

ARTICLE XXVIII ZONING HEARING BOARD**Section 2800 PURPOSE, ESTABLISHMENT AND MEMBERSHIP**

- A. The purpose of this Article is to establish regulations to govern the establishment, functions, and procedures of the Borough Zoning Hearing Board, hereinafter called the "Board".
- B. A Zoning Hearing Board shall be established for the purpose of carrying out zoning functions as provided by Article IX of Act 247, the Pennsylvania Municipalities Planning Code, as amended. The Board shall consist of three (3) members appointed by Borough Council for overlapping terms of three (3) years each, with one (1) term of office to expire each year. Members of the Board shall be residents of the Borough and shall hold no other office. The Board shall promptly notify Borough Council of any vacancy. Appointments to fill vacancies shall be only for the unexpired portion of the term.
- C. The Borough Council may, by resolution, appoint a resident of the Borough to serve as alternate member of the Board. The term of the alternate member shall be three (3) years, and the alternate member shall hold no other office in the Borough. An alternate may participate in any proceeding or discussion of the Board, but shall not be entitled to vote as a member of the Board nor be compensated pursuant to Section 2804, unless designated as a voting alternate member pursuant to Section 2801. Alternates shall hold no other office in the Borough.
- D. Any Board member may be removed for malfeasance, misfeasance or nonfeasance in office or for other just cause by majority vote of Borough Council, taken after the member has received fifteen (15) days advance notice of the intent to take such a vote. A hearing will be held in connection with the vote if the member shall request it in writing.

Section 2801 BOARD ORGANIZATION, RULES AND RECORDS

- A. The Board shall elect officers from its membership annually, and such officers may succeed themselves. For the conduct of any hearing and the taking of any action, the quorum shall be not less than a majority of all the members of the Board, but the Board may appoint a hearing officer from its own membership to conduct any hearing on its behalf and the parties may waive further action by the Board, as provided in Section 2805.
- B. If, by reason of absence or disqualification of a member, a quorum is not reached, the chairman of the Board shall designate the alternate member(s) to sit on the Board. The alternate member shall continue to serve on the Board in all proceedings involving the matter or case for which the alternate was initially appointed, until the Board has made a final determination of the matter or case.
- C. The Board, subject to the conditions of this Ordinance and the laws of the Commonwealth, may adopt, alter, and rescind rules and forms for its procedure. The Board shall file a copy of each decision with the Borough Manager, and with the Borough Zoning Officer. The Board shall keep full public records of its business, which records shall be the property of the Borough, and shall submit a full report of its activities to the Borough Council, as requested.

Section 2802 JURISDICTION

The Zoning Hearing Board shall have exclusive jurisdiction to hear and render final adjudications in the following matters:

- A. Substantive challenges to the validity of this Ordinance or Zoning Map, except those brought before the Borough Council pursuant to Section 609.1 and 916.1(a)(2) of Act 247, the Pennsylvania Municipalities Planning Code, as amended.
- B. Challenges to the validity of this Ordinance or Map raising procedural questions or alleged defects in the process of enactment or adoption shall be raised by an appeal taken within thirty (30) days after the effective date of said Ordinance. Where the ordinance appealed from is the initial Zoning Ordinance of the municipality and a Board has not been previously established, the appeal raising procedural questions shall be taken directly to court.
- C. Appeals from the determination of the Zoning Officer, including, but not limited to the granting or denial of any permit, or failure to act on the application therefor, the issuance of any cease and desist order, misinterpretation or misapplication of any provision of a valid ordinance or map, or any valid rule or regulation of the Borough governing the action of the Zoning Officer.
- D. Appeals from a determination by the Borough Engineer or the Zoning Officer with reference to the administration of any floodplain or flood hazard article within this Ordinance.
- E. Applications for variances from the terms of this Zoning Ordinance pursuant to Section 2808, such provisions within a land use ordinance pursuant to Section 910.2 of Act 247, the Pennsylvania Municipalities Planning Code, as amended.
- F. Applications for special exceptions under the Zoning Ordinance pursuant to Section 2809, or such provisions within a land use ordinance, pursuant to Section 912.1 of Act 247, the Pennsylvania Municipalities Planning Code, as amended.
- G. Appeals from the Zoning Officer's determination of preliminary opinion about a proposed development or use under Section 916.2 of Act 247, the Pennsylvania Municipalities Planning Code, as amended.
- H. Appeals from the determination of the Zoning Officer or Borough Engineer in the administration of this Ordinance or provision thereof with reference to sedimentation and erosion control and stormwater management insofar as the same relate to development.

Section 2803 APPLICATION FOR HEARINGS

- A. Applications for hearings before the Board shall be filed with the Zoning Officer, together with the proper fee in accordance with Section 2804.
- B. An application for a special exception or variance from the terms of this Ordinance shall state:
 - 1. The name and address of the applicant.
 - 2. Name and address of the owner of the real estate to be affected by the proposed application.

3. Description and location of the real estate to be affected by such proposed change.
 4. Statement of the present zoning classification, present land use, and existing improvements of the real estate in question.
 5. Statement of the Section of this Ordinance authorizing the proposed special exception or variance and reasons why it should be granted.
 6. Description of the proposed use and improvements.
 7. Site plan indicating the metes and bounds of the property, any proposed modification of property boundaries, location, arrangement, use, setback, and dimensional features showing compliance with applicable area, width, coverage, yard, and design standards of all proposed new structures, existing structures, additions to existing structures, and any significant features, existing and proposed improvements and facilities, such as, but not limited to, drainage facilities, utility lines, driveways, paved areas, curb cuts. and any additional information pertinent to the application. In the case of an application involving a proposed modification of property boundaries, the site plan must be prepared by a licensed engineer or surveyor. In the case of other applications, the site plan can be prepared by the applicant's representative, but the information must, nevertheless, be sufficiently accurate to provide the Zoning Hearing Board with the factual basis to determine the issues.
- C. In the event that any required information is not furnished, the application shall be refused and the fee returned to the applicant.

Section 2804 EXPENDITURES

- A. Within the limits of funds appropriated by the Borough Council, the Board may employ or contract for secretaries, clerks, legal counsel, consultants and other technical and clerical services. Members of the Board, including the alternative member when designated in accordance with Section 2801, may receive compensation for the performance of their duties, as may be fixed by the Borough Council, but in no case shall the amount of compensation exceed the rate of compensation authorized to be paid to the members of the Borough Council.
- B. The Borough Council may prescribe reasonable fees with respect to hearings before the Board. Fees for said hearings may include compensation for the secretary and members of the Board, notice and advertising costs and necessary administrative overhead connected with the hearing. The costs, however, shall not include legal expenses of the Board, expenses for engineering, architectural or other technical consultants or expert witness costs. The applicant, before any action by the Board, shall deposit with the Zoning Officer the appropriate filing fee as set forth in the fee schedule adopted by resolution of the Borough Council.

Section 2805 HEARINGS

The Zoning Hearing Board shall conduct hearings and make decisions in accordance with the following requirements:

- A. The Board shall fix a reasonable time and place for public hearings. Notification of said hearing shall be provided, as set forth in Section 2806.

- B. The first hearing before the Board or hearing officer shall be commenced within sixty (60) days from the date of receipt of the applicant's application, unless the applicant has agreed in writing to an extension of time. Each subsequent hearing before the Board or hearing officer shall be held within forty-five (45) days of the prior hearing, unless otherwise agreed to by the applicant in writing or on the record. An applicant shall complete the presentation of his case-in-chief within one hundred (100) days of the first hearing. Upon request of the applicant, the Board or hearing officer shall assure that the applicant receives at least seven (7) hours of hearings within the one hundred (100) days, including the first hearing. Persons opposed to the application shall complete the presentation of their opposition to the application within one hundred (100) days of the first hearing held after the completion of the applicant's case-in-chief. An applicant may, upon request, be granted additional hearings to complete his case-in-chief provided the persons opposed to the application are granted an equal number of additional hearings. Persons opposed to the application may, upon the written consent or consent on the record by the applicant and municipality, be granted additional hearing to complete their opposition to the application provided the applicant is granted an equal number of additional hearings for rebuttal.
- C. The hearings shall be conducted by the Board or the Board may appoint any member or an independent attorney as the hearing officer. The decision, or, where no decision is called for, the findings, shall be made by the Board; however, the appellant or the applicant, as the case may be, in addition to the Borough, may, prior to the decision of the hearing, waive decision or findings by the Board and accept the decision or findings of the hearing officer as final.
- D. The parties to the hearing shall be the Borough, any person affected by the application who has made timely appearance of record before the Board, and any other person including civic or community organizations permitted to appear by the Board. The Board shall have the power to require that all persons who wish to be considered parties enter appearances in writing on forms provided by the Board for that purpose.
- E. The chairman or acting chairman of the Board or the hearing officer presiding, shall have power to administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant documents and papers, including witnesses and documents requested by the parties.
- F. The parties shall have the right to be represented by counsel and shall be afforded the opportunity to respond and present evidence, to argument and to cross-examine adverse witnesses on all relevant issues.
- G. Formal rules of evidence shall not apply, but irrelevant, immaterial, unduly repetitious evidence may be excluded.
- H. The Board or the hearing officer, as the case may be, shall keep a stenographic record of the proceedings. The appearance fee for a stenographer shall be shared equally by the applicant and the Board. The cost of the original transcript shall be paid in full by the Board if the transcript is ordered by the Board or hearing officer, or shall be paid in full by the person appealing from the decision of the Board if such appeal is made, and in either event the cost of additional copies shall be paid by the person requesting such copy or copies. In other cases, the party requesting the original transcript shall bear the cost thereof.
- I. The Board or the hearing officer shall not communicate, directly or indirectly, with any party or that party's representatives in connection with any issue involved, except upon notice and opportunity for all parties to participate of any communication, reports, staff memoranda, or other materials, except advice from their solicitor, unless the parties are afforded an opportunity to

contest the material so noticed and shall not inspect the site or its surroundings with any party or his representative after the commencement of the hearing unless all parties are given an opportunity to be present.

- J. The Board or the hearing officer, as the case may be, shall render a written decision, or when no decision is called for, make written findings on the application within forty-five (45) days after the last hearing before the Board or hearing officer. Where the application is contested or denied, each decision shall be accompanied by findings and conclusions based thereon, together with the reasons therefor. Conclusions based on any provisions of this Ordinance or of any act, rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found. If the hearing is conducted by a hearing officer and there has been no stipulation that the decision or findings of the hearing officer are final, the Board shall make the hearing officer's report and recommendations available to the parties within forty-five (45) days, and the parties shall be entitled to make written representations thereon to the Board prior to final decision or entry of findings, and the decision of the Board shall be entered no later than thirty (30) days after the report of the hearing officer. Except for challenges filed under Act 247 Section 916.1, where the Board fails to render a decision within the forty-five (45) day period required by this Section, or fails to commence, conduct, or complete the required hearing as provided in Section 2805.B, the decision shall be deemed to have been rendered in favor of the applicant, unless the applicant has agreed or shall agree in writing or on the record to an extension of time. When a decision has been rendered in favor of the applicant because of the failure of the Board to meet or render a decision as hereinabove provided, the Board shall give public notice of said decision within ten (10) days from the last day it could have met to render a decision in the same manner as provided in Section 2806. If the Board shall fail to provide such notice, the applicant may do so. Nothing in this subsection shall prejudice the right of any party opposing the application to appeal the decision to a court of competent jurisdiction.
- K. A copy of the final decision, or where no decision is called for, the findings shall be delivered to the applicant personally or mailed to the applicant not later than the day following its date. To all other persons who have filed their name and address with the Board not later than the last day of the hearing, the Board shall provide, by mail or otherwise, brief notice of the decision or findings and a statement of the place at which the full decision or findings may be examined.

Section 2806 NOTICE OF HEARING

Public notice of any public hearing shall be given as follows:

- A. The public notice herein required shall state the name of the applicant, the location of the lot or building and the general nature of the question involved, and the date, time and location of the hearing.
- B. Public notice shall be published as per Act 247.
- C. Public notice of said hearing shall be conspicuously posted on the affected tract of land at least one (1) week prior to the hearing.
- D. Notice of all hearings shall be given in writing to the applicant; the Zoning Officer; the Borough Manager; and Borough Planning Commission, by mail to the owner, if the address is known, or to the occupant of every lot on the same street within five hundred (500) feet of the lot or building in

question and of every lot not on the same street within two hundred (200) feet of said lot or building; and to any person who has made a timely request for same, or who have registered their names and addresses for this purpose with the Board. Such written notice shall be given at least ten (10) days prior to the hearing. The Board may mail written notice thereof. Failure to give this notice, either in part or in full, as stated by this paragraph, shall not invalidate any action taken by the Board.

- E. In addition thereto, the public notice may note that copy of the landowner's application may be examined by the public at the Borough Hall during regular business hours.

Section 2807 APPEALS TO THE ZONING HEARING BOARD

- A. Any landowner affected, any person aggrieved by any decision under Section 2802A., B., C., D., G., and H., or any officer of the Borough may file an appeal with the Board in writing specifying the grounds thereof within the time required by Act 247, the Pennsylvania Municipalities Planning Code, as amended or as provided by the rules of the Board. These appeals must be filed within ten (10) days of the date that the decision is issued, which shall be noted on the decision. All appeals shall be on forms prescribed by the Zoning Hearing Board, accompanied by the requisite fees, shall refer to the specific provisions of this Ordinance involved and reasonably state the basis for the appeal.
- B. Requests for a variance or special exception may be filed by any landowner, or any tenant with permission of the landowner. The appropriate fee, as established by the fee schedule adopted by resolution by the Borough Council, shall be paid in advance for each appeal or application for a variance or special exception.

Section 2808 STANDARDS FOR VARIANCES

- A. The Board shall hear requests for variances where it is alleged that the provisions of the Zoning Ordinance inflict unnecessary hardship upon the applicant. The Board may grant a variance, provided the following findings are made where relevant in a given case:
1. That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to such conditions, and not the circumstances or conditions generally created by the provisions of the Zoning Ordinance district in which the property is located.
 2. That, because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the Zoning Ordinance and that the authorization of a variance is, therefore, necessary to enable the reasonable use of the property.
 3. That such unnecessary hardship has not been created by the applicant.
 4. That the variance, if authorized, will neither alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.
- B. In granting any variance, the Board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this Ordinance.

Section 2809 STANDARDS FOR SPECIAL EXCEPTIONS

Where this Ordinance provides special exception uses to be authorized or denied by the Board, pursuant to express standards and criteria, the Board shall hear and decide requests for such uses in accordance with such standards and criteria, as follows, in addition to such other requirements and standards listed in this Ordinance for the proposed use. In granting a special exception, the Board may attach such reasonable conditions and safeguards, in addition to those expressed in this Ordinance, as it may deem necessary to implement the purposes of the Pennsylvania Municipalities Planning Code(MPC) and the Zoning Ordinance.

- A. The size, scope, extent and character of the special exception request is consistent with the Borough Comprehensive Plan and with the purpose and intent of the zoning district involved, and promotes harmonious and orderly development.
- B. The proposed special exception use constitutes an appropriate use in the area consistent with the character and type of development in the area surrounding the location for which the request is made and will not substantially impair, alter, or detract from the use of surrounding property or from the character of the neighborhood; its effect on the other properties in the area; and is consistent with the presence or absence in the neighborhood of conditions or uses which are the same or similar in character to the condition or use for which the applicant seeks approval.
- C. The proposed special exception serves the health, safety, welfare, and the best interest of the Borough.
- D. The proposed use has adequate access and off-street parking, in accordance with Article XXV, and will not cause undue traffic congestion and hazard.
- E. Major street and highway frontage will be developed so as to limit the total number of access points and encourage access from parallel marginal roads or on roads perpendicular to the major street or highway.
- F. The proposed modification is reasonable in terms of the logical, efficient and economical extension of public services and facilities, such as public water and sewers, police and fire protection, transportation and public schools.
- G. The natural features and processes characterizing the proposed site and its surroundings shall not suffer unmitigated degradation, that the management of stormwater, the provision of water or sewer service, and any other alterations to the site's predevelopment condition, shall be consistent with Borough goals, practices and plans in these regards.
- H. Conditions are being imposed on the grant of this use to insure that the general purpose and intent of this Ordinance is complied with and that the use of adjacent property is adequately safeguarded with respect to harmonious design of buildings, aesthetics, planting and its maintenance as a sight or sound screen, landscaping, hours of operation, lighting, number of persons involved, allied

activities, ventilation, noise, sanitation, safety, smoke and fume control and the minimizing of noxious, offensive or hazardous elements.

- I. The recommendations of the Planning Commission on the proposed development plan should be reviewed, where such plan is required. The Board shall not be bound by such recommendations, nor shall the Board be bound by the action of the Borough Council in relation to the development plan.
- J. All commercial or industrial parking, loading, access or service areas will be adequately illuminated at night while in use as per Article XXIII, and the Malvern Borough Subdivision and Land Development Ordinance relating to access and street frontage.

Section 2810 BURDEN OF PROOF

The applicant or appellant shall have the burden of proof in all proceedings before the Board, including the burden of establishing that all conditions specified in this Ordinance have been met, and with regard to a variance or special exception, that the express standards and criteria to be considered by the Board have been met.

Section 2811 EXPIRATION OF SPECIAL EXCEPTIONS AND VARIANCES

Unless otherwise specified by the Board, a special exception or variance shall expire if the applicant fails to obtain a building permit, a use and occupancy permit, or a subdivision and land development approval as the case may be, within six (6) months from the date of authorization thereof.

Section 2812 TIME LIMITATIONS

- A. No person shall be allowed to file any proceeding with the Board later than ten (10) days after any permit has been issued or refused, or any other decision made by the Zoning Officer, or an application for development, preliminary or final, has been approved by the Borough Council, if such proceeding is designed to secure reversal or to limit approval in any manner unless such person alleges and proves that they had no notice, knowledge, or reason to believe that such approval had been given. If such person has succeeded to his interest after such approval, that person shall be bound by the knowledge of their predecessor in interest. The failure of anyone other than the landowner to appeal from an adverse decision by the Zoning Officer on a tentative plan pursuant to Section 709 of the Act 247, as amended, or from an adverse decision by the Zoning Officer on a challenge to the validity of an ordinance or map pursuant to Section 916.2 of Act 247, the Pennsylvania Municipalities Planning Code, as amended shall preclude an appeal from a final approval, except in the case where the final submission substantially deviates from the approved tentative approval.
- B. All appeals from determinations adverse to the landowners, to either the Zoning Hearing Board or Borough Council, shall be filed with the Borough Zoning Officer by the landowner within thirty (30) days after notice of determination is issued.

Section 2813 STAY OF PROCEEDINGS

- A. Upon filing of any proceeding referred to in Section 2807 and during its pendency before the Board, all land development pursuant to any challenged zoning ordinance, order or approval of the Zoning Officer or of any agency or body, and all official action thereunder, shall be stayed unless the Zoning Officer or any other appropriate agency or body certifies to the Board facts indicating that such stay would cause imminent peril to life or property. In such case, the development or official action shall not be stayed otherwise than by a restraining order, which may be granted by the Board, or by the Court having jurisdiction of zoning appeals on petition after notice to the Zoning Officer or other appropriate agency or body.
- B. When an application for preliminary or final development, has been duly approved and proceedings designed to reverse or limit the approval area filed with the Board by persons other than the applicant, the applicant may petition the Court having jurisdiction of zoning appeals to order such persons to post bond as a condition to continuing the proceedings before the Board. Procedures shall be in accordance with Act 247, Section 915.1.

Section 2814 APPEALS TO COURT

All appeals from all land use decisions rendered pursuant to Article IX of Act 247 shall be taken to the court of common pleas of the judicial district wherein the land is located and shall be filed within thirty (30) days after entry of the decision as provided in 42 Pa.C.S 5572 (relating to time of entry of order) or, in the case of a deemed decision, within thirty (30) days after the date upon which the notice of said deemed decision to given as set forth in Section 908(9) of Act 247.

