE CRITERIA

To be granted a variance, ALL the following criteria must be met:

- ✓ There is unnecessary hardship created by the unique physical conditions of the property. Physical conditions include irregularity, narrowness, shallowness of lot size or shape or exceptional topographical or other physical conditions that are not created by the provisions of the local zoning ordinance.
- ✓ Because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance, and the authorization of a variance is needed to enable the reasonable use of the property.
- ✓ Such unnecessary hardship has not been created by the applicant.
- ✓ The variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.
- ✓ The variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation at issue.

THE ZONING HEARING BOARD

PLANNING SERIES #6

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I. The Zoning Hearing Board

Preface

The *Zoning Hearing Board* (Planning Series Publication No. 6) is one of a series of 10 planning publications produced by the Governor's Center for Local Government Services (Center) as a means to educate both professionals and non-professionals on the ways that planning and land use management are achieved within the commonwealth. The planning publications were first developed in the 1970's and in subsequent editions have been revised to incorporate differences in the overall planning viewpoint, offer up-to-date best practices, and reflect the latest changes in Pennsylvania planning law. Each publication addresses a specific planning or land use method enabled through the Pennsylvania Municipalities Planning Code (MPC), Act 247 of 1968, P.L. 805, *as reenacted and amended*, 53 P.S. § 10101, *et seq.*, and used by municipalities throughout the commonwealth.

The Center's 10 Planning Series Publications are as follows:

- No. 1 – Local Land Use Controls in Pennsylvania
- No. 2 – The Planning Commission
- No. 3 – The Comprehensive Plan
- No. 4 – Zoning
- No. 5 – Technical Information on Floodplain Management
- **No. 6 – The Zoning Hearing Board**
- No. 7 – Special Exceptions, Conditional Uses and Variances
- No. 8 – Subdivision and Land Development in Pennsylvania
- No. 9 – The Zoning Officer
- No. 10 – Reducing Land Use Barriers to Affordable Housing

An appointment to a Zoning Hearing Board is an important yet complex responsibility which requires a thorough understanding of functions relating to the application and administration of the zoning ordinance. As such, the *Zoning Hearing Board* publication is specifically designed for the following purposes:

- To provide a summary of the roles, responsibilities, and terms of zoning hearing board member appointments.
- To describe the functions of the zoning hearing board, including challenges to the substantive validity of ordinances and related procedures.
- To outline the procedures to be followed for conducting hearings on applications and appeals and the issuance of written decisions.

II. Introduction

The zoning hearing board is a quasi-judicial body that renders decisions on specific types of land use appeals and applications. Members of the zoning hearing board are appointed by the governing body. Although the zoning hearing board functions like a court, formal court procedures are not strictly required.

The primary purpose of the zoning hearing board is to help assure fair and equitable application and administration of the zoning ordinance. The zoning hearing board hears appeals from the zoning officer's determinations and grants relief from the literal enforcement of the zoning ordinance in certain hardship situations by means of a variance. The right to appeal for relief is an important step in ensuring that due process is followed when restricting use of private property for a predetermined public good. The zoning hearing board also hears applications for special use and challenges to the substantive validity of ordinances. The Pennsylvania Municipalities planning Code (MPC) provides a specific set of rules that must be followed for applications submitted to the zoning hearing board.

The zoning hearing board has no legislative power; it can neither make nor modify zoning policy. Neither does the zoning hearing board have enforcement powers. The zoning hearing board schedules hearings on applications and appeals that come before it, takes evidence, and issues written decisions with findings of fact and conclusions of law. A zoning hearing board must limit its scope of activities to those permitted by the MPC and by the local zoning ordinance. As such, the zoning hearing board does not have statutory powers in matters relating to the Uniform Construction Code.

It is important that the zoning hearing board members have a thorough knowledge not only of its specific functions, but also of its place within the arena of local planning decisions. While the zoning hearing board is not responsible for the contents of the zoning ordinance, it nevertheless plays a vital role in the overall effectiveness of the zoning ordinance. In addition, the zoning hearing board may detect weaknesses in the zoning ordinance, perhaps as a result of frequent and similar variance requests. When a flaw, weakness, or lack of clarity is noticed, it should be communicated to the zoning officer and planning commission for their consideration to amend the zoning ordinance accordingly.

The zoning hearing board has the power to assure the fair and equitable application of the zoning ordinance. Abuses of this power can, in effect, undermine the zoning ordinance. An abuse or error of law can lead to a decision of the zoning hearing board being overturned on appeal.

Local officials should not take an appointment to the zoning hearing board lightly, nor should an appointee. It is an extremely responsible and demanding position, one that will play an important role in the growth and development of the community. The following pages provide some basic understanding of the zoning hearing board and discuss the various functions and procedures followed by the zoning hearing board.

Statutory Overview of Authority

Any municipality enacting a zoning ordinance must also create a zoning hearing board as required by Section 901 of the MPC. Also, Section 904 of the MPC provides that two or more municipalities may create a joint zoning hearing board in lieu of a separate board for each municipality. Furthermore, Section 815-A of the MPC specifies that the governing bodies of the municipalities adopting a joint municipal zoning ordinance – a single zoning ordinance enacted by and covering two or more municipalities – may establish a joint zoning hearing board pursuant to the authority of section 904 of the MPC. The joint municipal zoning ordinance shall either create a joint zoning hearing board to administer the entire joint municipal zoning ordinance or create individual zoning hearing boards in each of the individual participating municipalities to administer the joint municipal zoning ordinance for properties located in the participating municipalities.

III. Roles and Responsibilities

It is important to distinguish between the roles and responsibilities of the zoning hearing board and the zoning officer. The zoning officer's primary function is to administer and enforce the technical and other regulatory provisions of the enacted zoning ordinance.

In contrast, the zoning hearing board is a quasi-judicial body that renders decisions regarding the fair and equitable application and administration of the zoning ordinance, including by hearing appeals from the zoning officer's determinations and by granting relief from the literal enforcement of the zoning ordinance in certain hardship situations. As defined by the MPC, a "decision" is a "final adjudication of any board or other body granted jurisdiction..." The zoning hearing board adjudicates the matters brought before it and over which the MPC gives it jurisdiction. Its decision is a final adjudication.

However, Section 901.1(b).6 of the MPC specifies that the governing body or the planning commission, where designated, shall have exclusive jurisdiction to render final adjudications from the determination of the zoning officer or the municipal engineer in the administration of any land use ordinance or provisions thereof with reference to sedimentation and erosion control and stormwater management with respect to MPC Articles V (Subdivision and Land Development) and VII (Planned Residential Development).

Membership, Appointment and Organization of the Board

A zoning hearing board consists of either three or five members appointed by resolution of the governing body. Each member must be a resident of the municipality. Legal residence is best determined by where a person lives; it not only includes a person's intention to live somewhere, but also a physical presence. Under Section 903(a) of the MPC, a member of the zoning hearing board may not hold an elective office or be appointed to the planning commission.

The term of office for a three-member board is three years, and the term for a five-member board is five years. In both three and five-member boards, the terms shall be arranged so that the term of office of one member expires each year to preserve continuity. For example, the initial terms of a three-member board will necessarily be for one, two, and three years to have only one member's term expire each year. The terms of office should also be set to expire on December 31.

A three-member board may be changed to a five-member board by amendment to the zoning ordinance. When a three-member board is changed to a five-member board, the three existing board members remain in office until the expiration of their terms. The governing body appoints by resolution two additional members whose terms are arranged so that the term of only one member of the five-member board expires in any one year. The MPC provides that a municipality that desires to convert back to a three-member board may do so by means of an amendment to the zoning ordinance.

Any vacancy occurring during a term of office is filled for only the unexpired portion of the term.

It is possible for a member of a zoning hearing board to be removed from office. Removal however, requires a majority vote of the governing body. Any such removal of a member must be based on just cause. The primary grounds for removal could be any of the following: malfeasance – committing an unlawful act in office; misfeasance – committing a lawful act in an unlawful manner in office; and nonfeasance – failure to perform the duties of the office. The member must be given 15 days' notice of the intent of the governing body to vote on removal and has a right to a hearing when requested in writing.

A member that is threatened with removal may have a right to a hearing under the Local Agency Law, 2 Pa. C. S. § 551.

Members of the zoning hearing board may receive compensation for the performance of their duties. The amount of compensation, if any, is determined by the governing body. By limitation of Section 907 of the MPC, the actual rate of compensation is not permitted to exceed the rate paid to the members of the governing body.

Alternate Members

Section 903(b) of the MPC authorizes the appointment and participation of alternate members when the zoning hearing board is unable to obtain a quorum due to absence or disqualification of a member. The MPC authorizes the governing body to appoint by resolution a pool of one to three residents to serve as alternate members. The term of an alternate is three years.

Once alternates have been appointed, and if a quorum cannot be achieved, the chairman of the zoning hearing board is authorized to designate as many alternative members as necessary to reach a quorum. For instance, if a three-member board has only one regular member available, the chairman must designate one alternate to reach a quorum of two. Designation of alternates must be made on a case-by-case basis in rotation according to declining seniority among all alternates. Once seated, the alternate shall continue to serve on the board in all proceedings involving the case until the zoning hearing board makes a decision.

Even if an alternate has not been designated by the chairman as a voting alternate in a given case, the alternate may participate in any discussion or proceeding of the zoning hearing board. However, the alternate may not vote or be compensated unless designated and seated as a voting alternate. This experience as a non-voting alternate can provide valuable training for a new alternate.

Ethics Act – Statements of Financial Interests

The Public Official and Employee Ethics Act, 65 Pa.C.S. § 1101 *et seq.* (Ethics Act), applies to individuals who are defined by the Ethics Act to be a “public official.” Members of a zoning hearing board qualify as “public officials” and are subject to the requirements of the Ethics Act.

The Ethics Act also requires zoning hearing board members, including alternate members, to annually file a Statement of Financial Interests. Section 4 of the Ethics Act also requires that “no public official shall be allowed to take oath of office or enter or continue upon his duties, nor shall he receive compensation from public funds, unless he has filed a statement of financial interests as required by this Act.” This financial disclosure form must be filed with the governing body no later than May 1 of each year in office and also one year after leaving the position.

A nominee for membership on the zoning hearing board must file a Statement of Financial Interests 10 days before the nominee is approved or confirmed.

General Operating Procedures for the Board

The board annually elects officers from its own membership, and officers are able to succeed themselves. In order to conduct a hearing, it is necessary that a quorum be present, consisting of no less than a majority of all the members of the board. The board has the power to make, alter, and rescind rules for its procedures, provided that they are consistent with the rules of the municipality and of the commonwealth. Full public records must be kept by the board, and such records become property of the municipality. The board shall also submit a report of its activities to the governing body as requested.

The Municipal Records Act, of January 18, 1968, P.L. 961. No. 428, and the Pennsylvania Historical and Museum Commission’s Municipal Records Retention Manual establish procedures and standards for records retention, including mandatory record retention and disposition schedules.

The Pennsylvania Right-to-Know Law, 65 P.S. § 67.101 *et seq.* (RTKL) applies to the records of a zoning hearing board. Most requests will be submitted to the municipal open records officer for determination as to whether a responsive record is a “public record” and otherwise subject to a privilege or exception to disclosure. Unless an extension of time is warranted, the open records officer has five business days to respond to a request. In the event that a request for a record is made to the zoning hearing board or an individual member of the zoning hearing board, the zoning hearing board or individual should immediately notify the municipal open records officer of the request.

The zoning hearing board is subject to the open meetings provisions of the Sunshine Act, Act 94 of 1986, *as amended*, 67 Pa. C.S. § 701, *et seq.* Under the Sunshine Act, votes cast by each member must be cast publicly, and the roll call votes must be recorded. A meeting at which the zoning hearing board is not conducting a hearing may occur only after published notice of the meeting; minutes of the meeting are required. The MPC otherwise governs the requirements for public notice of a zoning hearing board hearing and the keeping of a stenographic transcript of the hearing.

IV. Functions of the Zoning Hearing Board

Section 909.1 of the MPC authorizes the zoning hearing board with **exclusive jurisdiction** to hear and decide the following:

1. Substantive challenges to the validity of any land use ordinance, except curative amendments (which are heard by the governing body)

Jurisdiction over a procedural challenge to a land use ordinance is vested exclusively in the county court of common pleas, not a zoning hearing board. The zoning hearing board's authority to hear procedural challenges to a land use ordinance was withdrawn by Act 39 of 2008.

2. Appeals from the determination of the zoning officer, including, but not limited to the following:
 - i. The granting or denial of any permit
 - ii. The failure to act on an application for any permit
 - iii. The issuance of any cease and desist order
 - iv. The registration or refusal to register any nonconforming use, structure, or lot

The terms “determination” and “decision,” which are used throughout the MPC, have precise meaning as defined in Section 107 of the MPC. As illustration, a zoning officer's determination is appealable to the zoning hearing board for a decision, which in turn is appealable to court.

3. Appeals from a determination by the municipal engineer or zoning officer with respect to the administration of any floodplain or flood hazard ordinance or such provisions within a land use ordinance
4. Applications for variances from the terms of the zoning ordinance and flood hazard ordinance or such provisions within a land use ordinance
5. Applications for special exceptions under the zoning ordinance or floodplain or flood hazard ordinance or such provisions within a land use ordinance. For more information see *Planning Series No. 5: Technical Information on Floodplain Management*.
6. Appeals from the determination of any officer or agency charged with the administration of any transfers of development rights or performance density provisions of the zoning ordinance;
7. Appeals from the zoning officer's determination for a preliminary opinion under Section 916.2 of the MPC [relating to obtaining a preliminary opinion of the zoning officer]
8. Appeals from the determination of the zoning officer or municipal engineer in the administration of any land use ordinance or provision with reference to sedimentation and erosion control or stormwater management insofar as the same relates to development not involving Article V (subdivision or land development) or VII (planned residential development) applications. In other words, appeals from erosion or stormwater provisions under a zoning ordinance dealing with building on a single lot.

A zoning hearing board is not authorized to render advisory opinions.

Appeal from the Determination of the Zoning Officers

The zoning hearing board is vested with authority to hear appeals from the determination of a zoning officer. A zoning officer typically makes such determinations with respect to an application for development approval or permit, but may also be called upon to make a determination for property for which no application is pending (for example, an inquiry as to the uses permitted within the zoning district the property is located within). An appeal from determination of the zoning officer must be filed within 30 days after notice of the determination is issued. However, if a person alleges and proves that he had no notice, knowledge, or reason to believe that such approval had been given, the appeal can be filed promptly after the aggrieved person learns of the decision, even if the 30 day time limit has expired. See Section 914.1 of the MPC.

Variances

A zoning hearing board is vested with the authority to grant relief from the strict application of the requirements of the zoning ordinance to a particular property. The form of relief is called a variance. The zoning hearing board hears requests for variances where it is alleged that the provisions of the zoning ordinance, if strictly applied, would cause unnecessary hardship.

Section 910.2(a) of the MPC sets forth the criteria that must be met for the grant of a variance. The zoning hearing board may grant a variance provided that all of the following findings are made where relevant in a given case:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;
2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;
3. That such unnecessary hardship has not been created by the appellant;
4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare and
5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

Illustrating the MPC provision that findings be made “where relevant in a given case,” the Commonwealth Court recently held that statutory criteria number five (minimization of relief) was not applicable to a use variance application. The Commonwealth Court’s decision is under review by the Supreme Court.

There are several types of variances and additional criteria or relaxation of the Section 901 criteria may apply. These types of variances are described in greater detail in Planning Series No. 7: Special Exceptions, Conditional Uses and Variances.

Section 902(b) of the MPC provides that, in granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of the MPC and the zoning ordinance.

See *Planning Series No. 7: Special Exceptions, Conditional Uses and Variances* for additional information.

Special Exceptions

A special exception is a use that the governing body has determined is in the public health, safety, and welfare in the zoning district proposed, but is subject to specific standards and more detailed review. The MPC authorizes a zoning hearing board to hear and decide upon an application for special exception.

Section 912.1 of the MPC states the zoning hearing board's functions with respect to special exceptions:

Where the governing body, in the zoning ordinance, has stated special exceptions to be granted or denied by the board pursuant to express standards and criteria, the board shall hear and decide requests for such special exceptions in accordance with such standards and criteria. In granting a special exception, the board may attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance.

The zoning hearing board may not grant any use as a special exception. Rather, it may only consider as a special exception a use specifically permitted by the zoning ordinance as a special exception.

The applicant for a special exception must first show that the proposed use is a use allowed under the zoning ordinance as a special exception. The applicant must next show that the specific standards and criteria contained in the zoning ordinance for that use are met by the proposed development. Specific criteria, for example, may refer to such factors as lot size, increased setbacks, buffering or landscaping requirements or additional parking spaces, or to special studies such as traffic studies and environmental impact studies.

An applicant for special exception is not required to carry the burden of proof of general or non-specific criteria. Examples of non-specific criteria include such provisions that the use not be more detrimental to the neighborhood or, that the use be in harmony with the spirit and purposes of the district. An opponent bears the burden of proving non-specific requirements, that is, sufficient evidence that the use would be detrimental to public health, safety, or general welfare. The mere possibility of an adverse impact or speculation or belief of harm is not enough. The objector must show that there is a high probability that the proposed use will generate a harm greater than normally generated by that type of use. An opponent must prove harm by offer of credible and particularized – often expert – evidence.

The application for special exception must be granted where the applicant demonstrates compliance with the specific requirements set forth in the zoning ordinance, unless an objector proves that the use would be detrimental to public health, safety, or general welfare.

See *Planning Series No. 7: Special Exceptions, Conditional Uses and Variances* for additional information.

Substantive Validity Challenges

A landowner who desires to challenge the substantive validity of a land use ordinance has two choices: (i) a request for a curative amendment or (ii) a substantive validity challenge. The governing body has exclusive jurisdiction to hear a curative amendment request.

The zoning hearing board has exclusive jurisdiction to hear the landowner's substantive validity challenge. The zoning hearing board also has exclusive jurisdiction to hear a substantive validity challenge brought by a person aggrieved by a use or development permitted on the land of another.

Section 916.1(b) of the MPC precludes the bringing of a substantive validity challenge by a person, other than the landowner, unless "aggrieved by a use or development permitted on the land of another by an ordinance or map." The courts have interpreted Section 916.1(b) to require, as a prerequisite to bringing such challenge, that an application for development or use has been submitted to the municipality. Without such application, the courts deem the challenge to be premature and that the zoning hearing board is without jurisdiction to hear it.

A substantive validity challenge follows the procedures stated in Section 916.1 of the MPC. A substantive validity challenge must be in writing and contain reasons for the challenge. Unlike the curative amendment, a substantive validity challenge does not require the landowner to file plans and explanatory materials describing the proposed use or development. In reaching its decision on the substantive validity challenge, the zoning hearing board must consider the testimony of record, the submitted plans and explanatory materials (if a landowner challenge), and five planning criteria in Section 916.1(c)(5) of the MPC. In abbreviated terms, these five criteria include:

1. Impact on roads and other public service facilities;
2. If the proposed use is residential, the impact on regional housing needs and effectiveness of the proposal in providing affordable housing;
3. Suitability of the site for the intensity of the use proposed by the site's natural features, such as soils, slopes, etc.;
4. Impact of the proposed use on the site's natural features, the degree to which these are protected or destroyed, the tolerance of these features to development, and any adverse environmental impacts; and
5. Impact on preservation of agriculture and other land use which are essential to public health and welfare.

If the zoning hearing board fails to conduct a hearing on the substantive validity challenge within 60 days of its filing or fails to render a written decision 45 days after the close of the hearing on the challenge, the result is a deemed denial of the challenge.

Section 916.1(h) broadens the zoning hearing board's view in the event of a substantive validity challenge to an ordinance that is generally consistent with an adopted multi-municipal comprehensive plan (under Article XI of the MPC). Section 916.1(h) applies where municipalities have jointly adopted a single (multi-municipal) comprehensive plan and all participating municipalities have adopted and are administering individual zoning ordinances consistent with the multi-municipal comprehensive plan. Under this circumstance, the zoning hearing board may consider the availability of uses under the participating municipalities' zoning ordinances within a reasonable geographic area. Such consideration is not limited to the municipality whose zoning ordinance is the subject of the challenge. Although not specifically stated in the MPC, this same consideration also is relevant to a joint municipal zoning ordinance enacted under Article VIII-A of the MPC.

The MPC prohibits concurrent substantive validity challenges for the same property. An original challenge must be finally determined or withdrawn before a different challenge can be filed on the identical property. This limitation applies unless the municipality adopts a substantially new or different zoning ordinance text or map.

Conflict of Interest

In the course of hearings before a zoning hearing board, conflict of interest issues may arise from two sources: (i) financial conflicts of interest governed by the Ethics Act and applicable to all "municipal officials" (by definition inclusive of members of the zoning hearing board) and (ii) conflicts of interest under principles of due process, that is the right to be heard by a fair and impartial tribunal and applicable to a zoning hearing board that functions in a quasi-judicial capacity.

Section 1103(a) of the Ethics Act provides that "[n]o public official or public employee shall engage in conduct that constitutes a conflict of interest." The Ethics Act defines "conflict of interest" as "[u]se by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for a private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. The terms do not include an action having a de minimis economic impact or which affect to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with he or a member of his immediate family is associated." "De minimis economic impact" is

defined as “[a]n economic consequence which has an insignificant effect.” Section 1103(j) of the Ethics Act requires, in the event of conflict of interest under the Ethics Act, that recusal of the individual with the conflict must “publicly announce and disclose the nature of his interest [the conflict of interest] as a public record in a written memorandum filed with the person responsible for recording the minutes of the meeting at which the vote is taken.” The individual recused may not participate in the matter from which he is recused. That is, he may not participate in the discussion, make a motion, second a motion, or vote on a motion relating to the matter.

Even if the member feels that there will be no conflict of interest, it may not appear this way to the public. By explanation of the situation or relationship, the disclosure will “clear the air” and allow the public to make an informed judgment. It is always wise to consult with a solicitor if doubt about conflict exists.

Independent of the Ethics Act, Pennsylvania courts have set forth “conflict of interest” principles applicable where a municipal board, such as the zoning hearing board, is functioning in a quasi-judicial capacity (also referred to as an adjudicatory capacity) and where a party appearing before the municipal board exercises his right to be heard, a constitutionally protected due process right.

The fundamental principle addressed by the courts is the right to a fair and impartial hearing before a fair and impartial tribunal. The courts have advised that where a municipal board “is acting in an adjudicatory role it must abide by due process standards and avoid the appearance of impropriety... A showing of actual bias is unnecessary in order to assert a cognizable due process claim; the mere potential for bias or the appearance of non-objectivity may be sufficient to constitute a violation of that right.” The courts recognize that due process requires a municipal board in the performance of its quasi-judicial functions to avoid even the appearance of bias or impropriety.

The courts have explained that recusal of a member of the municipal board acting in an adjudicatory capacity is warranted “where a member of the tribunal participates as an advocate or witness, publicly expresses predisposition, or has a fiduciary relationship with a party...” However, “[r]ecusal is required only where the record demonstrates bias, prejudice, capricious disbelief or prejudgment.” Where the relationship between the member of the zoning hearing board and the proceeding before the zoning hearing board lacks evidence of bias, prejudice, capricious disbelief, or prejudgment, it is legally insufficient to warrant recusal.

The courts have further advised that in the case of only an appearance of bias, “[i]f a [board member] thinks he is capable of hearing a case fairly, his decision not to withdraw will ordinarily be upheld on appeal.” Additionally, opinions formed by an individual member of the municipal board “on the basis of facts introduced or events occurring in the course of the current proceedings...do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus...remarks during the course of a [hearing] that are critical or disapproving of, or even hostile to, [the applicant, parties] ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial [outside of the hearing] source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.”

ZHB Solicitor

Although the MPC does not require that the zoning hearing board employ legal counsel, a zoning hearing board operating as a quasi-judicial board would be operating at a distinct disadvantage without a solicitor. One of the primary roles of the zoning hearing board solicitor is to provide legal advice to the zoning hearing board during a hearing.

The MPC permits the zoning hearing board to employ or contract for a solicitor and fix the compensation of legal counsel. Such compensation and the sums expended for services shall not exceed the amount appropriated by the governing body for this purpose. And, this power to employ or contract the solicitor requires the assent and ratification of the governing body.

Nonetheless, the courts have affirmed that the choice of solicitor rests with the zoning hearing board.

Section 617.3 of the MPC mandates that the legal counsel to the zoning hearing board shall be an attorney other than the municipal solicitor. The Commonwealth Court further ruled against the practice of allowing attorneys from the same law firm to serve in both adversary and adjudicative roles in the same hearing. *Sultanik v. Worcester Twp.*, 488 1197 (Pa. Cmwlt. 1985).

V. Hearing Procedures

Hearings conducted by the board and decisions arrived at following the conclusion of any such hearing must be in accordance with the requirements set forth in Section 908 of the MPC.

Notice

Section 908.1 of the MPC requires “public notice” of the required “hearing” before a zoning hearing board. The MPC definition of “public notice” is stricter than notice required by the Sunshine Act. As specified by definition of “public notice” in Section 107(a) of the MPC, the required notice must be “published once each week for two successive weeks in a newspaper of general circulation in the municipality.” Such public notice may not be published more than 30 days from the date of the hearing or fewer than seven days from the date of the hearing. All public notices must state “the time and place of the hearing and the particular nature of the matter to be considered at the hearing.”

Section 1909 of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1501 *et seq.* provides that “successive weeks” means calendar weeks. It further provides that while publication upon any day of such weeks is sufficient, at least five days shall elapse between each publication. Section 1908 of the Statutory Construction Act further provides that the five-day interval should be computed excluding the first day and including the last day of the five-day period.

In addition to published notice, the zoning hearing board must provide written notice to the applicant, to the zoning officer, to any person who has requested notification, and to any other persons that the governing body has designated by ordinance. Such written notice is to be given at such time and in such manner as prescribed by ordinance or, in the absence of an ordinance provision, by rules adopted by the zoning hearing board.

A municipal ordinance may provide for stricter public notice and written notice requirements that required by the MPC, but may not provide for less strict requirements.

Written notice of the hearing must be conspicuously posted on the affected tract of land at least one week prior to the hearing.

Pennsylvania courts have observed that “conspicuous posting” of the required written notice requires that notice generally apprise the public of the requested relief or action. While the MPC contains no specific requirements as to the design, location, spacing, or number of notices posted that would be legally sufficient to meet the requirement of “conspicuous posting,” suggested practices include posting at one or more points along the property’s frontage abutting a road and using a notice of an appropriate size, color, or format that would garner the attention of the pedestrian or traveling public, as local circumstances dictate.

All public notices must state “the time and place of the hearing and the particular nature of the matter to be considered at the hearing.” If the hearing is for a challenge to the substantive validity of an ordinance, Section 916.1(e) of the MPC requires that public notice also include notice that the validity of the ordinance or map is in question. In the case of a substantive validity challenge, the public notice must also state where and at what times a copy of the challenge may be examined by the public.

Time Requirements for Commencing and Conducting the Hearing

Section 908(1.2) of the MPC establishes detailed time requirements for conducting a hearing by the zoning hearing board on any application or appeal other than a substantive validity challenge. The MPC requires that the first hearing on the application be commenced within 60 days of the date of receipt of the application or appeal. It further requires that a subsequent hearing be held within 45 days of a prior hearing. An applicant is provided 100 days to complete the presentation of his proceeding and, upon request, provided a minimum of seven hours of hearing within the 100 days. Party opponents to the application have 100 days to complete the presentation of their case in opposition. If an

applicant requests and is granted additional hearings, the party opponents must be granted an equal number of additional hearings. As with all procedural requirements, the applicant may waive his procedural rights in writing. Failure of the municipality to conform to these procedural requirements may give rise to a deemed decision approving the application as presented.

Section 916.1 of the MPC established the time requirements for conducting a hearing by the zoning hearing board on a substantive validity challenge. It requires that the hearing on the substantive validity challenge be commenced within 60 days of the receipt of the challenge.

Stenographic Record for a Hearing

Section 908(7) of the MPC explicitly requires a stenographic record of a zoning hearing board's proceedings (i.e., hearing) to provide the courts with a complete and accurate record in the event of an appeal. Minutes, notes, and tapes of the hearing are not legally sufficient. Court rulings indicate that transcripts should conform with transcripts prepared in civil trials. Without a stenographic transcript, the zoning hearing board runs the risk of a remand by the court for a rehearing by the zoning hearing board.

A stenographic record is not required for a meeting of the zoning hearing board where a hearing is not conducted. In such instances, the zoning hearing board may document the meeting through traditional written meeting minutes.

Hearing Officer

Instead of conducting the hearing itself, the zoning hearing board may appoint a member of the board or an independent attorney as a hearing officer charged with conducting the hearings. Whether the zoning hearing board or a hearing officer conducts the hearing, the findings and decision must be made by the zoning hearing board. However, the appellant or the applicant, as the case may be, in addition to the municipality may, prior to the decision, agree to waive the decision or findings by the zoning hearing board and accept the decision or findings of the hearing officer as final.

Appellant and Applicant

The MPC specifies who may file an appeal or application requiring a hearing before the zoning hearing board. The appellant in an appeal may be an affected landowner, any office or agent of a municipality, or any aggrieved person. An applicant for a variance and special exception may be required by any landowner or any tenant with the permission of such landowner. An applicant filing a substantive validity challenge of an ordinance or map may be a landowner or person aggrieved by a use or development permitted on the land of another.

Section 107(a) of the MPC defines "landowner" to include:

- **the legal owner(s) of land**
- **the beneficial owner(s) of land, including the holder of an option or contract to purchase (whether or not such option or contract is subject to any conditions)**
- **a lessee, if authorized under the lease to exercise the rights of the landowner**
- **a person if having proprietary interest in land**

Parties and Standing

Section 908(3) of the MPC specifies that, in addition to the applicant or appellant "parties to the hearing are the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person including civic or community organizations permitted to appear by the board." The zoning hearing board is authorized to require that all persons who wish to be considered parties enter an appearance in writing on a form provided by the zoning hearing board for that purpose. However, the form functions simply as a means to indicate to the zoning hearing board one's interest in being considered as a party; it does not guarantee party status or, if not submitted, deny party status.

The zoning hearing board decides who may participate in the hearing before it as a party, subject to the provisions of Section 908(3) of the MPC, and formally acknowledges such parties for the record. This is referred to as “standing” to participate as a party. Standing to participate as a party may be challenged by the appellant or applicant. Such challenges must be raised at the time the party is seeking standing.

The MPC permits standing to any person “affected” by the application. This provision requires the zoning hearing board to consider if a person claiming party status is, in fact, “affected” by the matter before it. The courts have determined that a claim based purely on taxpayer status is not sufficient to establish standing as a “person affected by the application.” By contrast, a person whose property, residence, or business abuts the property that is the subject of the appeal is affected and has standing. However, as distance between the property of the individual seeking affected party status and the property that is the subject of the proceeding increases, standing becomes less certain.

Standing to participate as an affected person cannot be denied merely because the affected person’s property is located in another municipality.

Party Rights

A party has the right to be represented by counsel. A party must be given the opportunity to respond, present evidence (through the oral testimony of witnesses and exhibits), and cross-examine adverse witnesses on all relevant issues.

Subpoenas

Section 908(4) of the MPC gives the chairman, acting chairman, or hearing officer presiding over the hearing the power to issue subpoenas to compel both the attendance of witnesses and the production of relevant papers and documents. However, there is no right to a subpoena where the witnesses or materials requested are not shown to be relevant to the proceeding.

Evidence

All testimony must be sworn.

Unsworn statements offered during the course of the hearing or upon the close of the record of the hearing do not constitute legal evidence of record. The zoning hearing board may not consider unsworn statements when making its findings and decision. Unsworn statements also are not part of the record in the event of an appeal taken from the decision of the zoning hearing board.

Formal rules of evidence do not apply in hearings conducted by the zoning hearing board. Section 908(6) of the MPC authorizes the zoning hearing board to exclude any such irrelevant, immaterial, or unduly repetitious evidence that may be heard during the course of the hearing. Hearsay evidence – such as testimony about something the witness stated was reported by another who heard or saw it – if not objected to, is given evidentiary weight as the zoning hearing board deems appropriate with respect to the issues to be decided and in the consideration of the evidence as the whole.

The zoning hearing board is charged with the duty to make such findings of fact from the record made before it as are necessary to make its decision on an appeal or application. In performing this duty, the zoning hearing board assigns the weight as proof to be given to the evidence of record. The zoning hearing board also is cloaked with the authority to make determinations as to the credibility of a witness, testimony, or exhibit. As fact finder, the zoning hearing board has the power to reject even uncontradicted testimony if the board finds that testimony to be lacking in credibility.

Burden of Proof

The burden of proof differs depending on the application or appeal before the zoning hearing board.

An applicant for variance is required at the time of the hearing to demonstrate that it meets the criteria set forth in Section 910.2 of the MPC for the grant of a variance. An applicant for use variance also must demonstrate either that (a) the physical conditions of the property are such that it cannot be used for a permitted purpose; (b) the property can be conformed for a permitted use only at a prohibitive expense; or (c) the property is valueless for any purpose permitted by the zoning ordinance. *Allegheny West Civic Council, Inc. v Zoning Bd. of Adjustment*, 689 A.2d 225 (1997).

An applicant for special exception is required at the time of the hearing to present evidence that it meets the specific or objective criteria and standards of the ordinance for the proposed use as a special exception. It is not sufficient that an applicant promise it would come into compliance with the specific requirements at a future date. However, the applicant for a special exception is not required to demonstrate compliance with any subjective requirement of the ordinance for the proposed use. Rather, those objecting to the application for special exception bear the burden of proof relating to a subjective requirement. Additionally, such objectors must demonstrate that the proposed use will cause harm greater than normal for a use of the type proposed.

In a substantive validity challenge, the challenger bears the burden of proof. The ordinance enjoys a presumption of validity.

On appeal of an enforcement notice, the municipality has the responsibility of presenting its evidence first.

VI. Decision of the Board

Communications

A zoning hearing board functions in a quasi-judicial capacity. In such capacity, the zoning hearing board must maintain its impartiality in matters that may come before it for adjudication and decision. In making such decision, the zoning hearing board is limited to the record made before it during required hearing(s).

In the time following the start of the hearing and prior to a rendering of the decision or findings, it is important that no communication be made with any party or the party's representatives unless all parties are given the opportunity to participate. Section 908(8) of the MPC provides that:

The Board or the hearing officer shall not communicate, directly or indirectly, with any party or his representatives in connection with any issue involved except upon notice and opportunity for all parties to participate, shall not take notice of any communication, reports, staff memoranda, or other materials, except advice from their solicitor, unless the parties are afforded the opportunity to contest the material so noticed and shall not inspect the site or its surroundings after the commencement of hearings with any party or his representative unless all parties are given an opportunity to be present.

A copy of the zoning officer's report filed with the zoning hearing board should also be provided to the other parties. Section 908(8) does not restrict zoning hearing board members from individually observing a site that is the subject of an application before it.

Decision

Following the close of the evidentiary record (the hearing), a zoning hearing board is permitted, but not required, to enter into executive session to deliberate an application or appeal. However, a zoning hearing board must reenter open session to consider a motion and to vote on the matter before it for decision. The result is the issuance of a verbal decision.

In *Kennedy v. Upper Milford Township Zoning Hearing Board*, 834 A.2d 1104 (Pa. 2001), the Pennsylvania Supreme Court concluded that an executive session of a zoning hearing board to deliberate on an application before it did not violate the open meeting provisions of the Sunshine Act, 65 Pa. C.S. 704).

A zoning hearing board is required to issue a written decision on an application or appeal. Where no decision is called for, the zoning hearing board must issue only written findings. An appeal from the decision of the zoning hearing board to the courts is taken in the form of a land use appeal from the written decision.

In the event of a tie vote of the zoning hearing board on an application, the courts have advised that the result is a denial of the application. However, if the appellant was a person complaining of the issuance of a permit to another by the zoning officer, the effect of a tie vote would be to sustain the status-quo, that is uphold the issuance of the permit.

Findings of Fact

Section 908(9) of the MPC requires that where an application or appeal is contested (objected to by a party) or denied, the written decision of the zoning hearing board must be accompanied by findings of fact, the conclusions based on these facts, and the reasons that such conclusions were reached.

Section 908(9) also requires that any conclusions based on the MPC or any ordinance, rule, or regulation "contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found."

A zoning hearing board may be tempted to cut corners and issue a decision without the required findings of fact and conclusions of law, often with the belief that its decision may not be appealed. However, this practice denies the municipality, the parties, and the court of a full and complete record of the zoning hearing board's decision.

The MPC does not specifically require a decision granting an uncontested application to be accompanied by findings of fact or written decision. However, it would be prudent for a zoning hearing board to do so to document its action.

Timeliness

A written decision, or when no decision is called for, written findings must be issued within 45 days of the last hearing.

The last hearing refers to the hearing at which the evidentiary record (receipt of testimony and offer of exhibits) has been closed. Such date is not extended by an opportunity for parties to make oral or written argument, unless the extension of the hearing to receive argument is specifically provided for on the record.

However, where the hearing officer conducts the hearing and there has been no stipulation that his or her decision or findings are final, the zoning hearing board must make the hearing officer's report and recommendations available to the parties within 45 days. The zoning hearing board then has 30 days after issuance of the hearing officer's report to issue a written decision.

The applicant may offer in writing or clearly on the record to extend the time period for the issuance of the decision. The zoning hearing board must issue its decision by the expiration of the extended period.

Deemed Decision of Approval

Failure to comply with certain procedural requirements of the MPC will result in a decision "deemed to have been rendered in favor of the applicant" (commonly referred to as a deemed approval). The zoning hearing board is not permitted to file an appeal from the deemed approval. Only a person aggrieved by the deemed approval decision may file an appeal.

Such deemed approval occurs when the zoning hearing board fails to:

- hold a public hearing on an application or appeal within 60 days of the filing of the application or appeal;
- conduct the hearing in accordance with the time requirements specified by Section 908(9) of the MPC;
- issue a written decision within the required time period specified by Section 908(9) of the MPC; or
- commence or conduct the hearing or issue the decision within the extended time period as extended in writing by the applicant or appellant, or agreed to by the applicant or appellant on the record.

The purpose of the harsh legislative provision for a deemed approval is to assure timely hearing and decision on an application and to minimize dilatory conduct by the zoning hearing board.

A protestant or person affected by and opposing an application is not considered an applicant and enjoys no rights to a deemed decision.

A deemed approval is not self-enforcing. When a deemed approval occurs, the zoning hearing board must publish public notice of the deemed approval within 10 days from the last day the zoning hearing board could have met to issue a decision. Where the zoning hearing board fails to provide this public notice, the applicant may do so. This publication of public notice of the claim for a deemed approval triggers the start of the 30-day appeal period by a person aggrieved by the deemed approval.

Deemed Decision of Denial

There is one situation in which inaction results in a deemed denial instead of a deemed approval. If a landowner challenges the validity of the ordinance on substantive grounds the validity challenge is deemed denied according to Section 916.1(f) of the MPC when:

1. A hearing on the validity challenge is not held within 60 days of the filing of the challenge, or
2. The zoning hearing board fails to issue a decision within 45 days after the last hearing.

Notice of Decision

The zoning hearing board first renders an oral decision on the application. However, the MPC requires a written decision, subject to required procedures. Failure to timely issue a written decision may result in a deemed approval of the application as submitted.

Section 908(9) of the MPC requires the zoning hearing board – or appointed hearing officer – to render its **written** decision within 45 days after the last hearing (the close of the record). In cases in which the application is contested or denied, each written decision shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefore.

Section 908(10) of the MPC requires that a copy of the final decision, or where no decision is called for, of the findings of fact issued by the zoning hearing board must be delivered to the applicant personally or must be mailed to him not later than the day after the date of the written decision. To all other persons who have filed their name and address with the zoning hearing board, including a party, not later than the last day of the hearing, the zoning hearing board must provide by mail or hand delivery a brief notice of the decision or findings with a statement of the place at which the full written decision or findings may be examined.

VII. Expiration of Approvals

Some zoning ordinances contain provisions which stipulate that a grant of a variance or special exception will automatically expire within a reasonable period of time if a building permit has not been obtained, and construction has not commenced. Such expiration periods may be as short as six months or a period of a year or more, depending on the type of application or extent of development. An expiration provision runs with the land and is not personal to a given owner. The zoning hearing board may attach a condition providing for expiration of an approval within a reasonable period of time if the condition has not been satisfied. If the zoning ordinance contains no time limitation and no time limitation was imposed by way of a condition, the zoning hearing board approval can be exercised by a new owner years later.

The MPC protects vested rights of a developer who obtains a special exception or conditional use approval in order to proceed with a subdivision or land development. Section 917 of the MPC provides that, following special exception approval, the developer is entitled to at least six months in which to submit the subdivision or land development plan free of any intervening zoning changes (changes to a zoning ordinance or map enacted subsequent to the filing of the special exception application).

The Pennsylvania Commonwealth Court addressed the issue of whether the grant of a variance which later expired is binding on a subsequent or repeat application. It ruled that the zoning hearing board does not abuse its discretion if it denies a second variance after expiration of the earlier variance. The court concluded that "...any subsequent variance application, even one seeking the same variance for the same parcel of land, is a new application and the applicant must prove all elements necessary to the variance." *Omnivest v. Stewartstown Borough Zoning Hearing Board*, 641 A.2d 648, 652 (Pa. Cmwlth. 1994).

VIII. Continuances

A hearing on an application, appeal, or substantive validity challenge should not be postponed to a later date without substantial or compelling reasons, especially if the issue is of great concern and has attracted an audience. Nonetheless, the grant of a request for continuance should not be unreasonably withheld. A sample rule on continuance may be found in Appendix I: Suggested Zoning Hearing Board Rules of Procedure and Bylaws (Section 6.14).

The Sunshine Act contains requirements for public notice of a recessed or reconvened meeting. A notice must be prominently posted at the municipal office or intended hearing site giving the place, date, and time of the future meeting. Notice must also be given to the parties who have provided the municipality with a stamped, self-addressed envelope before the meeting. However, it may be prudent to publish public notice of the future hearing or to provide notice of the future hearing in the manner required by Section 908(c) of the MPC for the initial hearing.

IX. Multiple Applications

Zoning hearing boards are occasionally presented with multiple applications, filed simultaneously or consecutively, for the same property. Applications resting on different sections of the zoning ordinance or espousing different legal theories in support of an application (such as concurrent applications for variance and special exception or for use variance and variance by estoppel) are not repetitive or duplicative applications and must be heard and decision rendered on their individual merits. Courts have emphasized that changes in facts or circumstances are legitimate grounds for permitting subsequent similar applications or appeals.

X. Stay of Proceedings and Bond

Section 915.1(a) of the MPC provides that the filing of validity challenge to an ordinance or an appeal from the determination of the zoning officer automatically stays (stops) all affected land development pursuant to the challenged ordinance or official action. However, Section 915.1 of the MPC provides that if the zoning officer or other appropriate agency certifies that such a halt would cause an imminent danger to life or property, then the development may be stopped only by a restraining order granted by the zoning hearing board or by the court having jurisdiction, but following notice to the zoning officer or other appropriate body.

Section 915.1 authorizes an applicant to petition the county court of common pleas to require that those contesting an authorized permit or approval post bond as a condition to continuing the appeal. The court must hold a hearing to determine whether the appeal is frivolous. The petitioner bears the burden of proving that the appeal is frivolous and, if frivolous, the requested bond amount. The court exercises discretion to grant the petition or not and, where granted, has discretion to set the amount of the bond to be posted. The court's order on the petition for bond is not immediately appealable.

If the respondent to the petition for a bond refuses to post bond as ordered by the court and later appeals the grant of the petition for bond to an appellate court and loses, the respondent is then liable for all reasonable costs, expenses, and attorney fees incurred by the petitioner for the bond.

XI. Mediation

Section 908.10f of the MPC authorizes the voluntary use of mediation to “aid in completing” the proceedings on appeals, applications and substantive validity challenges heard by the zoning hearing board. Mediation supplements, but is not a substitute for, the required MPC proceedings. The zoning hearing board may not initiate or participate in the mediation. Section 908.1(b) specifies the procedures for mediation.

XII. Enforcement

The zoning hearing board has no enforcement powers or remedial powers. A zoning hearing board exists solely as an adjudicative body empowered to review matters brought to it under the respective provisions of the MPC.

A zoning hearing board has no power to enforce conditions of approval set forth in its decisions. The zoning officer is authorized to issue an enforcement notice and, if deemed necessary, issue a notice of revocation of the zoning hearing board’s approval for noncompliance with imposed conditions. The landowner may appeal from the zoning officer’s actions.

XIII. Appeals to Court

Article X-A of the MPC governs all matters of appeal taken from a decision of the zoning hearing board. Section 1001-A of the MPC mandates that the filing of a land use appeal is the exclusive means for securing review of the zoning hearing board’s decision. Section 1002-A of the MPC further mandates that a land use appeal must be brought within 30 days after the issuance of the decision by the zoning hearing board. Upon expiration of the 30-day period, the court is without jurisdiction to hear the land use appeal.

A land use appeal filed before the issuance of the written decision of the zoning hearing board is premature. If the appellant fails to file a land use appeal after the issuance of the written decision, the right to seek review of the zoning hearing board decision will be lost. In the event a zoning hearing board fails to issue a written decision within 45 days of the last hearing, a land use appeal may be filed within 30 days of the 45th day following the last hearing.

Land use appeals are filed with the county court of common pleas. In hearing such land appeals, the court of common pleas is not functioning as a trial court, but as a court of appeal. As an appellate court, the court of common pleas will not disturb the findings of fact and credibility findings made by the zoning hearing board. Rather, the court is limited to determining whether there has been a constitutional violation, an error of law, or an abuse of discretion by the zoning hearing board’s decision.

However, a party may request the county court of common pleas to receive additional evidence. The decision to hear additional evidence rests with the discretion of the court of common pleas. Where the requesting party had opportunity

to present the evidence to the zoning hearing board, the court typically denies the request. Where the court of common pleas hears additional evidence, the court is then required to make its own findings of fact and conclusions of law.

Section 1003-A of the MPC requires the court, upon the filing of a timely land use appeal, to issue, by registered or certified mail, the copy of the land use appeal notice together with an order (called a writ of certiorari) commanding the zoning hearing board to certify its entire record of the matter that is the subject of the appeal to the court within 20 days after the receipt of the writ.

Appeal from the decision of the county court of common pleas must be taken to the Commonwealth Court of Pennsylvania. Such appeal must be filed within 30 days of the date of the decision of the county court of common pleas. Upon expiration of the 30-day period, the Commonwealth Court is without jurisdiction to hear the land use appeal.

The zoning hearing board has no standing to appeal a reversal of its decision by the county court of common pleas to the Commonwealth Court.

XIV. Administrative Fees

The governing body may set reasonable administrative fees for applications or appeal to a zoning hearing board. The MPC authorizes these fees to include (i) compensation for the secretary and members of the zoning hearing board, (ii) notice and advertising costs, (iii) necessary administrative overhead connected with the hearing, and (iv) one half of the cost of the stenographer's appearance fee. However, fees should be reasonable and structured to recover the municipality's expenses. A municipality cannot use its powers to charge administrative fees for the purpose of raising general revenues or to frustrate or prevent zoning applications.

The MPC prohibits a municipality from imposing the following administrative fees: (i) the legal expense of the zoning hearing board, (ii) expenses for engineering, architectural, or other technical consultants or expert witness costs, and (iii) transcriptions.

Section 616.1(e) of the MPC requires a municipality to return the filing fee to the appealing party where and when the party is appealing an enforcement notice and wins before the zoning hearing board. The filing fee must be returned even if the appealing party loses before the zoning hearing board, but prevails in a subsequent appeal to court.

XV. Conclusion

The job of the zoning hearing board is obviously complex. However, it is a task necessary for proper administration of the zoning ordinance. The preceding pages have presented a basic overview of the zoning hearing board's functions in an attempt to help local officials better understand how a zoning hearing board operates.

XVI. Planning Assistance from DCED

DCED's Governor's Center for Local Government Services (Center) provides a full range of technical and financial services to all of Pennsylvania's local governments. The Center is the principal state agency responsible for helping with planning and land use matters discussed in this publication.

Local government officials, planners, and other interested individuals have several sources of assistance from the Center:

- **Toll-free telephone number** – 888-223-6837. Callers will be connected with staff that has knowledge of planning, land use, zoning, subdivision and land development, and the PA Municipalities Planning Code.
- **Website** – dced.pa.gov/lgs. There are helpful pages under Community Planning, plus information on the topics listed below.
- **Publications** – dced.pa.gov/publications. This and the other nine Planning Series publications listed in the Preface can be downloaded and printed for free, or hard copies can be purchased at cost. The website also has publications with suggested provisions for floodplain management ordinances, plus publications on many topics from fiscal management to intergovernmental cooperation to open meetings.
- **Training** – PATraininghub.org. DCED provides funding for local government training programs via the PA Local Government Training Partnership. There are training courses, videos, and online instruction on a variety of topics, including planning and land use, plus ten fact sheets on planning and land use topics.
- **Land use law library** – www.landuselawinpa.com. DCED and the PA Local Government Training Partnership maintain an online library of significant court cases on zoning, subdivision and land development, and other land use topics.
- **Planning and land use eLibrary** – <http://elibrary.pacounties.org>. DCED and the County Commissioners Association of Pennsylvania maintain an online library of comprehensive plans, zoning ordinances, and subdivision and land development ordinances in effect in Pennsylvania counties, cities, boroughs, and townships.
- **Financial assistance** – dced.pa.gov/program. Currently DCED provides funding for local government planning through the Municipal Assistance Program. MAP offers up to 50 percent grants for costs of undertaking comprehensive plans, zoning ordinances, subdivision and land development ordinances, and more.

XVII. Other Planning Assistance

Assistance and training on planning and land use are available from other sources:

- **County planning agencies** – Pennsylvania counties have a long tradition of being a source of capacity and expertise in planning and land use. Currently, every county has a planning commission, department, or both, or other agency like a development department that handles planning matters. Every county has staff involved in planning. Many county planning agencies offer assistance to local governments in their counties.
- **American Planning Association (APA)** – The Pennsylvania Chapter has an annual conference with many speakers and sessions on topics from local to national interest, plus training workshops and other educational events and information: <http://planningpa.org>. The national organization has an annual conference, publications, and a variety of audio, web, and e-learning resources: <https://www.planning.org>.
- **Local government associations** – In addition to programs through the PA Local Government Training Partnership, Pennsylvania's statewide associations representing different categories of local governments also offer annual conferences and training programs, including planning and land use, to their member local governments.
- **Penn State Extension** – Statewide Extension programming includes courses, webinars, and publications on community issues including planning and land use. Within that is the Pennsylvania Municipal Planning Education Institute which offers training programs on planning, zoning, and subdivision and land development: <http://extension.psu.edu/community>.
- **Universities and colleges** – Several Pennsylvania universities and colleges offer degree programs in planning. Others offer planning-related courses in geography or design degrees. Many have a community service objective and assist community groups and local governments with faculty and/or student service projects.

Appendix I

Suggested Zoning Hearing Board Rules of Procedure and Bylaws

ARTICLE 1. GENERAL PROVISIONS

- 1.1 The zoning hearing board of _____ shall be governed by the provisions of the Pennsylvania Municipalities Planning Code (MPC), Act 247 of 1968, P.L. 805, *as reenacted and amended*, 53 P.S. § 10101, *et seq.*, the zoning ordinance and by those rules of procedure and bylaws.
- 1.2 The zoning hearing board shall become familiar with all other applicable state statutes such as the Sunshine Act, Act 94 of 1986, *as amended*, 67 Pa. C.S. § 701, *et seq.* and the Public Official and Employee Ethics Act, 65 Pa.C.S. § 1101 *et seq.* (Ethics Act).
- 1.3 The zoning hearing board shall become familiar with the statement of community development objectives as contained within the zoning ordinance or stated by reference to the community comprehensive plan, and shall grant the minimum relief which will insure that the goals and objectives of the community are preserved and that substantial justice is done.
- 1.4 Nothing herein shall be construed to give or grant to the zoning hearing board the power or authority to alter or change the zoning ordinance, including the zoning map, which authority is reserved to the governing body.
- 1.5 Within the limits of funds appropriated by the governing body, the zoning hearing board may employ or contract for secretaries, clerks, legal counsel, consultants, and other technical and clerical services.
- 1.6 The legal counsel to the zoning hearing board shall be consulted in cases where the powers of the zoning hearing board are not clearly defined.

ARTICLE 2. OFFICERS AND DUTIES

- 2.1 ELECTION. The zoning hearing board shall, at its annual organizational* meeting, elect from its own membership, officers which shall consist of a chairman, a vice-chairman, and may either elect a secretary, or appoint a non-member as secretary. These officers shall serve annual terms as such and may succeed themselves.
- 2.2 CHAIRMAN. The chairman shall perform all duties required by law, ordinance, and these rules: shall preside at all meetings of the zoning hearing board; shall decide on all points of order and procedure, subject to these rules, unless directed otherwise by a majority of the zoning hearing board; shall appoint any committees found necessary to carry out the business of the zoning hearing board; and shall have power to administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant documents and papers. The chairman's signature shall be the official signature of the zoning hearing board and shall appear on all decisions as directed by the zoning hearing board.
- 2.3 VICE CHAIRMAN. The vice chairman, in the absence, disability or disqualification of the chairman, shall perform all the duties and exercise all the powers of the chairman.

* Organizational meetings are typically held on the first Monday of January, or the first Tuesday if the Monday falls on a holiday. However, practical considerations might dictate holding the zoning hearing board's organizational meeting until the first scheduled public hearing of the zoning hearing board. Terms of the office of members should be scheduled to expire on December 31.

- 2.4 **SECRETARY.** The secretary shall record and maintain permanent minutes of the zoning hearing board's proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating that fact; shall keep records of the zoning hearing board's examinations and other official actions; shall cause to be made a stenographic record of all hearings, including the names and addresses of all persons appearing before the zoning hearing board; shall, subject to the zoning hearing board and the chairman, conduct the correspondence of the zoning hearing board; shall cause to be published, in a local newspaper, public notices of meetings or hearings as required by law and by these rules of procedures; shall cause to be conspicuously posted a written notice on the affected tract at least one week prior to the hearing; shall file zoning hearing board minutes and records in the municipal office, which minutes and records shall be a public record; and shall submit a report of the zoning hearing board's activities to the governing body once a year or as required by the governing body.

NOTE: The zoning hearing board is required to make a stenographic recording of its public hearings. Minutes are not a legally sufficient substitute for a stenographic recording.

- 2.5 **VACANCIES.** The zoning hearing board shall promptly notify the governing body of any vacancies which occur. Should a vacancy occur among the officers of the zoning hearing board, such office shall be filled by election, for the unexpired term, at the next meeting of the full zoning hearing board.
- 2.6 **ALTERNATE MEMBERS.** When alternates have been appointed by resolution of the governing body, the chairman of the zoning hearing board shall designate as many alternates as necessary to reach a quorum. Designation of an alternate member shall be made on a case-by-case basis in rotation according to declining seniority. Once seated the alternate shall continue to serve on the zoning hearing board in all proceedings involving the matter or case for which the alternate was appointed until the zoning hearing board has made a decision on the case.

When an alternate has not been designated to sit by the chairman, the alternate may participate in any proceeding or discussion before the zoning hearing board but shall not vote or be compensated. Alternates shall hold no other office in the municipality, including membership on the planning commission and zoning officer.

ARTICLE 3. MEETINGS

- 3.1 **ANNUAL MEETING.** The annual organizational meeting of the zoning hearing board shall be the first regular meeting of the year.
- 3.2 **PUBLIC NOTICE.** The zoning hearing board shall hold all meetings at specified times and places of which public notice shall be given.
- 3.3 **QUORUM.** A quorum shall be not less than a majority of all members of the zoning hearing board and is required for any decision or official action by the zoning hearing board, except as modified herein.

ARTICLE 4. BOARD'S FUNCTIONS

- 4.1 The zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in matters authorized by Section 909.1(a) Jurisdiction of the MPC. As specified in the MPC, the zoning hearing board has nine functions:
- (A) Substantive challenges to the validity of any land use ordinance, except curative amendments
 - (B) Appeals from the determination of the zoning officer, including but not limited to:
 - (i) The granting or denial of any permit, or failure to act on the application
 - (ii) The issuance of any cease and desist order
 - (iii) The registration or refusal to register any nonconforming use, structure, or lot
 - (C) Appeals from determinations by the municipal engineer or zoning officer with respect to floodplain ordinances or provisions

- (D) Variances
- (E) Special exceptions
- (F) Appeals from determinations in the administration of transfers of development rights or performance density provisions
- (G) Appeals from the zoning officer's determination of a preliminary opinion under Section 916.2
- (H) Appeals from determinations by the zoning officer or engineer regarding sedimentation and erosion control or storm water management not involving Article V or Article VII applications

ARTICLE 5. HEARINGS

- 5.1 INITIATING ACTION BEFORE THE BOARD. All action before the zoning hearing board shall be initiated by a written application or appeal. All applications shall be made on forms specified by the zoning hearing board. No application shall be accepted unless the same shall be fully and legibly completed and unless all exhibits and supplemental material required by the application shall be attached and until all fees required shall have been paid.
- 5.2 HEARING SCHEDULE. In no instance will a hearing be scheduled later than 60 days from the date of the applicant's application or appeal for a hearing, unless the applicant has agreed in writing to an extension of time.
- 5.3 NOTIFICATION OF HEARING.
 - (A) Whenever a hearing has been scheduled, public notice shall be given to the general public by means of publication once each week for two successive weeks in a newspaper of general circulation with the community. Such notice shall state the time and place of the hearing and the particular nature of the matter to be considered. The first publication shall not be more than 30 days and the second publication shall not be less than seven days prior to the date of the hearing.
 - (B) Written notice shall be given to the applicant, the municipal planning commission, the zoning officer, and to any person who has made timely request for such notice.
 - (C) In addition to the notice provided herein, the zoning officer shall conspicuously post notice of said hearing on the affected tract of land no less than seven days prior to the date of the hearing.
- 5.4 CONDUCT OF HEARING. The hearing shall be conducted by the zoning hearing board, or the board may appoint any member of the zoning hearing board or an independent attorney as a hearing officer.
- 5.5 ORDER OF HEARING.
 - (A) Hearing called to order
 - (B) Chairman's statement of reason for hearing
 - (C) Chairman's statement of parties to hearing
 - (D) Identification of other individuals seeking party status
 - (E) Outline of procedures to be followed during hearing
 - (F) Applicant's presentation of their case
 - (i) Objectors cross-examine applicant's witnesses
 - (ii) Board cross-examines applicant's witnesses

- (G) Statement of the zoning officer
 - (i) Applicant cross-examines objector's witnesses
 - (ii) Board cross-examines objector's witnesses
 - (H) Objector's presentation of their case
 - (i) Applicant cross-examines objector's witnesses
 - (ii) Board cross-examines objector's witness
 - (I) Applicant's legal argument
 - (J) Objector's legal argument
 - (K) Deliberation and vote
 - (L) Concluding remarks and, if deliberation and vote is to occur at a later date, notice of when decision is expected to be made or written decision is expected to be issued
 - (M) Adjournment of hearing
- 5.6 STENOGRAPHIC RECORD. The zoning hearing board or the hearing officer, as the case may be, shall keep a stenographic record of the proceedings. A transcript of the proceedings and copies of graphic or written material received in evidence shall be made available to any party at cost.
- 5.7 PARTIES. The parties to the hearing shall be the municipality, any person affected by the application who has made timely appearance of record before the zoning hearing board, and any other person including civic or community organizations permitted to appear by the board. All persons who wish to be considered parties shall enter appearances in writing on forms provided by the board for that purpose. Persons affected shall not be denied standing because they do not reside nor have a property interest within the municipal boundaries
- 5.8 REPRESENTATION. All parties shall have the right to be represented by counsel and shall be afforded the opportunity to respond and present evidence and argument, and to cross-examine adverse witnesses on all relevant issues.
- 5.9 WITNESSES. All witnesses shall testify under oath.
- 5.10 EVIDENCE. The zoning hearing board shall not be bound by strict rules of evidence, but it may exclude irrelevant, immaterial, incompetent, or unduly repetitious testimony or evidence. The chairman, or hearing officer, as the case may be shall rule on all questions relating to the admissibility of evidence, which may be overruled by a majority of the zoning hearing board.
- 5.11 COMMUNICATION. The board or the hearing officer shall not communicate, directly or indirectly, with any party or his representatives in connection with any issue involved except upon notice and opportunity for all parties to participate, shall not take notice of any communication, reports, staff memoranda, or other materials except advice from the solicitor, unless the parties are afforded an opportunity to contest the material so noticed and shall not inspect the site or its surroundings after the commencement of hearings with any party or his representative unless all parties are given an opportunity to be present.

5.12 DECISIONS.

- (A) The zoning hearing board or the hearing officer, as the case may be, shall render a written decision or when no decision is called for, make written findings within 45 days after the last hearing before the zoning hearing board or hearing officer.
- (B) If the hearing is conducted by a hearing officer, and there has been no stipulation by the appellant or the applicant and the municipality that the hearing officer's decision or findings are final, the zoning hearing board shall make his report and recommendations available to the parties within 45 days, and the parties shall be entitled to make written representations thereon to the zoning hearing board prior to final decision or entry of findings. The zoning hearing board's decision shall be entered no later than 30 days after the report of the hearing officer.
- (C) The zoning hearing board may deliberate in executive session. All deliberations shall occur within the allotted 45-day time limit for the issuance of a decision.
- (D) The zoning hearing board shall vote on all matters in public session within the allotted 45-day time limit.
- (E) All matters shall be decided by a roll call vote. Decisions on any matter before the zoning hearing board shall require the affirmative vote of those present and voting unless otherwise specified herein.
- (F) No member of the zoning hearing board shall sit in hearing or vote on any matter in which he is personally or financially interested. Said member **shall not** be counted by the zoning hearing board in establishing the quorum for such matters, i.e. for a three member zoning hearing board, if one member removes himself, two members are still required for a quorum.
- (G) No member of the zoning hearing board shall vote on the adjudication of any matter unless he has attended the public hearing thereon.
- (H) A tie vote shall be considered a rejection of the application under consideration. However, if a person aggrieved has appealed the grant of a permit or approval, a tie vote upholds the prior approval.
- (I) A copy of the final decision or, where no decision is called for, of the findings shall be delivered to the applicant personally or mailed to him not later than the day following its date. The zoning hearing board shall provide by mail or otherwise, to all other persons who have filed their name and address with the zoning hearing board, brief notice of the decision or findings and a statement of the place at which the full decision or findings may be examined.

5.13 CONTINUANCES. On its own motion, or on approval of requests by applicant, appellants or their authorized agents, the zoning hearing board may provide for later continuances of cases on which hearings have begun. Such continuances shall be permitted only for good cause, stated in the motion, and, unless time and place is stated, shall require new public notice, with fees paid by applicants or appellants if continuances are at their request or result from their actions.

A notice of the place, date and time of the continued hearing shall also be posted prominently at the municipal office where the hearing will be continued.

5.14 FAILURE TO HOLD HEARING OR RENDER DECISION. Where the zoning hearing board fails to render a decision within the period required, or fails to hold a hearing within the period required, the decision shall be deemed to have been rendered in favor of the applicant. However, failure to act on a validity challenge results in a deemed denial. When a decision has been rendered in favor of the applicant because of the failure of the board to meet or render a decision, the board shall give public notice of deemed approval within 10 days from the last day it could have met to render a decision in the same manner as in Section 6.4(A).

- 5.15 RECONSIDERATION. Once an application has been voted upon and the meeting adjourned, there shall be no reconsideration of a decision of the board, except that the applicant may reapply based upon new evidence that substantially alters conditions of the petition.

ARTICLE 6. APPEALS

- 6.1 The procedure set forth in Article X-A of the Pennsylvania Municipalities Planning Code shall constitute the exclusive mode of appeal from any decision of the zoning hearing board.

ARTICLE 7. ADOPTION AND AMENDMENT OF RULES

- 7.1 These rules shall be adopted and may be amended by an affirmative majority vote of all members of the board.
- 7.2 Any proposed amendment must be presented in writing at a regular or special meeting preceding the meeting at which the vote is taken.

The foregoing rules or procedure and bylaws are hereby adopted, by the Zoning Hearing Board of _____, Pennsylvania on _____, 20____.

Chairman

Secretary

Appendix II

Pertinent MPC and Sunshine Act Definitions

Selected MPC Definitions

Section 107(a):

Public hearing a formal meeting held pursuant to public notice by the governing body or planning agency, intended to inform and obtain public comment, prior to taking action in accordance with this act.

Public meeting a forum held pursuant to notice under the act of July 3, 1986 (P.L. 388, No. 84), known as the Sunshine Act.

Public notice published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall state the time and place of the hearing and the particular nature of the matter to be considered at the hearing. The first publication shall not be more than 30 days and the second publication shall not be less than seven days from the date of the hearing.

Section 107(b):

The following words and phrases when used in Articles IX and X-A of the MPC shall have the meanings given to them in this subsection unless the context clearly indicates otherwise:

Board any body granted jurisdiction under a land use ordinance or under this act to render final adjudications.

Decision final adjudication of any board or other body granted jurisdiction under any land use ordinance or this act to do so, either by reason of the grant of exclusive jurisdiction or by reason of appeals from determinations. All decisions shall be appealable to the court of common pleas of the county and judicial district wherein the municipality lies.

Determination final action by an officer, body or agency charged with the administration of any land use ordinance or applications thereunder, except the following:

- (1) The governing body
- (2) The zoning hearing board
- (3) The planning agency, only if and to the extent the planning agency is charged with final decision on preliminary or final plans under the subdivision and land development ordinance or planned residential development provisions

Determinations shall be appealable only to the boards designated as having jurisdiction for such appeal.

Hearing an administrative proceeding conducted by a board pursuant to section 909.1.

Land use ordinance any ordinance or map adopted pursuant to the authority granted in Articles IV, V, VI and VII.

Report any letter, review, memorandum, compilation, or similar writing made by any body, board, officer, or consultant other than a solicitor to any other body, board, officer, or consultant for the purpose of assisting the recipient of such report in the rendering of any decision or determination. All reports shall be deemed recommendatory and advisory only and shall not be binding upon the recipient, board, officer, body, or agency, nor shall any appeal lie therefrom. Any report used, received, or considered by the body, board, officer, or agency rendering a determination or decision shall be made available for inspection to the applicant and all other parties to any proceeding upon request, and copies thereof shall be provided at cost of reproduction.

Selected Definitions from the Sunshine Act

Deliberation the discussion of agency business held for the purpose of making a decision.

Meeting any prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action.

Official action

- (1) Recommendations made by an agency pursuant to statute, ordinance, or executive order
- (2) The establishment of policy by an agency
- (3) The decisions on agency business made by an agency
- (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report, or order

Special meeting a meeting scheduled by an agency after the agency's regular schedule of meetings has been established.

**Pennsylvania Department of Community & Economic Development
Governor's Center for Local Government Services**

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