

Resolution No.: 17-1223
Introduced: September 30, 2014
Adopted: October 7, 2014

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

By: County Council

SUBJECT: Board of Appeals Revised Rules of Procedure

Background

1. Section 2-113 of the Montgomery County Code provides that, subject to the approval of the Council, the Board may adopt rules of procedure to govern its proceedings. The Board's rules may govern filing fees, the conduct of meetings and hearings, and other procedures necessary to hear and decide cases.
2. The last revisions to the Board's Rules of Procedure were made by Resolution 15-554 on March 23, 2004.
3. The County Board of Appeals requested the Council to approve revised Rules of Procedure to update references to the current Zoning Ordinance to the code that will be in effect on October 30, 2014.
4. On September 30, 2014, the County Council introduced the proposed revised Rules of Procedure.

Action

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland approves the following resolution:

The Rules of Procedure of the Board of Appeals are revised as attached to update Zoning Ordinance references, so that the references are consistent with the code that will be in effect of October 30, 2014.

The effective date of the revised rules will be October 30, 2014.

This is a correct copy of Council action.


Linda M. Lauer
Linda M. Lauer, Clerk of the Council

Board of Appeals (BOA) Rules of Procedure.

- 1.0 Applications for Variances.
 - 1.1 Application Forms.
 - 1.2 Requirements for Variances.
 - 1.3 Amendments to Applications.
 - 1.4 Filing Fees.
 - 1.5 Refund of Fees.
 - 1.6 Consolidation of Cases.
 - 1.7 Notice Requirements.
 - 1.8 Sign Requirements.
- 2.0 Applications for Administrative Appeals.
 - 2.1 Application Forms; Time.
 - 2.2 Filing Fees.
 - 2.3 Refund of Fees.
 - 2.4 Consolidation of Cases.
 - 2.5 Notice Requirements.
 - 2.6 Additional Information.
- 3.0 Preliminary Motions.
- 4.0 Statements in Support of or Opposition to Applications.
 - 4.1 Filing Statements.
 - 4.2 Exceptions to Procedures.
 - 4.2.1 Expedited Hearings
 - 4.2.2 Late Filings.
- 5.0 Powers of the Board.
- 6.0 Assistance for the Board.
 - 6.1 County Attorney.
 - 6.2 Staff of Maryland-National Capital Park and Planning Commission.
 - 6.3 Other
- 7.0 Hearings and Worksessions.
 - 7.1 General Information.
 - 7.2 Hearings.
 - 7.2.1 Schedules.
 - 7.2.2 Agenda.
 - 7.2.3 Evidentiary rules.
 - 7.2.4 Procedures.
 - 7.2.5 Continuation.
 - 7.2.6 Closing the record.
 - 7.2.7 Transcript.
 - 7.3 Worksessions.
- 8.0 Decisions.
- 9.0 Opinions.
 - 9.1 Mailing Requirements.
 - 9.2 Extension of Time for Mailings.
 - 9.3 Correction of Clerical Errors.
- 10.0 Reconsideration and Rehearing—Conditional Uses and Variances.

- 10.1.1 In general.
- 10.1.2 Grounds.
- 10.2 Requesting Reconsideration.
- 10.3 Notice of Requests to Reconsider.
- 10.4 Response.
- 10.5 Board Action on Requests to Reconsider.
- 10.6 Time for Appeals From Decisions.
- 11.0 Reconsideration of Decisions on Administrative Appeals.
- 12.0 Modifications to Conditional Uses Granted by the Board.
 - 12.1 Requirements.
 - 12.2 Transfers of Conditional Uses.
- 13.0 Records.
 - 13.1 Opinion Book.
 - 13.2 Docket File.
 - 13.3 Case Files
- 14.0 Computing time
- 15.0 Amendment procedure.

The procedures of the Board of Appeals, Montgomery County, Maryland are governed by the following laws:

Maryland Annotated Code, Land Use Article, Sections 22-301, 22-305, and 22-403

Maryland Annotated Code, State Government Article, Sections 10-501 through 512

Montgomery County Code:

Sections 2A-1 through 2A-11

Sections 2-108 through 2-116

Chapter 59 (Zoning Ordinance)

These laws are further explained and supplemented by rules adopted by the Board and approved by the County Council pursuant to Article V, Section 2-113 of the County Code as stated below. Copies of these laws are available at County regional libraries and at the office of the Board of Appeals.

Please consult the office of the Board of Appeals at 100 Maryland Avenue, Room 217, Rockville, Maryland, phone: 240-777-6600, for further information and assistance.

1.0. Applications for variances.

1.1 *Application Forms.* To request a variance, an applicant must submit completed application forms, accompanied by a check or money order in the amount of the applicable fee, to the Board's office. Application forms are available at the Board's office.

Applications may be filed any weekday during regular office hours.

Applications must contain the information required by section 7.3.2.B of the Zoning Ordinance. For further pre-hearing filing requirements, see below.

1.2 *Requirements for Variances.* An application for a variance must include the information required by section 7.3.2.B of the Zoning Ordinance and a short statement by the applicant with the reasons for the request. The information required by section 7.3.2.B must be filed at least 30 days before the hearing date.

An application for a variance is not considered filed until all forms are correctly completed, all required supporting material is submitted and the fee is paid.

1.3 *Amendments to Applications.* See section 7.3.2.D.4 of the Zoning Ordinance.

1.4 *Filing Fees.* Filing fees are adopted by the County Council. Fee schedules are available at the Board office; the fee for a specific case can be obtained by telephone.

1.5 *Refund of Fees.* On written request, the Board may refund filing fees:

- a. if an application is withdrawn within 48 hours after it is filed or before public notice is issued (90% refunded);
- b. if an application is withdrawn before a public hearing (50% refunded); or
- c. if an action of the County Executive, County Council or an administrative board or agency resolves or moots the issues pending before the Board, whether or not the Board has held a public hearing (all or a portion refunded).

1.6 *Consolidation of Cases.*

- a. If an applicant files more than one variance or administrative appeal involving the same property, the Board may, on written request, grant:
 1. consolidation of cases; and
 2. payment of only the highest applicable fee.
- b. If an applicant files a variance application involving property for which the applicant has also filed a conditional use application with the Hearing Examiner, the Board may, on written request:
 1. refer the variance(s) to the Hearing Examiner in accordance with Section 7.6.2.B.2 to conduct a hearing and write a report and recommendation; and

2. waive the variance fee.

1.7 Notice Requirements. At the time of filing the applicant must furnish the Board with a list of persons entitled to notice as specified in sections 7.3.2.B and 7.5.2.E of the Zoning Ordinance.

If an adjacent or contiguous property is a condominium or co-op the following information is required:

- a. the mailing address of the governing body of the condominium or co-op;
- b. the name and address of the developer of the condominium or co-op if one is still involved in the project.

1.8 Sign Requirements. Signs must be posted by the applicant according to the requirements of section 7.5.2.C of the Zoning Ordinance.

Signs are available at the office of the Board of Appeals. The deposit specified in the fee schedule is required.

At the time of the hearing, the applicant must sign an affidavit that the sign was properly posted. The affidavit will be furnished by the Board office.

In uncontested cases, an applicant may remove the sign on receipt of the written opinion.

If the case was opposed - either through letters or personal appearance - the sign must remain posted for 30 days following receipt of the written opinion.

If there is a request for reconsideration or rehearing, the sign must remain posted for 30 days after the Board issues a final opinion.

The applicant must return the sign to the Board's office to receive a partial refund of the deposit.

If the sign is not returned within 21 days after the date on which applicant was permitted to remove it, the refund is forfeited.

2.0. Applications for administrative appeals.

2.1 Application Forms; Time. Unless the applicable law specifies a shorter time, an appeal from an administrative decision must be filed within 30 days after the day the decision was mailed. The required forms must be obtained at the office of the Board of Appeals.

2.2 Filing Fees. Filing fees are adopted by the County Council. Fee schedules are available at the Board office; the fee for a specific case can be obtained by telephone.

2.3 Refund of Fees. On written request, the Board may refund filing fees:

- a. if an application is withdrawn within 48 hours after it is filed or before public notice is issued (90% refunded);
- b. if an application is withdrawn before a public hearing (50% refunded); or
- c. if an action of the County Executive, County Council or an administrative board or agency resolves or moots the issues pending before the Board, whether or not the Board has held a public hearing (all or a portion refunded).

2.4 Consolidation of Cases. If an applicant files more than one administrative appeal involving the same property, the Board may, on written request, grant:

- a. consolidation of cases; and
- b. payment of only the highest applicable fee.

2.5 Notice Requirements. At the time of filing the applicant must furnish the Board with a list of persons entitled to notice as specified in section 7.5.2.E of the Zoning Ordinance.

If an adjacent or contiguous property is a condominium or co-op the following information is required:

- a. the mailing address of the governing body of the condominium or co-op;
- b. the name and address of the developer of the condominium or co-op if one is still involved in the project.

2.6 Additional Information. Refer to the Montgomery County Code, sections 2A-1 through 11, and section 7.6.1.C of the Zoning Ordinance.

3.0. Preliminary motions.

3.1 Notification. Any party filing motions, oppositions thereto, legal memoranda or procedural requests must serve copies on all parties entitled to original notice in the case and must certify the date and manner of this service in writing. The Board may direct staff to notify other interested parties.

3.2 *Motions to dismiss.*

3.2.1 *Motion to dismiss for lack of jurisdiction.* A party may at any time move to dismiss any issue in a case on the grounds that the Board lacks jurisdiction.

3.2.2 *Motion for summary disposition.* Any party may file a motion to dismiss any issue in a case on the grounds that the application and other supporting documentation establish that there is no genuine issue of material fact to be resolved and that dismissal or other appropriate relief should be rendered as a matter of law. The motion should be supported by documents, affidavits, applicable precedent, or other appropriate materials. Unless otherwise approved by the Board, the motion must be made no later than 20 days prior to the hearing. The Board on its own motion may consider summary disposition or other appropriate relief.

3.2.3 *Response.* A response to a motion for summary disposition must be filed no later than 10 days prior to the hearing. A response may not rest upon mere allegations or denials but must show, by documents, affidavits, applicable precedent, or other appropriate materials, that there is a genuine issue to be determined at the hearing.

3.2.4 *Oral argument.* The Board may, at its discretion, hear oral argument on a motion to dismiss. Any party may request oral argument.

3.2.5 *Decision.* The Board must decide the motion after the close of oral argument or at a worksession. If the Board's decision disposes of the case, the Board must issue its resolution in accordance with section 7.6.1.B.3 of the Montgomery County Zoning Ordinance. If summary disposition is denied, or if partial summary disposition is granted, the hearing must proceed as necessary.

4.0. Statements in support of or opposition to applications.

4.1 *Filing statements.* Groups and organizations, whether or not they are represented by counsel, and citizens represented by counsel, who wish to testify at the hearing must file 2 copies of their statement at least 10 days before the scheduled hearing. This statement must contain:

- a. a list of expert witnesses, if experts are being used, along with
 1. a summary of their testimony;
 2. a resume setting forth the expert witness' qualifications. If the witness has qualified as an expert before this Board within two years before the hearing, a resume is not required; and
 3. any formal report an expert witness has prepared;
- b. a list of other witnesses who will testify; and

- c. an estimate of the time required.

4.2 *Exceptions to Procedures.*

4.2.1 *Expedited hearings.* If a variance request is heard on less than 30 days notice, statements may be filed before or at the hearing.

4.2.2 *Late filings.* If good cause is shown for the requested delay, and the applicant will not be prejudiced by the late filing, the Board may also, upon written request, permit the filing of these statements less than 10 days before the hearing.

5.0. **Powers of the Board.**

In fulfilling its legislative mandate the Board may exercise the following powers:

- (a) hold conferences with parties and/or their legal representatives to clarify issues and expedite full and fair handling of a case;
- (b) on motion by any party, or by the Board, dispose of procedural requests, including but not limited to the following motions: to amend, to consolidate applications or petitions, or to reopen the record of any case in order to receive additional evidence or information;
- (c) on motion by any party, or by the Board, introduce into the record documentary or other evidence, provided that all parties are given reasonable notice;
- (d) ask parties to submit proposed findings of fact and memoranda of law;
- (e) require parties to provide additional information about the application;
- (f) waive minor procedural defects or errors that do not affect substantive rights of the parties in order to proceed on the merits;
- (g) on motion by any party, or by the Board, dismiss any issue in a case if it determines that (1) the Board lacks jurisdiction to hear the issue, or (2) there is no genuine issue of material fact to be resolved and dismissal or other relief should be rendered;
- (h) take any other action necessary to carry out the intent of the Zoning Ordinance;
- (i) exercise all other powers included in section 2A-8(h)(1)-(16) of the County Code; and
- (j) visit the site which is the subject of a Board proceeding.

6.0. Assistance for the Board.

6.1 *County Attorney.* The Board may ask the County Attorney's office to send a representative to any of its meetings or hearings.

6.2 *Staff of Maryland-National Capital Park and Planning Commission.* The Board may ask that a member of the staff of MNCPPC attend any of its meetings or hearings to provide technical advice.

6.3 *Other.* The Board may also ask for help from other offices of the Montgomery County Government or other sources.

7.0. Hearings and Worksessions.

7.1 *General Information.* The Board holds public hearings and has worksessions. All meetings of the Board are open to the public except as otherwise expressly provided by law.

No person may engage in any conduct, including visual demonstration, such as waving or raising of placards, signs or banners, that disrupts the hearing. The wearing of armbands, badges or other objects on clothing is permitted.

A person wishing to videotape, televise, photograph, broadcast or record a hearing must obtain permission from the presiding officer. Such permission will be granted unless the activity will disrupt the hearing.

A recording of a hearing made by a member of the public or any transcript derived from such a recording may not be deemed a part of the official record.

7.2 *Hearings.*

7.2.1 *Schedules.* The Board meets at least once a week for public hearings, except during designated vacations or official holidays. If there is a backlog of cases, additional hearings will be scheduled to dispose of pending cases. If a case cannot be heard in one day, the chairman schedules an extra day or days as soon as possible.

7.2.2 *Agenda.* The agenda must be made available to citizens, organizations and the general public as requested.

A supply of agendas must be available for the public on the hearing day.

7.2.3 *Evidentiary rules.* For all hearings, the Board follows the evidentiary guidelines in section 2A-8(e) of the County Code.

7.2.4 Procedures.

- a. The chairman or vice chairman conducts all hearings.
- b. After a case is called, the applicant and all persons wishing to testify in support of the application state their names and addresses for the record.
- c. The presiding officer then asks if there is anyone present in opposition. All persons speaking in opposition must state their names and addresses for the record. Witnesses who are temporarily absent from the hearing room or arrive late are not excluded from testifying.
- d. All witnesses must be sworn.
- e. Unless the Board provides otherwise, the applicants and their supporters are heard first. Each person who speaks is subject to cross-examination.
- f. Following the presentation of the applicant, the opponents state their case. Each person is subject to cross-examination.
- g. A group or organization is encouraged to designate a person to speak on its behalf. Citizens representing themselves may testify at a hearing without prior notice.
- h. Rebuttal witnesses are then permitted.
- i. Each side is permitted a closing statement.
- j. Board members are free to ask questions at any time.
- k. All evidence and exhibits presented to the Board and accepted must be numbered, made part of the case record and included in the case file. The Board may require photographs or reductions to be substituted for large or bulky exhibits.
- l. Upon request of any party or upon its own motion, the Board may, in its discretion, visit the site which is the subject of the proceeding on reasonable notice to the parties. The parties may submit, or the Board may require, a listing of those specific areas on the site for the Board's viewing. Parties and their representatives may be present to observe, but no testimony may be taken. The parties or their representatives are prohibited from engaging in any discussion with the Board members at the site visit. The Board must issue written findings of fact relating to the site visit in any proceeding where a site visit has been conducted. A member who has not participated in the site visit prior to the Board's vote may not participate in the decision. However, the Board may schedule an additional site visit for the purpose of permitting an absent or new member to visit the site.

7.2.5 Continuation. If, for any reason, a hearing cannot be completed on the date originally scheduled, the Board may continue the hearing to a specific time and date. Except for administrative appeals, no further notice is necessary if the time and place of the continued hearing is announced at the time of the adjournment. If a case is continued to an indefinite time, all parties entitled to original notice and any other party the Board may designate must receive 15 days notice of the continued hearing.

7.2.6 Closing the record. As a rule the record is closed at the end of a hearing. The Board will hold the record open for at least 15 days after the conclusion of a hearing if:

- a. an amended application is filed less than 10 days before the hearing or during the hearing; or
- b. other circumstances occur to justify holding the record open at the Board's discretion.

7.2.7 Transcript. A complete verbatim record of all public hearings before the Board must be made. The Board may order a transcript of any proceeding for use by the Board or the County.

Any party may order a written transcript at that party's expense.

If a Board decision is appealed to the Circuit Court and the Board does not have a transcript of the hearing, the party who files the appeal must, within 10 days of filing the appeal, forward to the Board one original and one copy of the transcript to become a part of the record. If the Board has a transcript of the hearing, the Board will, at the appealing party's request and expense, make two copies of the transcript.

7.3 Worksessions. Worksessions are held as needed - as a rule biweekly - to decide cases which were not decided at the close of the hearing and to consider minor modifications, correspondence and other matters which may come before the Board. The date and time of worksessions are announced, and the agenda for a worksession is posted outside the hearing room and outside the Board's office on the morning of the day before the worksessions. All worksessions are open to the public, but only those persons permitted by the Board to offer comments may do so.

Any requests for Board consideration at a worksession must be submitted by the Thursday preceding a scheduled worksession.

Minutes of the previous worksession must be approved at the next worksession.

8.0. Decisions.

Whenever possible, a case will be decided immediately after the closing of the record. If a case is particularly complicated or lengthy, the Board may defer making a decision to a worksession.

If fewer than five Board members are present to hear oral argument on a conditional use, the Board may, in its discretion, defer its decision until the absent member or members have read the transcript of the argument so that they can participate in the final decision. If only three Board members were present to hear oral argument on a conditional use and the vote to grant the conditional use is 2:1, then one or both of the remaining Board members must read the transcript and participate in the final decision. Decisions do not have the force of law until the date on which the written Opinion is mailed and entered in the Opinion Book.

The Board retains the power to revise its decision in case of fraud, mistake or irregularity at any time.

9.0. Opinions.

9.1 Mailing Requirements. The Board must issue an Opinion in conditional use or variance cases within 30 days after the record is closed, and must issue an Opinion in an administrative appeal within 45 days after the record is closed. The Board may issue its Opinions by mail or electronically. The presiding officer assigns the writing of an Opinion to a Board or staff member.

9.2 Extension of Time for Mailings. In all cases the Board, on its own motion and with written notice to all parties, may extend the time for issuing a written Opinion.

9.3 Correction of Clerical Errors. A clerical error may be corrected at any time without prior notice or hearing. A copy of the corrected Opinion must be sent to all persons who received the original Opinion.

10.0. Reconsideration and rehearing –conditional uses and variances.

10.1.1 In general. Within 30 days from the date the Opinion was entered in the Opinion Book, the Board may, on its own motion, stay its decision and re-open a case to reconsider it or hold a rehearing. Any motion for reconsideration or rehearing must be made by a Board member who voted on the prevailing side.

10.1.2 Grounds. The Board may grant reconsideration only on evidence of changed circumstances, new evidence that could not reasonably have been presented at the original hearing, or if some mistake or misrepresentation was made at the original hearing that requires rehearing and reargument in order to be corrected.

10.2 Requesting Reconsideration. Any request for rehearing or reconsideration must be filed within 15 days after the date the Opinion is mailed and entered in the

Opinion Book. The request must be in writing and specify the nature of the relief desired and provide reasons supporting the request.

10.3 *Notice of Requests To Reconsider.* The party requesting reconsideration or rehearing must serve all parties who received the original Opinion with a notice specifying the substance of the request at the same time the request is made to the Board.

10.4 *Response.* Within 15 days after the notice of the request any party may file a written response and ask for oral argument. All parties who received the original Opinion must be served with a copy of the response.

10.5 *Board Action on Requests To Reconsider.* The Board must act either to grant or deny the request within 30 days after it is filed.

10.6 *Time for Appeals From Decisions.* The Board may, on its own motion, stay the time for appeal to the Circuit Court until the Board acts on the request.

11.0. Reconsideration of decisions on administrative appeals.

Requests for rehearing or reconsideration are governed by the Montgomery County Code, section 2A-10(f).

12.0. Modifications to conditional uses granted by the Board.

12.1 *Requirements.* A request for modification of the terms or conditions of a conditional use granted by the Board may be made at any time. Minor modifications of conditional uses may be granted without public hearing as provided by section 7.3.1.K.2 of the Zoning Ordinance. All parties who received a copy of the original opinion must receive notice of the Board's action modifying the original grant. The notice must state that any party may, within 15 days of the Board's resolution, request a public hearing on the Board's action.

12.2 *Transfers of Conditional Uses.* The transfer of a conditional use is a modification under section 7.3.1.K of the Zoning Ordinance. Except for accessory apartments, a transfer of a conditional use granted by the Board can only be granted if the original holder of the conditional use requests a transfer or agrees to the transfer in writing.

The transfer of a conditional use granted by the Board for an accessory apartment can be granted if the party requesting the transfer presents evidence of ownership of the property, such as a deed.

13.0. Records.

13.1 *Opinion Book.* The Board's staff must enter each opinion and resolution in the Board's Opinion Book, which must be kept complete and up to date. All opinions and

resolutions must record the vote of each member. If a member abstained or disqualified him/herself the opinion or resolution must give the reasons for this action. The opinion or resolution must also indicate if a member was absent.

13.2 *Docket File.* The staff must maintain a complete and up-to-date docket file. At a minimum this file must contain each petition or appeal, the assigned case number, name and address of the applicant, location of the property, the nature of the petition, the Board's decision, and any subsequent actions.

The docket file must be open to public inspection.

13.3 *Case Files.* The staff must maintain two identical files for each case. One file is for Board members to review and for use at the public hearing. The other file is for public inspection and must contain all information contained in the Board file, including letters of support or in opposition. Any person may read the file in the Board's office during regular office hours and copy any portion at their own expense.

14.0. Computing time.

Time must be computed as follows:

(1) Do not count the day of the event that begins a time period (e.g. the day a decision is entered into the Opinion Book).

(2) Include the last day of a time period unless it falls on a Saturday, Sunday, Federal, State or County holiday. In that case the time period ends on the next business day.

(3) If the required time period is more than 7 days count Saturdays, Sundays and holidays as days. If the time period is 7 days or less do not count Saturdays, Sundays or holidays.

15.0. Amendment procedure.

These rules of procedure may be amended under section 2-113 of the County Code.