



**CITY OF DOVER, DELAWARE  
BOARD OF ADJUSTMENT MEETING  
Wednesday, September 17, 2025 at 9:00 AM**

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*City Hall Council Chambers, 15 Lookerman Plaza, Dover, Delaware*

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**AGENDA**

**IN-PERSON & VIRTUAL MEETING**

This Board of Adjustment Meeting for September 17, 2025 will be held in City Council Chambers. The public is welcome to attend in person. The Meeting will also be provided as a Virtual Meeting using Webex, an audio/video conferencing system as an electronic means of communication. See the participation information below to join by phone or computer.

**PUBLIC PARTICIPATION INFORMATION**

**To Attend City of Dover Board of Adjustment Meeting of September 17, 2025**

Join by Phone: Dial 1-650-479-3208  
Access Code: 253 607 47575  
Password for Phone: 36837262

Join Online: <https://bit.ly/BOA09172025>  
Webinar Number: 2536 074 7575  
Webinar Password: DoverBOA

If you are new to Webex, get the app now at <https://www.webex.com/> to be ready when the meeting starts. For problems accessing the meeting, please call the Planning Office at (302) 736-7196.

Written comments are accepted via mail to City of Dover – Board of Adjustment,  
P.O. Box 475 Dover, DE 19903 and via email at [CompPlan@dover.de.us](mailto:CompPlan@dover.de.us).

**WELCOME**

Welcome to new Board of Adjustment member as appointed September 8, 2025 for a Three-year Term to Expire July 2028: Carylin Brinkley

**ROLL CALL**

**APPROVAL OF AGENDA**

It is noted that consideration of previous Meeting Minutes, a Special Recognition, and other items of Business will be scheduled for the next meeting of the Board of Adjustment. This Meeting is intended as a Training Session.

## COMMUNICATIONS & REPORTS

**Meeting Reminder:** The next Board of Adjustment Meeting date is Wednesday, October 15, 2025 at 9:00 AM.

## WORKSHOP TRAINING SESSION

### 1. Training Session Topics:

- City Ordinances and State Code Provisions
- Role and Responsibilities of Board of Adjustment Members
- Conduct of Meetings
- Discussion of DRAFT Rules of Procedure

## PUBLIC COMMENTS OPPORTUNITY

## ADJOURN

**Posted Agenda:** September 10, 2025

THE AGENDA ITEMS AS LISTED MAY NOT BE CONSIDERED IN SEQUENCE. PURSUANT TO 29 DEL. C. §10004(e)(2), THIS AGENDA IS SUBJECT TO CHANGE TO INCLUDE THE ADDITION OR THE DELETION OF ITEMS, INCLUDING EXECUTIVE SESSIONS, WHICH ARISE AT THE TIME OF THE MEETING

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## **ARTICLE 9. BOARD OF ADJUSTMENT**

### **Section 1. Creation, appointment and organization.**

There shall be a board of adjustment pursuant to the provisions of chapter 3 of title 22, Municipalities, of the Delaware Code Annotated (22 Del. C. § 301 et seq.).

### **Section 2. Powers and duties.**

The board of adjustment shall have the powers and duties as specified in Delaware Code Annotated (22 Del. C. § 301 et seq.) and as articulated below:

- 2.1 *Variance.* The board shall have the authority to authorize variances from provisions of the zoning ordinance that are not contrary to public interest where the board determines that a literal interpretation of the zoning ordinance would result in undue hardship or exceptional practical difficulties to the applicant. In granting variances, the board shall determine that the spirit of the zoning ordinance is observed and substantial justice done.
- 2.11 *Area variance.* A variance shall be considered an area variance if it relates to bulk standards, signage regulations, and other provisions of the zoning ordinance that address lot layout, buffers, and dimensions. In considering a request for an area variance, the board shall evaluate the following criteria and document them in their findings of fact:
- (a) The nature of the zone in which the property lies;
  - (b) The character of the immediate vicinity and the contained uses therein;
  - (c) Whether, if the restriction upon the applicant's property were removed, such removal would seriously affect neighboring properties and uses; and
  - (d) Whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in his efforts to make normal improvements in the character of that use of the property that is a permitted use under the provisions of the zoning ordinance.
- 2.12 *Use variance.* A variance shall be considered a use variance if it would permit a use of the subject property that would otherwise not be permitted on the subject property. In considering a request for a use variance, the board shall determine that the following criteria exist and document them in their findings of fact:
- (a) That there are physical conditions applying to the land or building for which the variance is sought, which conditions are peculiar to such land or building, and have not resulted from any act of the applicant or any predecessor in title; and
  - (b) That the aforesaid circumstances or conditions are such that the strict application of the provisions of this ordinance would deprive the applicant of all reasonable use of such land or building and the granting of the variance is necessary for the reasonable use of the land or building, and that the variance as granted by the board is the minimum variance that will accomplish this purpose; and

- (c) That the granting of the variance under such conditions as the board may deem necessary or desirable to apply thereto will be in harmony with the general purpose and intent of this ordinance, will not represent a radical departure therefrom, will not be injurious to the neighborhood, will not change the character thereof and will not be otherwise detrimental to the public welfare.

2.2 *Appeal of administrative order, requirement, decision, or determination.* The board shall have the authority to hear and decide appeals where it is alleged there is any order, requirement, decision or determination made by an administrative official in the enforcement of the zoning ordinance. Appeals to the board may be made by any person aggrieved or by any officer, department, board or bureau of the municipality affected by any decision of an administrative officer.

### **Section 3. Procedure.**

The powers and duties of the board of adjustment shall be exercised in accordance with the following procedure:

- 3.1 The board of adjustment shall not decide upon any appeal or variance without first holding a public hearing, notice of which hearing and of the substance of the appeal or application shall be given by publication in the official newspaper of the city at least ten days before the date of such hearing. In addition to such published notice, the board of adjustment shall cause notice to be given of the substance of every appeal for a variance, together with notice of the hearing thereon, by causing notices thereof to be mailed by postal card or other means at least ten days before the date of said hearing to the owners of all property abutting that held by the applicant in the immediate area (whether or not involved in such appeal) and all other owners within 200 feet, or such additional distance as the board of adjustment may deem advisable, from the exterior boundaries of the land involved in such appeal, as the names of said owners appear on the last completed assessment roll of the city. Any or all of the notices required by this subsection shall be issued by the office of the city planner on order of the board of adjustment or upon order of the chairperson of said board if the appeal is received when the board is not in session and the chairperson deems it necessary or desirable to expedite the public hearing on such appeal. Provided that due notice shall have been published as above provided and that there shall have been substantial compliance with the remaining provisions of the subsection, the failure to give notice in exact conformance herewith shall not be deemed to invalidate action taken by the board of adjustment in connection with the granting of any appeal or variance.
- 3.2 If the land involved in an appeal or application lies within 500 feet of the boundary of any other incorporated municipality, the city planner shall also transmit to the municipal clerk of such other municipality a copy of the official notice of the public hearing thereon not later than the day after such notice appears in the official newspaper of the city.
- 3.3 Unless work is commenced and diligently prosecuted within one year of the date of the granting of a variance, such variance shall become null and void.
- 3.4 All variance applications and appeals made to the board of adjustment shall be in writing, on forms prescribed by the board. All variance requests and appeals from an order, requirement, decision or determination made by an administrative official, board or agency of the city shall be accompanied by a fee as provided for in Appendix F—Fees and Fines. The board of adjustment may, in its discretion, return to the applicant part or all of the fee paid by him in the event that his appeal under section 2.2 Appeal of administrative order, requirement, decision, or determination hereof is partially or wholly successful. The fees filed in connection with applications under section 2.1 Variance shall not be returnable, regardless of disposition of the case by the board.

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- 3.5 Each variance application or appeal shall fully set forth the circumstances of the case. Every variance application or appeal shall refer to the specific provision of the ordinance involved, and shall exactly set forth, as the case may be, the interpretation that is claimed, the details of the variance that is applied for and the grounds on which it is claimed that the same should be granted.
- 3.6 Every decision of the board of adjustment shall be recorded in accordance with standard forms adopted by the board, and shall fully set forth the circumstances of the case and shall contain a full record of the findings on which the decision is based. Every decision of the board shall be filed by case number, together with all documents pertaining thereto.
- 3.7 All the provisions of this ordinance relating to the board of adjustment shall be strictly construed. The board, as a body of limited jurisdiction, shall act in full conformity with all provisions of law and of this ordinance and in strict compliance with all limitations contained therein; provided, however, that if the procedural requirements set forth in this section have been substantially observed, no applicant or appellant shall be deprived of the right of application or appeal.
- 3.8 Whenever the board of adjustment denies an application for variance, such application for variance, or an application on the same property which is substantially similar, shall not be accepted for reconsideration by the board of adjustment sooner than one year from the date of denial.

(Ord. of 7-12-1982, § 4; Ord. of 6-24-1991; Ord. of 7-12-2004(2) ; Ord. of 4-28-2008(2); Ord. No. 2009-09, 6-22-2009; Ord. No. 2010-18, 8-9-2010)

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## Chapter 30 STANDARDS OF ETHICAL CONDUCT AND ETHICS COMMISSION<sup>1</sup>

### ARTICLE I. IN GENERAL

#### Sec. 30-1. Applicability.

This chapter shall be applicable to all elected and appointed officials and all employees of the city.

(Ord. No. 2017-14, 12-11-2017)

#### Sec. 30-2. Statement of intent and purpose.

- (a) *Intent.* The proper operation of democratic government requires that public officials and employees be independent, impartial, and responsible to the people; that governmental decisions and policies be made in the proper channels of the governmental structure; that public office not be used for personal gain; and that the public has confidence in the integrity of its government. It is the intent of the city that all elected and appointed officials and all employees of the city adhere to high levels of ethical conduct, honesty, integrity and accountability to assure that the public has confidence in all aspects of city government and the city officials that exercise discretionary powers. These standards of ethical conduct are intended to uphold the public trust in the persons in positions of public responsibility who are acting for the benefit of the public. All elected and appointed officials and all employees of the city shall comply with both the letter and the spirit of the standards of ethical conduct and strive to avoid situations that create impropriety or the appearance of impropriety. The standards define and discourage certain actions that may create impropriety or the appearance of impropriety that undermine public trust in elected and appointed public officials and employees.
- (b) *Purpose.* The standards of ethical conduct should promote public confidence in the integrity of city officials; state principles of conduct and ethics which are to be applied in public service; inform the public of the standards to which their city officials are expected to adhere; and help motivate city officials and public employees to pursue productive conduct and ethical ideals which exceed minimum standards. The city council finds and declares as matters of public policy goals and objectives for all city employees and elected and appointed officials, the following:
- (1) *Public trust.* In our democratic form of government, the conduct of officials and employees of the city must hold the respect and confidence of the people. They must, therefore, avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
  - (2) *Standards.* To ensure propriety and to preserve public confidence, officials and employees of the city must have the benefit of specific standards to guide their conduct and disciplinary mechanisms to guarantee uniform maintenance of those standards. Some standards of this type are so vital to government that violation thereof should subject the violator to criminal penalties.

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<sup>1</sup>Editor's note(s)—Ord. No. 2017-14, adopted December 11, 2017, repealed ch. 30, §§ 30-31—30-35 and 30-71—30-74 and enacted a ch. 30 as set out herein. Former ch. 30 pertained to similar subject matter and derived from the Code of 1981; an Ord. adopted July 13, 1998; and Ord. No. 2010-23, adopted August 23, 2010.

- (3) *Public service.* In our democratic form of government, it is both necessary and desirable that all citizens should be encouraged to assume public office and employment, and that, therefore, the activities of officials and employees of the city should not be unduly circumscribed.
- (4) *Performance of duty.* Elected city officials are obligated to uphold the fundamental legal principles of our system of government, as set forth in the United States Constitution, the state constitution, and the city Charter, as well as all applicable provisions of federal, state and local law and court decisions. They are bound to do so, and the failure to do so shall constitute malfeasance in office.
- (5) *Fairness.* City officials and employees shall strive for the highest standard of fairness in all of their activities and shall not grant any special consideration, treatment, or advantage to any citizen beyond that which is available to every other citizen.
- (6) *Use of private information.* In the course of their official responsibilities, city officials and employees are often privy to categories of information which are of a private nature and are legally protected from public disclosure. City officials and employees shall maintain the privacy of such information, and they shall not take advantage of such information for personal gain, or the personal gain of friends or family.

(Ord. No. 2017-14, 12-11-2017)

### **Sec. 30-3. Acknowledgment of policies; required disclosures, and required annual training.**

In order for the mayor, councilmembers, mayoral and council appointees, and city employees to better serve the constituents of the city in an open, transparent fashion and to further be held accountable, the following actions shall be taken by each of the designated persons:

- (a) *Acknowledgment of policies.* Each elected and appointed official and all city employees shall be furnished copies of Chapter 30—Standards of Ethical Conduct and Ethics Commission, either electronically or, if requested, in hard copy, before entering upon the duties of their office or employment and shall sign a written acknowledgment of receipt of the copy. The documents shall be read, reviewed, and signed by all appointees by the time of their appointment or re-appointment.
- (b) *Financial disclosure report.* Any city employee or elected or appointed official who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, any city agency (and any city official who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, the city agency on which he serves as an appointee) shall file a financial disclosure report with the ethics commission fully disclosing the same. Such disclosure shall be confidential and the ethics commission shall not release such disclosed information, except as may be necessary for the enforcement of this chapter. The filing of such financial disclosure report shall be a condition of commencing and continuing employment or appointed status with the city. The financial disclosure report shall be submitted by August 1 of each calendar year.
- (c) Disclosure of interest in legislation.
  - (1) A councilman who has a financial or other private interest in any legislation shall disclose on the records of the council or other appropriate authority the nature and extent of such interest. This provision shall not apply if the councilman disqualifies himself from voting on such legislation.
  - (2) Any other city official or employee who has a financial or other private interest in any legislation and who participates in discussion with or gives an official opinion to the council shall disclose on the records of the council or other appropriate authority the nature and extent of such interest.

- (3) Any city employee or city officer who has a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, any city agency, shall file with the ethics commission a written statement fully disclosing the same. Such disclosure shall be confidential and the ethics commission shall not release such disclosed information, except as may be necessary for the enforcement of this subchapter. The filing of such disclosure statement shall be a condition of commencing and continuing employment or appointed status with the city.
- (4) *Required annual training.* All city employees and elected and appointed officials shall undergo and receive annual training on the city's ethics policies and procedures.

(Ord. No. 2017-14, 12-11-2017)

### **Sec. 30-4. Definitions.**

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

*Close relative* means a person's parents, spouse, children (natural or adopted), and siblings of the whole and half-blood.

*Commission* and *ethics commission* mean the city ethics commission as established by this chapter.

*Compensation* means any money, thing of value, or any other economic benefit of any kind or nature whatsoever conferred on or received by any person in return for services rendered or to be rendered by the official or employee, or by another.

*Employee* includes all persons who receive compensation as an employee of the city or a city agency, and shall not include persons that are elected or appointed to serve as mayor, city councilmember or a member of any city committee, commission or board, whether paid or unpaid.

*Financial interest.* A person has financial interest in a private enterprise if:

- (1) He has a legal or equitable ownership interest in the enterprise of more than ten percent (one percent or more in the case of a corporation the stock of which is regularly traded on an established securities market);
- (2) He is associated with the enterprise and received from the enterprise during the last calendar year, or might reasonably be expected to receive from the enterprise during the current or the next calendar year, income in excess of \$5,000.00 for services as an employee, officer, director, trustee, or independent contractor; or
- (3) He is a creditor of a private enterprise in an amount equal to ten percent or more of the debt of that enterprise (one percent or more in the case of a corporation the securities of which are regularly traded on an established securities market).

*Matter* means an application, petition, request, business dealing, contract, subcontract, or any other transaction of any sort with the city.

*Official* means any elected or appointed official of the city and all members of any committee, commission or board appointed by the mayor of the city or appointed by the city council.

*Official responsibility* means any direct administrative or operating authority at any level, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, recommend or otherwise direct action on behalf of the city.

*Personal or private interest* means an interest in a matter which tends to impair the independent judgment of an official or employee in the performance of his duties with respect to that matter.

*Private enterprise* means any activity conducted by any person, whether conducted for profit or not for profit, and includes the ownership of real or personal property. The term "private enterprise" does not include any activity of the city, of any political subdivision, or of any agency, authority, or instrumentality thereof.

*Public official.* All elected and appointed officials and all employees of the city.

(Ord. No. 2017-14, 12-11-2017)

**Sec. 30-5—30-19. Reserved.**

**ARTICLE II. STANDARDS OF ETHICAL CONDUCT.**

**Sec. 30-20. Established.**

High ethical standards among public officials and employees are essential to gain and maintain the confidence of the people, because such confidence is essential to the conduct of free government. Public officials and employees are agents of the people and hold office for the benefit of the public. They are bound to observe in their official acts the highest standards of morality and to discharge faithfully and impartially the duties of their offices, regardless of personal considerations, recognizing that the public interest must be their primary concern. Their conduct in both their official and private affairs should be above reproach. These standards of ethical conduct are adopted in order to secure this desired high level of public trust, ensure the impartiality of public officials and employees, and impose standards of accountability.

(a) *General responsibilities of officials and employees.*

- (1) Officials and employees have the common obligation of serving the public. In performing their duties, they shall treat the public and each other with respect, concern, and responsiveness, recognizing that their common goal of exceptional public service can only be achieved by working together. Disputes that arise among public servants shall be resolved at the lowest possible level; keeping in mind that public money spent on resolving these disputes is money not spent on important public needs.
- (2) Officials and employees shall treat their position as a public trust, with a fiduciary duty to use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.
- (3) Officials and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.
- (4) Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service.
- (5) No official or employee may request or receive, and no person may offer any money, thing of value or promise thereof, other than any city pay received, that is conditioned upon or given in exchange for promised performance of an official act.

- (b) *Appearance of violation.* Each city employee and official shall endeavor to pursue a course of conduct which will not raise suspicion among the public that he is engaging in acts which are in violation of his public trust and which will not reflect unfavorably upon the city and its government.
- (c) *Private interest; gifts.* No city employee or official shall have any interest in any private enterprise, nor shall he incur any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest. No city employee or official shall accept other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following:
- (1) Impairment of independence of judgment in the exercise of official duties;
  - (2) An undertaking to give preferential treatment to any person;
  - (3) The making of a governmental decision outside official channels; or
  - (4) Any adverse effect on the confidence of the public in the integrity of the government of the city.
- (d) *Interest in private enterprise.* No city employee or official shall acquire a financial interest in any private enterprise which he has reason to believe may be directly involved in decisions to be made by him in an official capacity on behalf of the city.
- (e) *Prohibitions relating to conflicts of interest.* No councilman or other official or employee, whether paid or unpaid, shall engage in any business or transaction or shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties in the public interest or would tend to impair his independence of judgment or action in the performance of his official duties. Personal as distinguished from financial interest includes an interest arising from blood or marriage relationships or close business or political association provided, that upon request from any person with official responsibility with respect to the matter, any such person who has such a personal or private interest may nevertheless respond to questions concerning any such matter.
- (1) *Restrictions on exercise of official authority.*
    - a. *Prohibited participation.* No city employee or official may participate on behalf of the city in the review or disposition of any matter pending before the city in which he has a personal or private interest, provided that, upon request from any person with official responsibility with respect to the matter, any such person who has such a personal or private interest may nevertheless respond to questions concerning any such matter. A personal or private interest in a matter is an interest which tends to impair a person's independence of judgment in the performance of his duties with respect to that matter.
    - b. *Impairment of judgment.* A person has an interest which tends to impair his independence of judgment in the performance of his duties with respect to any matter when:
      - i. Any action or inaction with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent than such benefit or detriment would accrue to others who are members of the same class or group of persons; or
      - ii. The person or a close relative has a financial interest in a private enterprise which enterprise or interest would be affected by any action or inaction on a matter to a lesser or greater extent than like enterprises or other interests in the same enterprise.
    - c. *Statutory responsibility.* In any case where a person has a statutory responsibility with respect to action or inaction on any matter where he has a personal or private interest and there is no provision for the delegation of such responsibility to another person, the person

may exercise responsibility with respect to such matter, provided that, promptly after becoming aware of such conflict of interest, he files a written statement with the ethics commission, fully disclosing the personal or private interest and explaining why it is not possible to delegate responsibility for the matter to another person.

- (2) *Restrictions on representing another's interest before the city.*
- a. *Prohibited.* No city employee or official may represent or otherwise assist any private enterprise with respect to any matter before the city.
  - b. *Exception.* This subsection shall not preclude any city employee or official from appearing before the city or otherwise assisting any private enterprise with respect to any matter in the exercise of his official duties.
- (3) *Restriction on contracting with the city.*
- a. *Prohibited.* No city employee or official shall benefit from any contract with the city, nor solicit any contract, and shall not enter into any contract with the city (other than an employment contract).
  - b. *Ownership of enterprise.* No private enterprise in which a city employee or official has a legal or equitable ownership of more than ten percent (more than one percent in the case of a corporation the stock of which is regularly traded on an established securities market) shall enter into any contract with the city (other than an employment contract) unless such contract was made or let after public notice and competitive bidding.
- (f) *Postemployment restrictions.* No person who has served as a city employee or official shall represent or otherwise assist any private enterprise on any matter involving the city, for a period of two years after termination of his employment or elected or appointed status with the city, if he gave an opinion, conducted an investigation or otherwise was directly and materially responsible for such matter in the course of his official duties as a city employee or official, nor shall any former city employee or official disclose confidential information gained by reason of his public position, nor shall he otherwise use such information for personal gain or benefit.
- (g) *Unauthorized disclosure of confidential information.* No person shall disclose any information required to be maintained confidential by the ethics commission under section 30-3(b), 30-73 or 30-74.
- (h) *Abuse of office.*
- (1) *Political contributions.* No elected city official shall agree to sponsor legislation, or to influence in any manner the formulation or passage of legislation, in exchange for political contributions or promises thereof.
  - (2) *Substantial interest.* No elected city official shall vote for, or promote in any manner whatsoever, legislation affecting any subject matter in which he has a substantial interest. Any such interest shall be disclosed by said elected official prior to a vote on any such legislation, and said elected official shall vote "abstain" when called upon to vote.
  - (3) *Use of city property.* No city official or employee shall request or permit the use of city-owned vehicles, equipment, materials, or property for personal convenience or profit, except when such services are available to the public generally or are provided for the use of such official or employee in the conduct of official business as a matter of municipal policy.
  - (4) *Personal gain.* No city official or employee shall utilize the influence of his office or position for personal pecuniary gain, or to avoid the legal consequences of his personal conduct.
- (i) *Criminal sanctions.*

- (1) *Penalties.* Any person who knowingly or willfully violates any provision of this section shall be guilty of a misdemeanor, punishable for each such violation by imprisonment of not more than one year and by a fine as provided for in Appendix F—Fees and Fines.
- (2) *Time limitations.* A prosecution for a violation of this section shall be subject to the time limitations of 11 Del. C. § 205.
- (j) *Contracts voidable by court action.* In addition to any other penalty provided by law, any contract entered into by any city agency in violation of this chapter shall be voidable by the city agency; provided that in determining whether any court action should be taken to void such a contract pursuant to this subsection, the city agency shall consider the interests of innocent third parties who may be damaged thereby. Any court action to void any transaction must be initiated within 30 days after the city agency involved has, or should have, knowledge of such violation.
- (k) *Private gain.* No city employee or official shall use his public office to secure unwarranted privileges, private advancement or gain.
- (l) *Confidential information; prohibited activity.* No city employee or official shall engage in any activity beyond the scope of his public position which might reasonably be expected to require or induce him to disclose confidential information acquired by him by reason of his public position.
- (m) *Disclosure of information.* No city employee or official shall, beyond the scope of his public position, disclose confidential information gained by reason of his public position, nor shall he otherwise use such information for personal gain or benefit.
- (n) *Ex parte communications.* No official or employee shall encourage, make or accept any ex parte or other unilateral application or communication that excludes the interests of other parties in a matter under consideration when such application or communication is designed to influence official decision or conduct of the official or other officials, employees or agencies in order to obtain a more favored treatment or special consideration to advance the personal or private interests of himself or herself or others. The purpose of this provision is to guarantee that all interested parties to any matter shall have equal opportunity to express and represent their interests.
- Any written ex parte communication received by an official or employee in matters where all interested parties should have equal opportunity for a hearing shall be made part of the record by the recipient.
- Any oral ex parte communication received under such conditions should be written down in substance by the recipient and also made a part of the record.
- A communication concerning only the status of a pending matter is not regarded as an ex parte communication.
- (o) *Sexual favors.* No city employee or official, in the course of his public responsibilities, shall use the granting of sexual favors as a condition, either explicit or implicit, for an individual's favorable treatment by that person or a city agency.

(Ord. No. 2017-14, 12-11-2017)

**Sec. 30-21—30-70. Reserved.**

### ***ARTICLE III. ETHICS COMMISSION***

**Sec. 30-71. Established; composition; removal; terms of office; vacancies; chairperson; quorum; compensation; legal counsel.**

- (a) *Established; composition; removal.* The city ethics commission is hereby established to administer and implement this chapter. The ethics commission shall consist of five members, all residents of the city, appointed by the mayor and confirmed by the city council. No member of the commission shall hold any elected or appointed office under the government of the United States or the state, county, or city. Members of the ethics commission may be removed by the mayor, with the concurrence of the city council, for substantial neglect of duty, gross misconduct in office or a violation of this chapter.
- (b) *Terms of office; vacancies.* A member of the ethics commission shall be appointed for a term of office of five years and until his successor has been appointed and has qualified. The members shall be appointed for staggered terms of office, and until their successors have been appointed. When a vacancy occurs in the membership of the ethics commission, it shall be filled by appointment for the unexpired portion of the term in the same manner as the original appointment.
- (c) *Chairperson; quorum.* The ethics commission shall elect a chairperson from among its membership. Three members of the ethics commission shall constitute a quorum and, if a quorum is present, a vacancy on the ethics commission shall not impair the right of the remaining members to exercise all the powers of the ethics commission. Disciplinary hearings may be conducted and sanctions may be imposed only by the affirmative action of at least three members; otherwise, the ethics commission may delegate authority to the chairperson to act for the ethics commission between meetings.
- (d) *Compensation.* Members of the ethics commission shall receive no compensation.
- (e) *Legal counsel.* The city solicitor shall provide legal counsel to the ethics commission and shall be the legal representative of the ethics commission in connection with its duties hereunder, on a case-by-case basis, or determine that outside counsel is needed and obtain such outside counsel for a particular matter.

(Ord. No. 2017-14, 12-11-2017; Ord. No. 2023-11, 11-13-2023)

**Sec. 30-72. Powers and duties.**

- (a) The powers and duties of the ethics commission shall be:
  - (1) *Standards of ethical conduct.* To recommend to the mayor and council, from time to time, such rules of conduct for public employees and officials as it shall deem appropriate.
  - (2) *Advisory opinions.* To issue written advisory opinions, upon the request of any city employee or official, as to the applicability of this chapter to any particular factual situation.
  - (3) *Referrals to solicitor.* To refer to the city solicitor for investigation any alleged violation of this chapter and, after notice and hearing, to recommend such disciplinary action as it may deem appropriate to such appropriate official or agency as the ethics commission shall determine, or to take such other disciplinary action as authorized by section 30-73(o) or other provisions of the city Charter or this Code. The ethics commission may dismiss, without reference to the city solicitor, any complaint which the ethics commission determines is frivolous or fails to state a violation.
  - (4) *Report of crimes.* To report to the appropriate federal, state or city authorities any substantial evidence of a violation of any criminal law which may come to its attention in connection with any proceeding, whether advisory or disciplinary.

- (5) *Records.* To maintain a file of its proceedings, waiver decisions and advisory opinions with a view toward achieving consistency of opinions and recommendations subject to the confidentiality requirements of sections 30-74 and 30-73(s).
- (6) *Procedures.* To follow the procedural rules specified in section 30-73 and to establish such other procedural rules as shall be consistent with the rules prescribed therein.
- (7) *Witnesses, evidence.* To subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require, by subpoena, the production of books, papers, records or other evidence needed for the performance of the ethics commission's duties or exercise of its powers.
- (8) *Assistance to city personnel.* To provide assistance to any city employee, official or agency in administering the provisions of this chapter.
- (9) *Provide information.* To prepare any necessary reports and studies to advance the purpose of this chapter, to provide any necessary materials explaining the duties of individuals covered by this chapter, and to supply instructions and public information materials to facilitate compliance with, and enforcement of, this chapter.
- (10) *Request city agencies for assistance.* To request appropriate city agencies to provide such professional assistance as it may require in the discharge of its duties.

(Ord. No. 2017-14, 12-11-2017)

### **Sec. 30-73. Rules of procedure; complaints; hearings; dispositions.**

- (a) Any person, either personally or on behalf of an organization or governmental body, may file a sworn complaint for the ethics commission with the city clerk. The complaint must be in writing, be signed, and show the address of the person who submitted it. The complaint must state that, to the best of the person's knowledge, information, and belief formed after reasonable reflection, the information in the complaint is true. The complaint must describe the facts that constitute the violation of the standards of ethical conduct in sufficient detail so that the ethics commission and the person who is the subject of the complaint can reasonably be expected to understand the nature of any offense that is being alleged. The commission may request any additional information deemed necessary to screen the complaint or to render a decision. No complaints shall be accepted or considered which relate to actions that took place more than one year prior to the date of filing. The individual filing the sworn complaint has 60 days from the date that the issue is brought to his or her attention to file a complaint.
- (b) After the sworn complaint has been filed, none of the parties or their representatives may communicate on an ex parte basis with any commission members pertaining to the complaint. All communications pertaining to the complaint shall be submitted to the city clerk.
- (c) Within seven days of receiving a sworn complaint the city clerk shall send copies of the complaint to each member of the ethics commission, the city solicitor, and the official or officials against whom such complaint has been filed. Hereinafter, the complaining party shall be referred to as the "complainant" and the official against whom a complaint has been lodged shall be referred to as the "respondent."
- (d) The commission recognizes that distribution to the public of a sworn complaint prior to screening by the commission as required below could harm the reputation of an innocent person and is contrary to the public interest; therefore, the public release of the complaint is prohibited until the screening process has been completed. The commission shall consult in confidence to screen the complaint within 14 days of receiving the complaint. The commission may immediately dismiss a complaint if:
  - (1) It has no jurisdiction; or

- (2) The alleged violation, if true, would not constitute a violation of the standards of ethical conduct; or
  - (3) The alleged violation is a minor or de minimis violation; or
  - (4) The complaint is, on its face, frivolous, groundless, or brought for purposes of harassment; or
  - (5) The matter has become moot because the person who is the subject of the complaint is no longer an officer, official or employee; or
  - (6) The respondent had obtained an advisory opinion under section 30-74(c) permitting the conduct; or
  - (7) The appointing authority of the respondent has already taken action as a result of finding a violation and the commission believes the action was appropriate.
- (e) In issues regarding standards of ethical conduct violations, the enforcement process is intended to be corrective rather than remedial unless the violation is a repeated offense. In the event the ethics commission determines a standards of ethical conduct violation has occurred, and it is minor in nature, with the concurrence of the complainant and the subject of the sworn complaint, the commission may dispense with the hearing process and conduct a more informal mediation process in lieu of a hearing.
- (f) If the sworn complaint is not dismissed or otherwise resolved pursuant to subsection 30-73(d), the city clerk shall promptly contact the members of the ethics commission, the city solicitor, the complainant, and the respondent in order to ascertain a date and time when a hearing can be convened on such complaint. As soon as a date and time have been agreed upon for a hearing before the ethics commission, the city clerk shall send written notice of such scheduling and a copy of the rules of procedure to the complainant and to the respondent. No copies of the complaint shall be provided to any other parties before the respondent receives the complaint. The city solicitor shall be the prosecuting attorney in all disciplinary proceedings before the ethics commission. In any such investigation or proceeding, a defendant shall be given an opportunity to be heard after notice, to be advised and assisted by legal counsel, to produce witnesses and offer evidence, and to cross examine witnesses. A transcript of any such proceeding shall be made and retained, subject to the confidentiality requirements of this chapter.
- (g) The commission may dismiss a complaint if the complainant does not appear at the hearing and if, in the opinion of the commission, it would be unfair to the respondent not to have the opportunity to examine the complainant.
- (h) As promptly as possible after the close of the hearing, the commission shall deliberate to determine if the allegations have been proven by clear and convincing evidence. Only ethics commission members who have been present for the hearing may participate in the deliberations, and any findings and recommendations must be adopted by a majority of the commission. The commission may consider, when making findings and recommendations, the severity of the offense, the presence or absence of any intention to conceal, deceive, or mislead, whether the violation was deliberate, negligent or inadvertent, and whether the incident was isolated or part of a pattern.
- (i) Within seven days of the conclusion of deliberations, the commission shall issue an order setting forth its findings and recommendations. In the alternative, the commission where it deems it appropriate, may issue an advisory opinion in lieu of making findings and recommendations.
- (j) If the respondent is an employee, the commission may, if it determines corrective action is necessary, notify the city manager or the council president and recommend that action be taken, including discipline.
- (k) If the respondent is a city official, the commission may propose actions to the city council that are appropriate to the finding as specified in section 30-73(o).
- (l) The commission shall send a written copy of its findings and recommendations to the respondent and the complainant.

- 
- (m) *Proceeding relating to member.* A member of the ethics commission shall be ineligible to participate, as a member of the ethics commission, in any ethics commission proceeding relating to his conduct. A member of the ethics commission who has been found by the ethics commission to have violated this chapter shall be ineligible to serve again as a member of the ethics commission.
- (n) *Self-disqualification.* A member of the ethics commission may disqualify himself from participating in any investigation of the conduct of any person upon submission, in writing and under oath, of an affidavit or disqualification stating that he cannot render an impartial and unbiased decision in the case in which he seeks to disqualify himself.
- (o) *Actions by ethics commission.* With respect to any violation with which a person has been charged and which the ethics commission has determined as proved, the ethics commission may take any one or more of the following actions:
- (1) *Reprimand.* Issue a written reprimand or censure of that person's conduct.
  - (2) *Discipline.* With respect to a city employee, remove, suspend, demote or take other appropriate disciplinary action with respect to that person, without regard to any limits imposed by this chapter, but within the limits of the constitution, the laws of the state, the Charter of the city, and ordinances and existing collective bargaining agreements.
  - (3) *Recommend removal.* With respect to an appointed official, recommend that appropriate action be taken to remove the official from the appointed position.
  - (4) *Recommend fine.* With respect to an elected city official, recommend that such official be fined in an amount recommended by the ethics commission.
- (p) *Rights of person charged.* In any proceeding before the ethics commission, upon the request of any person charged with a violation of this chapter, such person shall be permitted to inspect, copy or photograph books, papers, documents, photographs or other tangible objects which will be used as evidence against that person in a disciplinary hearing and which are material to the preparation of his defense.
- (q) *Exculpatory information.* In any proceeding before the ethics commission, if the city solicitor or ethics commission at any time receives any exculpatory information concerning an alleged violation against any person, it shall forthwith make such information available to such person.
- (r) *Subpoenas.* Any person charged with a violation of this chapter may apply to the ethics commission for the issuance of subpoenas for the appearance of witnesses and for the production of documents on his behalf. The application shall be granted upon a concise showing by such person that the proposed testimony or evidence is relevant (or is reasonably calculated to lead to the discovery of relevant evidence) and is not otherwise available. The application shall be denied if not made at a reasonable time or if the testimony or evidence would be merely cumulative.
- (s) *Confidentiality of proceedings.*
- (1) *City employee.* All proceedings before the ethics commission relating to a violation of this chapter by a city employee shall be maintained confidential by the ethics commission, unless:
    - a. Public disclosure is requested, in writing, by the person charged; or
    - b. The ethics commission determines after a hearing that a violation has occurred.
  - (2) *City official.* All proceedings before the ethics commission relating to a violation of this chapter by a city official, appointed or elected, shall be maintained confidential by the ethics commission, unless:
    - a. Public disclosure is requested, in writing, by the person charged; or
    - b. The ethics commission determines after a hearing that a violation has occurred.

- (t) *Appeals; public inspection.* Notwithstanding the confidentiality requirements of subsections (s)(1) and (2) of this section, the ethics commission shall make available for public inspection the record of all proceedings relating to any decision of the ethics commission which is appealed to the superior court and the ethics commission shall report to appropriate federal, state and/or city authorities any substantial evidence of a violation of any criminal law which comes to its attention in connection with any proceeding under this chapter.
- (u) *Confidentiality procedures.* The chairperson of the ethics commission shall, with the approval of the ethics commission, establish such procedures as, in the chairperson's judgment, may be necessary to prevent the disclosure of any record of any proceedings or other information received by the ethics commission, except as permitted by this chapter.

(Ord. No. 2017-14, 12-11-2017)

### **Sec. 30-74. Waivers of restrictions and advisory opinions.**

- (a) *Authority of ethics commission.* Notwithstanding the provisions of section 30-20, upon the written request of any city agency or of any individual who is or was a city employee or city official, the ethics commission may grant a waiver to the specific prohibitions contained therein if the ethics commission determines that the literal application of such prohibition in a particular case is not necessary to achieve the public purposes of this chapter or would result in an undue hardship on any employee or official. Any such waiver may be granted only by written decision of the ethics commission. Any person who acts in good faith reliance upon any such waiver decision shall not be subject to discipline or other sanction hereunder with respect to the matters covered by the waiver decision, provided there was a full disclosure to the ethics commission of all material facts necessary for the waiver decision.
- (b) *Waiver information confidential; exceptions.* Any application for a waiver, any proceeding and any decision with respect thereto shall be maintained confidential by the ethics commission, provided that:
- (1) *Applicant's request.* Public disclosure shall be made by the ethics commission upon the written request of the applicant;
  - (2) *Violations.* The ethics commission may make such public disclosure as it determines is required in connection with the prosecution of any violation of this chapter;
  - (3) *Evidence of crime.* The ethics commission shall report to appropriate federal, state and/or city authorities substantial evidence of any criminal violation which may come to its attention; and
  - (4) *Public record.* In the event that a waiver is granted, the waiver decision and the record of all proceedings relating thereto shall be open to public inspection.
- (c) *Advisory opinion authorized.* Upon the written request of any city employee or official, the ethics commission may issue an advisory opinion as to the applicability of this chapter to any particular fact or situation. Any person who acts in good faith reliance upon any such advisory opinion shall not be subject to discipline or other sanction hereunder with respect to the matters covered by the advisory opinion, provided there was a full disclosure to the ethics commission of all material facts necessary for the advisory opinion.
- (d) *Advisory opinion confidential; exceptions.* Any application for an advisory opinion, any proceeding and any decision with respect thereto shall be maintained confidential by the ethics commission, provided that:
- (1) *Applicant's request.* Public disclosure shall be made by the ethics commission upon the written request of the applicant;
  - (2) *Violations.* The ethics commission may make such public disclosure as it determines is required in connection with the prosecution of any violation of this article; and

- 
- (3) *Evidence of crime.* The ethics commission shall report to appropriate federal, state and/or city authorities substantial evidence of any criminal violation which may come to its attention.

(Ord. No. 2017-14, 12-11-2017)

**Sec. 30-75. Judicial review.**

In the event that the ethics commission finds that any person has violated any provision of this chapter, said person shall have a right of appeal to the superior court of any such finding, and of any sanctions imposed with respect thereto, by filing a notice of appeal with the superior court within 30 days of the final action by the ethics commission in a particular case. The appeal shall be on the record without a trial de novo. If the court determines that the record is insufficient for its review, it shall remand the case to the ethics commission for further proceedings on the record. The court's review, in the absence of actual fraud, shall be limited to a determination of whether the ethics commission's decision was supported by substantial evidence on the record. The burden of proof in any such appeal shall be on the appellant.

(Ord. No. 2017-14, 12-11-2017)



## **Title 22**

### **Municipalities**

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## Subchapter II Boards of Adjustment

### § 321 Creation and powers.

The legislative body of cities or incorporated towns shall provide for the appointment of a board to be known as the board of adjustment and in the rules and regulations adopted pursuant to the authority of this chapter shall provide that the board may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.

(39 Del. Laws, c. 22, § 8; Code 1935, § 6234; 22 Del. C. 1953, § 321.)

### § 322 Composition; terms of office.

(a) In cities or incorporated towns not having heretofore adopted a home rule charter pursuant to Chapter 8 of this title, the board of adjustment shall consist of all of the following members or their authorized agents:

- (1) The chief engineer of the street and sewer department, the public works commissioner, or the city manager.
- (2) The city solicitor.
- (3) The mayor.

If the city or incorporated town has no city engineer or public works commissioner, or city solicitor, then the mayor or chief executive of such city or town shall appoint 2 members, each to be appointed for a term of 3 years and removable for cause by the appointing authority upon written charges and after public hearing, who, with the presiding officer of the zoning commission, shall constitute the board of adjustment for such city or town. Vacancies shall be filled for the unexpired term of any member whose term becomes vacant.

(b) In cities or incorporated towns having heretofore or hereafter adopted a home rule charter pursuant to Chapter 8 of this title, the legislative body thereof may establish a board of adjustment consisting of 5 members who shall be residents of the city or incorporated town and who shall have knowledge of and experience in the problems of urban or suburban or rural development, and who, at the time of appointment, shall not be candidates-elect for or incumbents of an elective public office. The mayor or chief executive officer of such city or incorporated town, with consent of the legislative body thereof, shall appoint 4 members for terms of 4 years, provided that the terms of the original members shall be established in a manner that 1 shall expire each year. The mayor or chief executive officer of such city or incorporated town, with the consent of the legislative body thereof, shall appoint 1 member who shall be chairperson and who shall serve at the pleasure of that appointing official. The members shall be entitled to compensation as determined by the city or incorporated town.

(c) In the event that a city or incorporated town qualifying under subsection (b) of this section fails to establish a board of adjustment as permitted in subsection (b) of this section, the board of adjustment shall consist of those persons designated in subsection (a) of this section.

(d) (1) Anything heretofore in this section to the contrary notwithstanding, any city or town, by its legislative body, may establish a board of adjustment consisting of not less than 3 nor more than 5 members who shall be residents of the city or town and who shall have knowledge of the problems of urban or suburban or rural development and who, at the time of appointment and throughout the term of office, shall not be candidates nor members of the legislative body nor employees of the city or town. The mayor or chief executive officer of such city or town shall appoint such members of the board of adjustment, and all such appointments shall be confirmed by a majority vote of the elected members of the legislative body.

(2) All appointments shall be for a period of 3 years, provided that the terms of the original members shall be established in such a manner that the term of at least 1 member shall expire each year and the successor shall be appointed for a term of 3 years. The board of adjustment so selected shall elect from among their own number a chairperson and a secretary.

(3) Any member of the board of adjustment may be removed from office by the legislative body for cause after a hearing by a majority vote of all the elected members of the legislative body of such city or town. A vacancy occurring otherwise than by the expiration of term shall be filled for the remainder of the unexpired term in the same manner as an original appointment.

(39 Del. Laws, c. 22, § 8; Code 1935, § 6234; 22 Del. C. 1953, § 322; 57 Del. Laws, c. 717; 58 Del. Laws, c. 276; 59 Del. Laws, c. 137, § 1; 64 Del. Laws, c. 284, § 1; 70 Del. Laws, c. 186, § 1; 78 Del. Laws, c. 211, § 1; 81 Del. Laws, c. 218, § 1.)

### § 323 Rules; meetings; administration of oaths; records.

The board of adjustment shall adopt rules in accordance with any ordinance adopted pursuant to this chapter. Meetings of the board shall be held at the call of the chairperson and at such other times as the board may determine. Such chairperson, or in the chairperson's absence, the acting chairperson, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings showing the vote of each member upon each question or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

(39 Del. Laws, c. 22, § 8; Code 1935, § 6234; 22 Del. C. 1953, § 323; 70 Del. Laws, c. 186, § 1.)

### § 324 Appeals to board.

Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the

municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time as provided by the rules of the board by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

(39 Del. Laws, c. 22, § 8; Code 1935, § 6234; 22 Del. C. 1953, § 324.)

### § 325 Stay of proceedings.

An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal has been filed with the officer that, by reason of facts stated in the certificate, a stay would in the officer's opinion cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board or by a court having jurisdiction on application on notice to the officer from whom the appeal is taken and on due cause shown.

(39 Del. Laws, c. 22, § 8; Code 1935, § 6234; 22 Del. C. 1953, § 325; 70 Del. Laws, c. 186, § 1.)

### § 326 Notice and hearing on appeal.

The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person, by agent or by attorney.

(39 Del. Laws, c. 22, § 8; Code 1935, § 6234; 22 Del. C. 1953, § 326.)

### § 327 Determinations of board.

(a) The board of adjustment may:

(1) Hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this chapter or of any ordinance adopted pursuant thereto;

(2) Hear and decide special exceptions to the terms of the ordinance upon which the board is required to pass under such ordinance;

(3) Authorize, in specific cases, such variance from any zoning ordinance, code or regulation that will not be contrary to the public interest, where, owing to special conditions or exceptional situations, a literal interpretation of any zoning ordinances, code or regulation will result in unnecessary hardship or exceptional practical difficulties to the owner of property so that the spirit of the ordinance, code or regulation shall be observed and substantial justice done, provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any zoning ordinance, code, regulation or map; provided, however, that notwithstanding any provision of law to the contrary, the legislative body of any city or incorporated town may, by ordinance, vest a designated town official or department with authority to administratively grant a dimensional variance for existing conditions that do not exceed 1 foot of the required dimension restrictions without the application being considered by the board of adjustment, subject to the standards, procedures and conditions set forth in the ordinance granting such authority.

(b) In exercising the powers provided in subsection (a) of this section the board may, in conformity with this chapter, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

(39 Del. Laws, c. 22, § 8; Code 1935, § 6234; 22 Del. C. 1953, § 327; 65 Del. Laws, c. 61, § 1; 76 Del. Laws, c. 371, § 1.)

### § 328 Appeal to Superior Court from board's decision.

(a) Any person or persons, jointly or severally aggrieved by any decision of the board of adjustment, or any taxpayer or any officer, department, board or bureau of the municipality may present to the Superior Court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the Court within 30 days after the filing of the decision in the office of the board.

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

(c) The Court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

(39 Del. Laws, c. 22, § 8; Code 1935, § 6234; 22 Del. C. 1953, § 328.)

### § 329 Priority of proceedings.

All issues in any proceeding under this subchapter shall have preference over all other civil actions and proceedings.

(39 Del. Laws, c. 22, § 8; Code 1935, § 6234; 22 Del. C. 1953, § 329.)

### § 330 Hearing on appeal.

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made.

(39 Del. Laws, c. 22, § 8; Code 1935, § 6234; 22 Del. C. 1953, § 330; 70 Del. Laws, c. 186, § 1.)

**§ 331 Record on appeal.**

The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified. The cost of a transcript of the hearing appealed from is the responsibility of the person appealing the decision, unless the cost is awarded against the board as provided in § 332 of this title.

(39 Del. Laws, c. 22, § 8; Code 1935, § 6234; 22 Del. C. 1953, § 331; 73 Del. Laws, c. 38, § 1.)

**§ 332 Costs on appeal.**

Costs shall not be allowed against the board of adjustment, unless it appears to the Court that it acted with gross negligence, in bad faith or with malice in making the decision appealed from. For purposes of this section, the word “costs” includes all fees paid or owed to the Prothonotary’s Office in connection with the appeal to the Superior Court and all documented out-of-pocket expenses incurred by the board of adjustment in preparing, filing and serving sufficient copies of the record of the proceedings appealed from, including but not limited to expenses for photocopying, copying and/or duplication of survey drawings or plots, audio tape recordings, video tape recordings, computer discs, and expenses for preparing the transcript of the hearing.

(39 Del. Laws, c. 22, § 8; Code 1935, § 6234; 22 Del. C. 1953, § 332; 73 Del. Laws, c. 38, § 2.)

2024 WL 3385825

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Superior Court of Delaware.

MIDDLECAP ASSOCIATES, LLC, Plaintiff,

v.

The TOWN OF MIDDLETOWN, a municipal corporation of the State of Delaware, the Town of Middletown Town Council, the governing body of the Town of Middletown, and Kenneth L. Branner, Jr., James Reynolds, Aaron Blythe, James Royston, Drew Chas, Robert McGhee and Robert Stout, in their individual and official capacities as Members of the Town of Middletown Town Council, Defendants.

C.A. No. N23C-03-181 CEB

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Submitted: May 29, 2024

|

Decided: July 11, 2024

*Upon Certiorari Review of the Denial of a Conditional Use Permit, REVERSED.*

#### Attorneys and Law Firms

[John W. Paradee](#), Esquire, and [Mark A. Denney, Jr.](#), Esquire, BAIRD, MANDALAS & BROCKSTEDT, LLC, Dover, Delaware. Attorneys for Plaintiff.

[Scott G. Wilcox](#), Esquire, GIORDANO, DELCOLLO, WERB & GAGNE, LLC, Wilmington, Delaware. Attorney for Defendants.

#### OPINION

[BUTLER](#), R.J.

#### BACKGROUND

\*1 Middlecap Associates, LLC (“Middlecap”) is a landowner in Middletown, De. It seeks to develop a plot of approximately 15 acres on Dove Run Centre Drive by constructing a garden apartment complex of 192 units.

The zoning for the property is C-3. Under the Middletown zoning code, C-3 is designated for “Employment/Regional Retail,” intended to “provide service and retail environments and employment/office opportunities in a manner compatible with the historic character, scale, and architectural type of Middletown.”<sup>1</sup> In order to build an apartment complex on the property, Middlecap needs a “conditional use permit.”

A conditional use permit is a device whereby the governing body can review a planned improvement to the property and attach conditions to the permit. So, for example, while a shopping center is permitted in zone C-3 as a matter of right, C-3 zoning also permits, “subject to receiving a conditional use permit by the Town Council,” 1) daycare centers, 2) sales of goods from transient vehicles and 2) garden apartments.<sup>2</sup>

The Middletown zoning code provides for a zoning board of adjustment, which exercises the powers typical of most zoning boards, considering appeals of zoning variances and other exceptions.<sup>3</sup> But the zoning board of adjustment does not hear requests for conditional use permits. Rather, conditional use permits are granted by the Town Council, “issued after consultation and review by the Planning Commission.”<sup>4</sup> In this case, Middlecap brought its plans to the Planning Commission, but the Planning Commission voted against grant of the permit by a vote of 6-1.

Undaunted, Middlecap brought its request to the Town Council. The Town Council's action is the subject under review in this lawsuit. The Town Council held a public hearing on the application. Middlecap made a presentation, demonstrating the plot plan, drawings and spoke of the effects of the complex on traffic in the area. After questioning by some council members, a vote was held, and the conditional use permit was denied by a council vote of 4-0.

#### PROCEDURAL HISTORY

Middlecap's effort to obtain judicial review of the town council's action first took the form of a “Verified Petition” in the Court of Chancery. There followed motions practice in the Court of Chancery. On February 2, 2023, the Court

of Chancery issued its decision in *Delta Eta v. Mayor and Council of the City of Newark*,<sup>5</sup> holding that Chancery does not have jurisdiction over conditional use permit disputes. Chancery went on to rule that a writ of certiorari, available in Superior Court, would provide the plaintiff with an adequate remedy. Since this case was essentially on all fours with *Delta Eta*, it too was dismissed by the Chancery Court,<sup>6</sup> leaving Middlecap with the option to transfer the dispute to Superior Court – an option Middlecap exercised shortly thereafter.<sup>7</sup>

\*2 Once in Superior Court, Middlecap re-filed its complaint. It then amended the complaint to remove the request for an injunction and add a request for certiorari review. There followed motions practice in this Court concerning the limitations period for filing a petition for certiorari in Superior Court, as well as naming the council members individually as defendants. These issues have been dealt with in a separate opinion.<sup>8</sup> The parties then briefed their contentions on the merits of the dispute.

## STANDARD AND SCOPE OF REVIEW

Under the laws of Middletown, there is no right of appeal from the denial of a conditional use permit. When there is no other available means to obtain judicial review of a government action, a writ of certiorari, which commands the inferior tribunal to deliver up the record to Superior Court for review, is the appropriate pleading.

When reviewing a dispute under the Court's certiorari jurisdiction, the Court is not free to do a “deep dive” into the record. In any number of cases, the Delaware Supreme Court has tackled the question of the scope of review and the “record below” that may be considered in certiorari cases. Because the Court's ruling here is directly tied to the standard of review on certiorari, we will save further comment for the Analysis below.

## ANALYSIS

### I. The Record Under Review in Certiorari Cases.

In *Black v. New Castle County Board of License Review*,<sup>9</sup> the Supreme Court reviewed an administrative decision of a county board on certiorari. The Court said:

“The standard for reviewing a petition for a writ of *certiorari* is “strictly limited” the reviewing court “may not weigh evidence or review the lower tribunal's factual findings. Likewise, the reviewing court may not “consider the case on its merits.” As this Court has observed, “[u]nder principles of law well established in this State, *certiorari* involves a review of only such errors as appear on the face of the record being considered.”<sup>10</sup>

According to the Court, certiorari “brings up the record only so that the reviewing court can merely look at the regularity of proceedings” and that:

“The reviewing court is then limited to determining based on that limited record whether the lower tribunal: “(i) exceeded its jurisdiction;” (ii) “proceeded illegally or manifestly contrary to law”; or (iii) “proceeded irregularly.” Reversible procedural irregularity includes a tribunal's failure to create an “adequate record” for judicial review.<sup>11</sup>

*Maddrey v. J.P. Court 13*,<sup>12</sup> was an appeal of a summary ejection proceeding. In her petition for certiorari relief in Superior Court, Maddrey argued that the magistrate at her trial had erred in admitting an investigator's report over a hearsay objection. Superior Court ruled that the magistrate did not err, the report was admissible, and denied relief.<sup>13</sup>

On appeal to the Delaware Supreme Court, the Court said this:

On a common law writ of *certiorari*, the Superior Court cannot look behind the face of the record. Rather, it can only review the record for the purpose of confirming an irregularity in asserting jurisdiction, an improper exercise of its power or the declaration of an improper remedy by the inferior tribunal. For a court to do anything more, such as combing the transcript for an erroneous evidentiary ruling as Maddrey asks us to sanction in this case, converts the limited *certiorari* review of summary possession into an impermissible full appellate review that is inconsistent with both the function of the common law writ *and* the General Assembly's intent to terminate landlord tenant possession disputes summarily.<sup>14</sup>

\*3 The Supreme Court said “the evidence presented to the Justice of the Peace Court, including the testimony reflected in the transcript, is not a proper part of the record subject to Superior Court's review.”<sup>15</sup> Doing so “necessarily

contemplates that the Court will weigh and evaluate the evidence,” and is little more than a “device to circumvent the requisites of appellate jurisdiction of the Court.”<sup>16</sup>

## II. The Record Here is Limited to the Council's Vote and Any Explanation.

So far, we understand that certiorari review is limited to 1) jurisdiction, 2) “manifest” errors of law, and 3) procedural “irregularity.” Jurisdiction is not at issue in this dispute. Errors of law sit in that ambiguous space in which “manifest” error is reversible, but due to the limited nature of the review on certiorari, a legal conclusion about which there may be disagreement is not reviewable. The only “error of law” the Court discerns from this record is the “procedural regularity” question and, mindful of the Supreme Court’s admonition to avoid a detailed review of the record, the Court limits its review to the actual votes by Council and its explanations for voting in that manner. Thus, the review here is of the procedural regularity of the Town Council’s vote.

### a. There is no written opinion; the transcript is the only record.

In order to review the procedural regularity of the proceedings concerning the conditional use permit request, the Court must be satisfied that the tribunal applied the law to the facts. This is important because the failure to create an adequate record for judicial review is itself a “procedural irregularity.”<sup>17</sup> Creating such an “adequate record” is usually accomplished in administrative cases because there is a written Opinion of the board or agency. In the usual case, reference to the transcript of the proceeding is unnecessary because the quasi-judicial rationale for the decision by the agency is subsumed within its written opinion.

Here, there is no written Opinion, only a transcript of the proceedings before the Council. While the entire transcript is outside the scope of review in a certiorari proceeding, the transcript reflects the votes of the council members and their reasoning for doing so. That record begins at page 40 and ends at page 42. Since it is the only memorial of the “regularity” of the proceedings, it will be considered.

### b. The votes and the stated reasons.

The transcript reflects Councilman Royston voted no, expressing that “I believe we should deny the conditional use permit based upon the approval from 2020 commercial space

center. I think we should maintain and retain the approved plan.”

Councilman Blythe voted no, saying “I think it’s in conflict with the comprehensive plan that we have talked about all night.”

Councilman Chas voted no “for the reasons previously discussed” and because the comprehensive plan “was necessary at the time and still feel that the residents deserve.”

Councilman Reynolds voted no, saying deviation from the present plan “is in conflict with the general purposes of the comprehensive plan and related town plans.”

Councilman McGhee voted no “because this would be detrimental to the general purposes of the comprehensive plan.”

\*4 And with that, the plan was unanimously disapproved.

## III. The Middletown City Code Requirements for Conditional Use Permits.

In Middletown, the city code requires that a conditional use permit not:

- (i) Affect adversely the health or safety of persons residing or working in the neighborhood of the proposed use;
- (ii) Be detrimental to the public welfare or injurious to property or improvements in the neighborhood; and
- (iii) Be in conflict with the general purposes of the Comprehensive Plan or related Town planning or development policies.<sup>18</sup>

These are the standards against which the application for a permit must be judged by the council, exercising its quasi-judicial function. And since “adverse effects on health” or “detriment to public welfare” were not mentioned by the council, it is safe to say that all votes were cast because the council felt the proposed conditional use conflicted with “the general purposes of the Comprehensive Plan or related Town planning or development policies.”

Just what these general purposes are, or what related planning or development policies were implicated by the application, or how the permit application conflicted with those purposes is not part of the record under review. This is a problem.

Undoubtedly the parties would like to continue to argue the issue now, but the Court is not a voting member of the town council and the merits are of no concern at this point. What is concerning is the absence of any rationale for these conclusions. The Court is not in a position to conduct judicial review of a vote that simply recites the legal standard in conclusory fashion, devoid of any integration of facts that support it.

As briefly as possible, let us consider that the General Assembly has the full power to regulate land use throughout the state.<sup>19</sup> Its votes are a true exercise of legislative power, limited only by the Constitution. When the power to regulate land use is delegated to counties and towns, the power must be exercised within its delegated limits, and whether the county or town has done so is subject to judicial review, just as the county's and town's delegation of licenses or permits or zoning variances are frequently delegated to administrative agencies. When a county or town council retains the power to vote on a land use issue, it is subject to judicial review just as an administrative agency is – to ensure that its actions are within the delegated powers conferred by the higher authority and that it has acted with due process. “Normal” legislative prerogatives of the legislative process are absent when the legislative activity concerns delegated powers and, as we will see, legislators can quite easily forget that a zoning decision does not offer the same freedom of choice that other legislative affairs may.

#### IV. Land Use Decisions Require an Adequate Record for Judicial Review.

The requirement of creating an adequate record for review is not a platitude. In *Miles v. County Council of Sussex County*,<sup>20</sup> Sussex County Council rezoned some land, saying the change was “in accordance with the comprehensive Development Plan and promotes the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of Sussex County.”<sup>21</sup> The reader may recognize this as the same sort of formulaic, conclusory language used by Middletown here. The Chancery Court said “This statement is not a finding of fact and provides the Court no guidance in attempting to review the Council's decision.”<sup>22</sup> Moreover, citing multiple prior decisions,<sup>23</sup> the Court said “For ten years now the Council has been on notice that it must make findings of fact if its zoning decisions are to withstand judicial review.”<sup>24</sup> These rulings were adopted by

the Supreme Court on appeal in the oft cited case of *Tate v. Miles*.<sup>25</sup>

\*5 In *Christiana Town Center, LLC v. New Castle County*,<sup>26</sup> a writ of certiorari case, the Court said “A decision will be reversed for irregularities of proceedings if the lower tribunal failed to create an adequate record to review.”<sup>27</sup> In *Reise v. Board of Building Appeals of the City of Newark*,<sup>28</sup> the city agency revoked a rental permit but did not provide a statement of the reasons. The Supreme Court said “it is settled law that a quasi-judicial tribunal must state the basis for its decision, in order to allow judicial review.”<sup>29</sup>

In *New Castle County Council v. BC Development Associates*,<sup>30</sup> the county council rejected a rezoning of the former Brandywine Country Club. As here, the votes were cast with only perfunctory reasons given. The Court wrote that “when Council makes a rezoning decision without establishing the basis for its action, it thwarts the ability of a court to provide effective review.”<sup>31</sup> As to exactly how detailed that record must be, the Supreme Court said this:

insofar as Council simply “creates a record” and relies upon that record to justify its decision, the record must prove to be an adequate substitute for a more formal explanation. Thus, Council's reasons must be clear from the record. If several possible explanations for a given decision appear on the record, the reviewing court must not be left to speculate as to which evidential basis Council favored. We lay down no precise formula that Council must follow in order to satisfy the *Tate* requirements. Nevertheless, we believe that when Council is faced with a particularly complex zoning application and a large body of conflicting evidence is presented for its consideration, a formal statement of its findings would greatly aid the process of judicial review.<sup>32</sup>

The Court must conclude that merely reciting a code provision in support of a “no” vote is not a statement of reasons for the vote. Certainly, a reviewing Court does not need an extensive recitation of all the whys and wherefores, but some connection of the facts as found by the council person and the legal standard being applied is essential to ensure that the quasi-judicial decision was made with fidelity to the law.

It is not as though the requirement of a record for judicial review is news to the Town of Middletown. The Town

Council was involved in a rezoning case wherein these very principles were laid out specifically by the Vice Chancellor. In the protracted litigation over a Walmart store location, *O'Neill v. Town of Middletown*, one of the decisions voiding council's rezoning vote was predicated on council's failure to articulate its reasons for finding that the planned commercial activity was consistent with the Comprehensive Plan adopted by the city.<sup>33</sup> Just as a failure to articulate why a proposed rezoning is consistent with the Comprehensive Plan is fatal to the council's action, a failure to articulate why a conditional use is inconsistent with the Comprehensive Plan is likewise fatal.

In light of the foregoing, the decision of the Town Council must be voided. It may well be that the Council had bona fide reasons to deny the application that are grounded in one or more of the three statutory criteria above. The Court merely concludes that this record is not sustainable because it fails to articulate a record of reasons sufficient for judicial review.

#### **V. Plaintiff's Remaining Claims are Dismissed.**

\*6 As noted above, this dispute has had a somewhat unusual procedural history, travelling from Chancery Court as a "Verified Petition" seeking injunctive relief to Superior Court seeking certiorari. In both forums, however, the pleadings included a prayer for declaratory judgment.

By this ruling, the Court does not conclude that Middlecap is entitled to a conditional use permit. Rather, the Council's vote was defective insofar as it failed to articulate its rationale sufficiently for judicial review. Council is free to reject the

application again, should it be made, so long as it does so with reference to the criteria in the code and articulates its reasoning in sufficient detail to demonstrate that it proceeded with "regularity."

In light of this ruling, the rights and duties of the parties remain where they were. The Court therefore declines to rule on Plaintiff's prayer for a declaratory judgment.<sup>34</sup> Plaintiff's remaining arguments in favor of reversal of the Council's actions are dismissed as moot.

#### **CONCLUSION**

Chancery Court's rejection of jurisdiction over conditional use permit litigation may well give rise to additional lawsuits in Superior Court, invoking this Court's power to issue writs of certiorari. As we have seen here, certiorari review is a different analysis from Chancery's general equitable jurisdiction. Thus, questions will need to be worked out, including how the standards traditionally referenced by Chancery will apply given the more limited review in certiorari cases. The Court does not shy from the challenge, but the necessity of a record from which such review can occur will remain as true in Superior Court as it has for many years in Chancery Court.

#### **IT IS SO ORDERED.**

#### **All Citations**

Not Reported in Atl. Rptr., 2024 WL 3385825

#### **Footnotes**

- 1 Middletown Zoning Code, page 40.
- 2 Zoning code page 43-44. Although garden apartments require a conditional use permit in zone C-3, garden apartments are permitted as a matter of right in zone R-3 "Multi-Family Residential." Zoning code page 31.
- 3 Chapter 8 of the zoning code.
- 4 Section 10.A.(1)(b).
- 5 *Delta Eta v. Mayor and Council of Newark*, No. 2021-1106-MTZ, 2023 WL 2982180 (Del. Ch. Feb. 2, 2023).
- 6 *Middlecap Assocs., LLC. v. Middletown*, No. N23C-03-181 CEB, 2023 WL 2981893 (Del. Ch. Feb. 2, 2023).

- 7 A full discussion of the procedural history is found in the Court's previous denial of a motion to dismiss the case on procedural grounds. See *Middlecap Assocs., LLC v. Middletown*, No. N23C-03-181 CEB, 2023 WL 6848999 (Del. Super. Oct. 16, 2023).
- 8 Id.
- 9 *Black v. New Castle Cnty. Bd. of License Review*, 117 A.3d 1027 (Del. 2015).
- 10 Id. at 1030-31 (footnotes omitted).
- 11 Id. at 1031 (footnote omitted).
- 12 *Maddrey v. J.P. Court* 13, 956 A.2d 1204 (Del. 2008).
- 13 *Sub nom. Maddrey v. Arbor Mgmt.*, No. 06A-09-003 WCC, 2007 WL 3287942 (Del. Super. Oct. 26, 2007).
- 14 *Maddrey*, 956 A.2d at 1215.
- 15 *Maddrey*, 967 A.2d at 1216.
- 16 Id. (citing *Castner v. State*, 311 A.2d 858 (Del. 1973)).
- 17 *Christiana Town Ctr., LLC v. New Castle Cnty.*, No. 3342004, 2004 WL 2921830 (Del. Dec. 16, 2004) (citing Woolley, Delaware Practice, Volume 1, § 923).
- 18 Middletown Zoning Code, § 10.A(1).
- 19 Del. Const. art.II, § 25.
- 20 *Miles v. Cnty. Council of Sussex Cnty.*, 1985 WL 165744, at \*2 (Del. Ch. Jan. 21, 1985).
- 21 Id.
- 22 Id. at \*3.
- 23 *Green v. Cnty. Planning & Zoning Comm'n. of Sussex Cnty.*, 340 A.2d 852 (Del. Ch. 1974); *Moore v. Gravenor*, Del. Ch. C.A. 684-S, Hartnett, V.C. (March 7, 1978); *Russell v. Cnty. Council of Sussex Cnty.*, Del. Ch. C.A. 695-S, Brown, V.C. (April 25, 1978); *Bay Colony, Ltd. v. Cnty. Council of Sussex Cnty.*, et al., Del. Ch. C.A. 1001-S, Hartnett, V.C. (December 5, 1984).
- 24 Id.
- 25 *Tate v. Miles*, 503 A.2d 187 (Del. 1986).
- 26 *Christiana Town Ctr.*, 2004 WL 2921830.
- 27 Id. at \*2 (citing Woolley, Delaware Practice, § 923).
- 28 *Reise v. Bd. of Bldg. Appeals of Newark*, 746 A.2d 271 (Del. 2000).
- 29 Id. at 274.
- 30 *New Castle Cnty. Council v. BC Dev. Assocs.*, 567 A.2d 1271 (Del. 1989).
- 31 Id. at 1276.
- 32 Id. at 1276-77 (footnote omitted).

33 [O'Neill v. Middletown](#), No. Civ.A. 1069-N, 2006 WL 205071 at \*34-36 (Del. Ch. Jan. 18, 2006).

34 See 10 Del. C. § 6501 (Court has discretion to refuse to enter a declaratory judgment).

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## **RULES OF PROCEDURE OF THE BOARD OF ADJUSTMENT OF CITY OF DOVER, DELAWARE**

These rules shall govern the procedure of the Board of Adjustment of the City of Dover, Delaware.

### **Definitions**

**"Agenda"** includes but is not limited to a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor.

**"City"** means the City of Dover, Delaware, unless otherwise specified.

**"Board of Adjustment"** or **"Board"** means the Board of Adjustment of the City of Dover, Delaware.

**"Meeting"** means the formal or informal gathering of a quorum of the members of the Board of Adjustment for the purpose of discussion or taking action on public business.

**"Chairman"** means the Chairman of the Board of Adjustment.

**"Presiding Officer"** means the Chairman of the Board of Adjustment, or such other person who presides over the meetings of the Board of Adjustment, pursuant to the Rules of the Board of Adjustment.

**"Public business"** means any matter over which the Board of Adjustment has supervision, control, jurisdiction or advisory power.

**Rule 1 - Duties**

- 1.1 The Chairman shall preside at all meetings or hearings of the Board, decide all points of order or procedure, and perform all duties required by law or these Rules.
- 1.2 The Department of Planning and Inspections shall conduct, at the discretion of the Board, all official correspondence of the Board, send out all notices required by law and by these Rules of Procedure, keep records of each examination of other official action of the Board and perform all duties required by law and these Rules of Procedure.
- 1.3 In the absence of the Chairman, the presiding officer, with all powers and duties of the Chairman enumerated herein, shall be the Vice-Chairman as elected from its membership by a majority vote of all of the members of Board of Adjustment. In the absence of the Vice-Chairman, the presiding officer, with all powers and duties of the Chairman enumerated herein, shall be such other member of the Board of Adjustment as is elected by a majority vote of the members of Board of Adjustment present.

**Rule 2 - Order of Business; Conduct of Meetings**

- 2.1 The order of business at each regular meeting of the Board of Adjustment shall be as follows:
- Call to Order
  - Pledge of Allegiance
  - Roll Call
  - Approval Agenda
  - Approval of Minutes
  - Communications of Reports
  - Old Business
  - New Business
  - Adjournment

- 2.2 The order of business can be altered at any duly constituted meeting by an affirmative vote of a majority of the Board of Adjustment members present. The privilege of the floor may be granted to the public at any time by presiding officer.
- 2.3 During public hearings, the presiding officer may set reasonable time limits on public comments. An individual may submit a written statement in lieu of or in addition to verbal comments. The presiding officer may terminate or limit testimony which is irrelevant or unduly repetitive.
- 2.4 Every attempt will be made to complete all business scheduled. In the event that the presentation of a scheduled agenda item takes longer than reasonably anticipated, the presentation may be suspended by approval of majority of the Board of Adjustment members present. A motion to suspend a presentation should, to the extent possible, include the date and time at which the remainder of the presentation will be heard.
- 2.5 Testimony at public hearings shall be taken under oath which shall be administered by the Board's attorney or any other individual as may be directed by the presiding officer.

**Rule 3 - Meetings of the Board of Adjustment**

- 3.1 Regular meetings shall be held in City of Dover City Hall Council Chamber or such other location as designated by majority vote of all the members of the Board of Adjustment.
- 3.2 Regular meetings shall convene at 9:00 A.M. on those days when a meeting has been properly noticed and advertised.

- 3.3 Special meetings and executive sessions may be held as provided in Title 29, Chapter 100 of the Delaware Code. Special meetings may be called by the Chairman upon at least 48 hours' notice to each member. The Chairman shall call a special meeting within 10 days of receipt of a written request from any two members of the Board. Notice of a special meeting shall include an explanation as to why the notice required in Rule 4 could not be given.
- 3.4 Except for executive sessions, all meetings shall be open to the public.
- 3.5 Minutes of all meetings, including executive sessions, shall be kept and made available for public inspection and copying. At a minimum, the minutes shall include a record of attendance and a record, by individual members of the Board of Adjustment, of each vote taken and each action agreed upon.

#### **Rule 4 - Public Notice of Meetings**

- 4.1 Public notice of all meetings shall be posted on the public bulletin board located in City Hall and on the official City of Dover website.
- 4.2 Public notice, property posting and advertisement of meetings and public hearings shall comply with all applicable provisions of State law and City of Dover ordinances. In addition, notice of a public hearing shall be mailed to an appellant or applicant (or attorney or agent of the appellant or applicant) at least 15 days before the date of the hearing.

#### **Rule 5 - Agenda**

- 5.1 The agenda for Board of Adjustment meetings shall be available to members of the Board of Adjustment at least one week prior to the scheduled meeting.
- 5.2 The Director of the Department of Planning and Inspections shall be responsible for the preparation and contents of the agenda. Any member of the Board of Adjustment may place items on the agenda by contacting the Director of Planning and Inspections, either verbally or in writing, prior to the posting of the agenda. Any other person may

request to have items placed on the Board of Adjustment agenda by notifying the Director of Planning and Inspections, in writing; provided, however, that items requested to be placed on the agenda that are not, in the opinion of the Director or Planning and Inspections, of Board of Adjustment jurisdiction, or which do not meet requirements of notice or advertisement, will not be placed on the posted agenda. Those items that do not qualify as Board of Adjustment business will be responded to by the Director of Planning and Inspectiuons and copied to the members of the Board of Adjustment.

- 5.3 Items which arise at the time of the Board of Adjustment's meeting may be added to the agenda, and items may be deleted from the agenda, by a majority vote of all of the members of the Board of Adjustment present, subject to requirements of advertisement and other applicable provisions of state law and City of Dover ordinance.

**Rule 6 - Attendance of Members of the Board of Adjustment at meetings; Quorums**

- 6.1 No members of the Board of Adjustment shall be absent from scheduled meetings or from other official duties without cause. When

unable to attend a scheduled meeting, a member of the Board of Adjustment shall be responsible for notifying one of the following: the Chairman, the Director of Planning and Inspections, another Board of Adjustment member, or a staff member of the Office of Planning and Inspections.

- 6.2 The presence of no less than three (3) members of the Board of Adjustment shall constitute a quorum.
- 6.3 When a quorum is not present at any properly called meeting, the members of the Board of Adjustment present may adjourn.
- 6.4 If no members of the Board of Adjustment are present, any staff member of the Office of Planning and Inspections may adjourn the meeting.
- 6.5 Three (3) affirmative votes shall be required to approve any special use exception or variance. Failure to receive three (3) affirmative votes shall be deemed to disapprove any matter.
- 6.6 Any other matter may be decided by majority vote of Board of Adjustment members present.

### **Rule 7 - Voting Procedure**

- 7.1 On each motion duly made and seconded, the presiding officer shall call the roll or determine the vote in some other manner, and announce the results.
- 7.2 A written record shall be made of the vote by each member of the Board of Adjustment on each vote taken. Said record shall also reflect the number of "aye" votes, the number of "nay" votes and the number of "abstaining" votes.

### **Rule 8 - Record Keeping**

- 8.1 A file shall be kept in the Office of Planning and Inspections of all Board of Adjustment meetings. The file shall include copies of meeting notices (including the time, date and place where they were posted), the agenda and the minutes of the meeting.

### **Rule 9 - Minutes of Board of Adjustment Meetings**

- 9.1 Minutes shall be taken of each meeting of the Board of Adjustment, and shall reflect the following:
- a. Kind of meeting.
  - b. Date and place of meeting.
  - c. Name of the presiding officer.
  - d. Members of Board of Adjustment present.
  - e. Whether the minutes of the previous meeting were approved.
  - f. The proceedings of the Board of Adjustment, briefly and accurately stated. The minutes shall record what was done rather than what was said. However, a member of Board of Adjustment may request that a statement or written material be attached to the minutes and made a part thereof.
  - g. All motions voted upon and the results of said motions.
  - h. Names of members of Board of Adjustment making motions and those making secondary motions.
  - i. A record by individual members of Board of Adjustment, of each vote taken and action agreed upon.
  - j. Time of convention and adjournment.

- 9.2 Minutes shall be taken, prepared and presented by a staff member of the Office of Planning and Inspections and the Board's attorney in written form for approval as written or as amended. The minutes as approved shall be filed in the minute book of the Board of Adjustment. Copies of the approved minutes shall be made available to the general public, except as otherwise authorized by law.
- 9.3 Recordings will be made of all Board of Adjustment meetings at which City of Dover business is transacted. The recordings shall be under the custody of the Director of Planning and Inspections and shall be open to inspection and copying in accordance with applicable law regarding access to public records.

#### **Rule 10 - Conduct During Meetings**

- 10.1 When a member of Board of Adjustment desires to speak, that member shall address the presiding officer and shall not proceed until recognized and granted the privilege of the floor. The presiding officer shall recognize the member of Board of Adjustment who is the first to address the presiding officer.
- 10.2 No member of Board of Adjustment shall interrupt another in debate without the consent of the other. To obtain such consent, the member shall first address the presiding officer.
- 10.3 If any member of Board of Adjustment, in speaking or otherwise, transgresses the Rules of the Board of Adjustment, the presiding officer shall, or any member of Board of Adjustment may, call the errant member to order. When a member shall be called to order, that member shall not proceed without the permission of the presiding officer.

#### **Rule 11 - Change or Suspension of Rules**

Any rule of the Board of Adjustment may be changed or suspended by the approval of a majority of all of the members of the Board of Adjustment.

**Rule 12 - Rules of Order**

- 12.1 These rules have been adopted in order to provide an orderly procedure for matters coming before the Board. However, these rules shall be interpreted and applied so as to afford substantial justice and to promote a fair but efficient hearing procedure. Consequently, strict adherence to these rules shall not be required but the Board may modify and digress from these rules for reasonable cause as the situation may demand. In the event that any rule herein contradicts state law or City of Dover ordinance, such rule shall be construed in compliance with such statute or ordinance. In the event that any of the foregoing rules is declared illegal or unenforceable by any court of competent jurisdiction, the balance hereof shall remain in full force and effect.

**Rule 13 - Standards of Conduct**

- 13.1 Persons attending Board of Adjustment meetings shall observe appropriate dress standards and standards of conduct. Attire that may distract from the proceedings shall not be permitted.
- 13.2 Persons attending Board of Adjustment meetings may wear one (1) "cause supporting sign" affixed to their clothing. The size of such "sign" may not exceed three (3) inches by five (5) inches. Signs offensive to the members of the Board of Adjustment or to participants, and signs that may distract from the proceedings shall not be permitted. No placards shall be permitted at any meeting of the Board of Adjustment.

- 13.3 The City Manager for the City of Dover may, from time-to-time, prescribe by policy reasonable and appropriate attire and conduct for persons attending meetings of the Board of Adjustment.
- 13.4 Members of the news media shall conduct themselves in such a manner as to not be disruptive of the proceedings of the Board of Adjustment.
- 13.5 Persons attending Board of Adjustment meetings shall at all times conduct themselves in an orderly manner and follow the direction of the presiding officer.
- 13.6 No applause or other disruptive behavior shall be permitted. All cellular phones, pagers, and other electronic devices which emit noise shall be turned off or placed on silent mode for the duration of the meeting.

#### **Rule 14 - Appeals and Applications to the Board of Adjustment**

- 14.1 Appeals and applications to the Board, as permitted by state law and City of Dover ordinances, shall be on forms to be prepared by the Director of Planning and Inspections and approved by the Board of Adjustment, and shall be accompanied by the proper fee. Appeals and applications shall be signed by any person authorized by law to make such an appeal or application, or an agent or an attorney of such person.
- 14.2 All appeals and applications to the Board shall be accompanied by a recent survey, prepared and approved by a licensed surveyor, of the subject property, except when this requirement is waived by the Board or the Office of Planning and Inspections.
- 14.3 Appellants, Applicants, supporters, and members of the opposition are encouraged to submit their exhibits and other supporting materials prior to the hearing, if possible.

- 14.4 All communication and correspondence with the Board shall be submitted through the Office of Planning and Inspections. Telephone, email, verbal or written communication to individual Board members regarding a case is prohibited.
- 14.5 Appeals and applications shall not be amended after public notice of the public hearing has been made except that the size of any variance requested may be increased or reduced by an applicant prior to or at the public hearing provided, however, that the type of variance requested (side yard variance, front yard variance, etc.) has been included in the public notice.
- 14.6 During the presentation of an appeal or application to the Board, persons addressing the Board shall identify themselves by name and place or residence. No cross-examination of witnesses or applicants will be permitted. All questions for others should be directed to the Board and the Board may direct the question to the appropriate person. Nothing in this paragraph shall limit an attorney from directly questioning witnesses in support of the position the attorney is advocating.
- 14.7 The Board may continue a hearing or vote to leave the record open for the purpose of supplementing the record and may put limitations or conditions thereon.
- 14.8 Following a decision by the Board on an appeal or application, a copy of the written decision shall be sent to the appellant or applicant, or the agent or attorney for the appellant or applicant. Any oral discussion of or vote upon the application by the Board shall be deemed in the nature of preliminary deliberations to the rendering of a final written decision and only the written decision, as adopted by a majority of the Board, shall constitute a decision of the Board.
- 14.9 The Board may impose conditions with respect to the granting of an application or appeal pursuant to the City of Dover Municipal Code. Whenever such condition is imposed by the Board, the condition should be stated in the decision of the Board. Such decision shall remain valid

only as long as the condition or conditions upon which it was approved exist or the conditions imposed by the Board are adhered to.

**Rule 15 — Order of Proceeding:**

- 15.1 The order of presentation shall generally be as follows subject to modification by the Chairman for reasonable grounds.
- 15.2 The Board shall identify the application number, the general nature of the proceeding (appeal, variance, or special use exception), the name of the filing party, the description of the subject property, and shall state whether the Office of Planning and Inspections has received any correspondence pertaining to the application.
- 15.3 The Applicant/Appellant will be afforded the opportunity to present testimony and evidence supporting the application. The Applicant/Appellant may appear with or without legal counsel. The Applicant/Appellant shall be permitted to present witnesses and introduce exhibits, petitions, and other documents into the record.
- 15.4 Upon the conclusion of each witness' initial testimony, members of the Board, the Planning and Inspections Department, and the Board's attorney shall have an opportunity to ask questions of the Applicant/Appellant and its witnesses and counsel.
- 15.5 In the case of a variance or special use exception application, at the conclusion of the Applicant's witnesses and evidence, any person desiring to make a statement in support of the application shall be given an opportunity to do so. Each person desiring to make such a statement shall identify himself or herself by name and address and shall be sworn in prior to making a statement.
- 15.6 In the case of a variance or special use exception application, at the conclusion of the statements in favor of an application, any person

desiring to make a statement in opposition to the application shall be given an opportunity to do so. Each person desiring to make such a statement shall identify himself or herself by name and address and shall be sworn in prior to making a statement.

- 15.7 At the conclusion of all evidence and public statements, if applicable, the Applicant/Appellant shall be given a brief opportunity to submit additional testimony or evidence in the form of "rebuttal." The presiding officer may allow for brief "sur-rebuttal" testimony from the opposition provided that such testimony is limited to the scope of the testimony presented in the "rebuttal" and is not repetitive, redundant, or irrelevant.
- 15.8 All exhibits presented to the Board for its consideration shall be identified and marked appropriately. All such documents shall be retained by the Office of Planning and Inspections.
- 15.9 Hearsay evidence shall be permitted a Board hearing and the Board shall be entitled to hear and consider any probative evidence which, in the Board's opinion, is relevant and of sufficient credibility to be entitled to consideration.
- 15.10 The Board shall have the authority to set reasonable time limits on all parties and speakers appearing before it.
- 15.11 The presiding officer shall have authority to terminate or limit any testimony or questioning which is irrelevant or unduly repetitive or provocative.
- 15.12 Once all testimony and evidence has been presented, the public hearing shall be closed and no new testimony or evidence will be permitted unless the Board votes to leave the public record open.

#### **Rule 16 - Delaware Freedom of Information Act**

- 16.1 All procedures of the Board of Adjustment shall comply with the Delaware Freedom of Information Act, as contained in Title 29,

Chapter 1000 of the Delaware Code, as amended. To the extent that any provision herein shall conflict with the provisions of the Delaware Freedom of Information Act, the more restrictive provision shall apply.

### **Rule 17 - Delaware State Employees', Officers' and Officials' Code of Conduct**

17.1 Members of the Board of Adjustment shall be subject to the Delaware State Employees', Officers' and Officials' Code of Conduct, as set forth in Title 29, Chapter 58, Subchapter I of the Delaware Code.

### **Rule 18 - Request for a Rehearing**

18.1 A motion for a rehearing shall be made not later than 10 days after the filing of a decision in the office of the Board of Adjustment. The Board of Adjustment may rehear a matter for the following reasons:

- a. Mistake, inadvertent surprise or excusable neglect.
- b. Newly discovered evidence which by due diligence could not have been discovered at the time of the original hearing.
- c. Fraud, misrepresentation or other misconduct of an adverse party.

18.2 A motion for a rehearing shall state the grounds therefore and may be accompanied by applicable affidavits. The motion and affidavits shall be provided by mail to the opposing party of record, if any. The opposing party shall have 10 days after receipt of the motion to file a response thereto and attach applicable affidavits. The Board shall determine the motion upon the written application, any responses thereto, and accompanying affidavits, if any.

### **Rule 19 - Adoption and Effective Date**

19.1 These rules shall become effective upon adoption by a majority vote of all of the members of the Board of Adjustment.

Adopted:  
Effective Date:

DRAFT