

## **ZONING HEARING PROCEDURES AND RULES**

This document is intended to provide a basic primer for zoning hearings before the Zoning Hearing Board (which will be referred to as the ZHB).

### **I. APPLICATION; TIME LIMIT**

Once an application is filed for a zoning hearing, the hearing is scheduled before the ZHB. The first hearing must be held within sixty (60) days after the application is filed, unless that time is extended by the applicant. The application is first sent to the Township Planning Commission, which reviews the application and makes a recommendation to the ZHB.

### **II. ROLE OF ZONING HEARING BOARD**

The ZHB's role, which is set out in Article IX of the Pennsylvania Municipalities Planning Code (which will be referred to as the MPC), is to apply the Township's Zoning Ordinance to the facts of the case before it, and on occasion to interpret the terms of the Zoning Ordinance. The ZHB is NOT permitted to ignore or rewrite the Zoning Ordinance, which can only be done by the Township's Board of Supervisors. The ZHB is bound by the Zoning Ordinance before it, and must apply the terms of that Zoning Ordinance as written, or interpret the intent of the Zoning Ordinance when an interpretation is at issue. As such, it has no power whatsoever to alter the Ordinance. That is a legislative function, and can only be performed by the Township's Board of Supervisors.

Therefore, the ZHB will not generally accept testimony or evidence involving policy or why someone thinks the Zoning Ordinance is wrong or should have been written differently. That evidence or testimony is irrelevant to the ZHB's role, and therefore is not appropriate testimony, and typically will not be permitted.

IT IS ALSO IMPORTANT TO NOTE THAT THE ZHB DOES NOT ENFORCE THE ZONING ORDINANCE OR VIOLATIONS, OR EVEN ITS DECISIONS. THAT IS THE JOB OF THE TOWNSHIP'S ZONING OFFICER AND BOARD OF SUPERVISORS. ONCE THE ZHB MAKES ITS DECISION, ITS ROLE AT THE TOWNSHIP LEVEL IS COMPLETED.

### **III. HEARING PROCEDURES; BURDENS OF PROOF**

If the hearing is on an appeal from an enforcement notice by the Township, then the Township has the burden of proof, which means that the Township must proceed with the evidence in the case and must prove its case by a preponderance of the evidence (which means that the ZHB must be convinced that the Township has submitted sufficient evidence to prove its case, and that the evidence which the ZHB accepts is slightly more persuasive than the evidence

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against the Township). In all other appeals to the ZHB, the applicant has the burden of proof, using the same preponderance of evidence standard.

All testimony or statements must be taken under oath or affirmation, and a certified court stenographer will take down the testimony, because there must be an official permanent record of the hearing. The ZHB chairman, the court stenographer, and the ZHB's solicitor all have the power to swear in or affirm witnesses.

The party with the burden of proof will present his/her/its evidence one witness at a time. After each witness has testified on direct examination, then any opposing attorney will have the right to cross examine each witness, and anyone in the audience will have the right to ask questions of, or cross examine, each witness. The witness's representative will then have the right of redirect examination of the witness. At that point, the testimony of that witness is finished, and the party with the burden of proof will present their next witness, following the same procedure, until all witnesses for that party have been presented. A person does not have to be sworn in or affirmed to ask questions, but during the questioning period, questioners are confined to asking questions only, and are not permitted to make statements, which can be made later, and must be under oath. The ZHB can ask questions of witnesses at any time during their testimony.

After the party with the burden of proof has finished presenting its case, any opponents, objectors, or other parties can present their case, again following the same procedure. As stated above, all statements of every person must be made under oath or affirmation, and anyone making a statement or testifying will be subject to being questioned or cross-examined by the other parties and anyone from the audience.

If the municipality is represented as a party, or if any party is represented by an attorney, the ZHB will typically allow them to go first in their cross-examination and in the presentation of their case, because experience has shown that they frequently address in an efficient way many of the issues that others in the audience wish to address, thus saving time.

Once all of the opponents or other parties have presented their testimony, then the party with the burden of proof will have the right to present rebuttal testimony, which cannot be a repeat of testimony they have already given, but is intended to rebut any new testimony or evidence presented by others after the first party presented all of their testimony and evidence.

After all of the testimony and evidence has been presented, the parties will have a right to make closing statements or argument in support of their case, beginning with the party with the burden of proof, and in the order they presented their respective cases. This is usually limited to parties that are represented by attorneys, because the audience members have typically already presented their comments and arguments in the form of statements. However, each case will be handled based on its own individual circumstances.

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#### **IV. TYPES OF MATTERS TO COME BEFORE THE ZHB**

There are several different types of matters that will typically come before the ZHB. Each one has its own special rules and limitations. A brief explanation of each follows.

##### **A. SPECIAL EXCEPTION**

It is often said that a special exception is neither special nor an exception. Rather, it is a use that is permitted in a particular zone so long as the applicant can show that he/she/it meets all of the special exception criteria set out in the Zoning Ordinance. The courts have held that, when the Township's Board of Supervisors allows a certain use in a certain zone by special exception, that constitutes a recognition by the Supervisors that the use in general is a lawful use and is appropriate in the zone, subject only to the specific applicant proving that his/her/its proposed use meets all of the general or specific criteria for that use. In other words, by law, the ZHB is not permitted to determine that the proposed use in general is not appropriate, because the Board of Supervisors has already determined that it is. Thus, by law, the only role that the ZHB has is to assure that the applicant meets his/her/its burden of proof to show that all of the required general or specific criteria for the proposed special exception are met.

Because a special exception is a permitted use, once the applicant meets his/her/its burden of proof, the burden shifts to the objectors to prove that, even though the applicant may have met the required burden, the particular use as proposed is contrary to the public health, safety, and welfare. However, the courts have held that the objectors' burden is a heavy one, and they must essentially prove by clear and convincing evidence (much stronger evidence than a preponderance of evidence, discussed in III, above) that the proposed use will cause harm to the public health safety and welfare, even though it meets all of the special exception criteria. Their evidence must be concrete, and cannot be speculative (i.e. "if this is built my property values will go down" is not sufficient).

Of course, the objectors can also challenge the special exception by showing that the applicant has not met his/her/its burden of proof on one, some, or all of the special exception criteria.

All special exceptions must meet the general special exception standards in the Zoning Ordinance. The Zoning Ordinance may also contain specific criteria for some special exception uses in addition to the general standards.

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## **B. VARIANCES**

A variance is a request to waive or alter the terms of the Zoning Ordinance for a specific proposed use. A variance recognizes that the Zoning Ordinance does not apply to the proposed use in some way, but requests the ZHB to waive or alter the Zoning Ordinance requirements to allow the proposed use. A variance can seek to allow a use that is not permitted in a particular zone, or to waive a certain requirement for a proposed use (i.e. setbacks, parking, or such).

In theory, a variance is difficult to obtain, because the Applicant must first show that failure to allow the proposed use creates an unnecessary hardship. Once the unnecessary hardship is shown, the applicant must then also show that all of the following are met: the hardship exists because of unusual conditions of the property or lot, such as dimensional, topographic, or physical characteristics, which exist because of the property, and not because of the Zoning Ordinance; because of the unique circumstances of the property, the property cannot reasonably be used in a manner permitted by the Zoning Ordinance; that the hardship was not created by the applicant; that the variance will not alter the essential character of the neighborhood; and that the variance represents the minimum variance that will afford relief.

A variance can be granted only if all six of the above criteria are met. Failure to meet any one of the criteria will result in denial of the variance request.

## **C. ENFORCEMENT NOTICES**

An Enforcement Notice is a notice sent by the Township notifying a property owner that he/she/it is in violation of one or more provisions of the Zoning Ordinance. The MPC requires that the property owner be given a specified amount of time to correct, or cure, the violation. If the property owner does not believe that there is a violation, or otherwise wishes to appeal the Enforcement Notice, the Enforcement Notice will specify a certain period of time within which they must file an appeal to the ZHB. If they do not file an appeal or cure the violation within the time given, then the violation is conclusively presumed, and they cannot later challenge the existence of the violation.

If the property owner appeals the Enforcement Notice to the ZHB within the required time, then the ZHB will hold a hearing, following the same procedures outlined in III, above. However, because the Township is claiming that the property owner has violated the Zoning Ordinance, the burden of proving the violation is on the Township, which therefore has the burden of proof, and must present its case first. If the Township is successful in convincing the ZHB of the violation, then the Township (NOT the ZHB) can seek civil fines of up to \$500 per day, plus costs and attorney's fees, from the property owner before a district justice, because, as stated in III, above, the ZHB does not

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enforce the Ordinance or its decisions. That is the role of the Township and the Zoning Officer.

#### **D. VALIDITY CHALLENGES**

A validity challenge is essentially a legal challenge that questions the validity of either the entire Zoning Ordinance or a portion of it. This challenge generally raises legal arguments. Some common validity challenges are for spot zoning, failure to include a provision required by law, including a provision that is illegal or not permitted, or the constitutionality of a portion of the Zoning Ordinance, although there may be other types of validity challenges as well. The person challenging the validity of the Zoning Ordinance has a very high burden of proof, because all ordinances are presumed to be lawful and constitutional.

#### **V. TESTIMONY AND EVIDENCE**

There are a number of rules of testimony and evidence before a ZHB that are important to know.

- Zoning hearings are considered local administrative, not court, proceedings. Therefore, the rules of evidence used in courtrooms do not strictly apply. Some evidence that would not be permitted in a court trial may be permitted in a zoning hearing. However, all evidence or testimony presented must be relevant to the issues before the ZHB.
- One type of evidence or testimony that is often offered is hearsay evidence, which is testimony offered by someone about a statement of another person, or a document prepared by another person, which is offered for the truth of the statement. For example, if a witness testifies that John Smith told them something, that is hearsay, because that witness is offering what John Smith said as the truth. Other examples are a newspaper article or a letter written by someone other than the witness. All of those are hearsay, because they are offered by someone other than the person who made the statement or wrote the document as proof of the truth of the information in the statement or document. The rule on hearsay before ZHBs is that if the hearsay is not objected to, it can be considered by the Board. However, if someone objects to the information as hearsay, the Board can only consider the hearsay evidence if other non-hearsay evidence is presented that corroborates or confirms the hearsay evidence. For example, if someone testified that John Smith told them that he was driving a car, that is hearsay, and, if objected to, could not be considered. However, if another witness were to come in and say "I saw John Smith driving the car", then the hearsay would be confirmed or corroborated by non-hearsay evidence, and therefore could be considered by the Board. The reason for this rule is that it would be unfair to allow hearsay testimony into evidence when the other party would not have any way of testing the truth of that evidence, because the other parties could not cross-examine the person who was supposed to have made the statement or written the document about its truth.

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- Direct evidence is the best evidence. For example, it is much better to testify that I said or did something than it is to ask someone else “isn’t it true that I said or did something”. As another example, it is not as effective to say John Smith handed me a flyer as it is to present the flyer and say this is a flyer that John Smith handed me.
- Photographs can be valuable direct evidence, but typically only the person who took the photographs or someone who was present when they were taken and who can confirm that they are accurate can present the photographs.

This explanation is provided to give a framework and general overview of the procedures before a ZHB, and to answer common questions that zoning officers are often asked. However, because zoning is a technical area of law, it is generally best if you seek the advice of an attorney who is experienced in zoning law and practice. Municipal zoning officers are not attorneys, and, although generally knowledgeable and experienced, and useful and willing sources of help when you are considering a zoning appeal or application, they cannot, and do not want to, give legal advice.

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