

DIVISION 2. - BOARD OF ZONING APPEALS<sup>[4]</sup>

Footnotes:

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**State Law reference**— Board of zoning appeals, Code of Virginia, §§ 15.2-2308—15.2-2309.

Sec. 42-566. - Membership; terms; removal and disqualification of members; officers.

- (a) The board of zoning appeals shall consist of five members and shall be appointed by the Montgomery County Circuit Court. At the request of town council, the circuit court may also appoint not more than three alternates to the board of zoning appeals. Appointments for vacancies occurring other than by expiration of term shall in all cases be for the unexpired term. The qualifications, terms and compensation of regular and alternate members shall be the same. A regular member when he knows he will be absent from or will have to abstain from any application at a meeting shall notify the chairman 24 hours prior to the meeting of such fact. The chairman shall select an alternate to serve in the absent or abstaining member's place and the records of the board shall so note. Such alternate member may vote on any application in which a regular member abstains.
- (b) The term of office for all regular and alternate members shall be for five years.
- (c) Members may be removed for cause by the appointing authority upon written charges and after a public hearing.
- (d) Members may be reappointed to succeed themselves.
- (e) Members of the board shall hold no other public office in the locality, except that one may be a member of the local planning commission.
- (f) A member whose term expires shall continue to serve until his successor is appointed and qualifies.
- (g) Any member of the board shall be disqualified to act upon a matter before the board with respect to property in which the member has an interest.
- (h) The board shall choose annually its own chair and a vice-chair who shall act in the absence of the chair.
- (i) The board may elect one of its members or a qualified individual who is not a member of the board as secretary, excluding the alternate members. A secretary who is not a member of the board shall not be entitled to vote on matters before the board.

(Code 1972, § 30-143; Code 1992, § 30-165; Ord. No. 2004-4, § 30-143, 9-7-2004; Ord. No. 2016-5, 8-23-2016)

**State Law reference**— Created, membership, Code of Virginia, § 15.2-2308.A.

Sec. 42-567. - Powers and duties.

The board of zoning appeals shall have the powers and duties as set forth in Code of Virginia, § 15.2-2309, as amended from time to time.

(Code 1972, § 30-144; Code 1992, § 30-166; Ord. No. 2004-4, § 30-144, 9-7-2004; Ord. No. 2012-6, § 30-166, 6-19-2012; Ord. No. 2016-5, 8-23-2016)

**State Law reference**— Powers and duties of boards, Code of Virginia, § 15.2-2309.

Sec. 42-568. - Rules and regulations.

- (a) The board of zoning appeals shall adopt such rules and regulations as it may consider necessary.
- (b) The meeting of the board shall be held at the call of its chairperson or at such times as a quorum of the board may determine.
- (c) The chairperson or, in his absence, the acting chairperson, may administer oaths and compel the attendance of witnesses.
- (d) 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. It 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.
- (e) A quorum shall be at least three members.
- (f) A favorable vote of three members of the board shall be necessary to reverse any order, requirement, decision or determination of any administrative official or to decide in favor of the applicant on any matter upon which the board is required to pass.

(Code 1972, § 30-145; Code 1992, § 30-167; Ord. No. 2004-4, § 30-145, 9-7-2004)

Sec. 42-569. - Procedure for appeal.

- (a) An appeal to the board may be taken by any person aggrieved or by an officer, department, board or bureau of the municipality affected by any decision of the zoning administrator. Notwithstanding any Charter provision to the contrary, any written notice of a zoning violation or a written order of the zoning administrator dated on or after July 1, 1993, shall include a statement informing the recipient that he may have a right to appeal the notice of a zoning violation or a written order within 30 days in accordance with this section, and that the decision shall be final and unappealable if not appealed within 30 days. The zoning violation or written order shall include the applicable appeal fee and a reference to where additional information may be obtained regarding the filing of an appeal. The appeal period shall not commence until the statement is given. A written notice of a zoning violation or a written order of the zoning administrator that includes such statement sent by registered or certified mail to, or posted at, the last known address of the property owner, as shown on the current real estate tax assessment books or current real estate tax assessment records, shall be deemed sufficient notice to the property owner and shall satisfy the notice requirements of this section. Such appeal shall be taken within 30 days after the decision appealed from by filing with the zoning administrator and the board a notice of appeal specifying the grounds thereof. The zoning administrator shall forthwith transmit to the board all the papers constituting the record upon which the action appealed was taken. An appeal shall stay all proceedings in the furtherance of the action appealed from unless the zoning administrator certifies to the board that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order granted by the board or by a court of record on application and on notice to the zoning administrator and for good cause shown.
- (b) Appeals shall be mailed to the board of zoning appeals in care of the zoning administrator, and a copy of the appeal shall be mailed to the secretary of the planning commission. A third copy should be mailed to the individual official, department or agency concerned, if any.
- (c) Appeals requiring an advertised public hearing shall be paid for by the appellant.
- (d) In no event shall a written order, requirement, decision or determination made by the zoning administrator, or other administrative officer, be subject to change, modification or reversal by any zoning administrator or other administrative officer after 60 days have elapsed from the date of the

written order, requirement, decision or determination where the person aggrieved has materially changed his position in good faith reliance on the action of the zoning administrator or other administrative officer, unless it is proven that such written order, requirement, decision or determination was obtained through malfeasance of the zoning administrator or other administrative officer or through fraud. The 60-day limitation period shall not apply, in any case, where, with the concurrence of the attorney for the town council, modification is required to correct clerical or other nondiscretionary errors.

(Code 1972, § 30-146; Code 1992, § 30-168; Ord. No. 2004-4, § 30-146, 9-7-2004)

**State Law reference**— Appeals to board, Code of Virginia, § 15.2-2311.

Sec. 42-570. - Public hearing.

The board shall fix a reasonable time for the hearing of an application or appeal, shall give public notice thereof as well as due notice to the parties in interest and shall decide the same within 60 days. In exercising its powers, the board may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from. The concurring vote of three members shall be necessary to reverse any order, requirement, decision or determination of an administrative officer or to decide in favor of the applicant on any matter upon which it is required to pass under this chapter or to effect any variance from the chapter. The board shall keep minutes of its proceedings and other official actions which shall be filed in the office of the board and shall be public records. The chairperson, or, in his absence, the acting chairperson, may administer oaths and compel the attendance of witnesses.

(Code 1972, § 30-147; Code 1992, § 30-169; Ord. No. 2004-4, § 30-147, 9-7-2004)

**State Law reference**— Appeal procedure, Code of Virginia, § 15.2-2312.

Sec. 42-571. - Certiorari to review decision of board.

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any aggrieved taxpayer, officer, department, board or bureau of the town may seek a writ of certiorari to review the decision of the board pursuant to Code of Virginia, § 15.2-2314, as may be amended from time to time.

(Ord. No. 2016-5, 8-23-2016)

**Editor's note**— Ord. No. 2016-5, adopted August 23, 2016, amended section 42-571 in its entirety to read as herein set out. Former section 42-571, pertained to appeal from decision of board, and derived from Code 1972, § 30-148; Code 1992, § 30-170; Ord. No. 2004-4, § 30-148, 9-7-2004.

**State Law reference**— Certiorari review of decision of board. Code of Virginia, § 15.2-2314.

Sec. 42-572. - Boards of zoning appeals, ex parte communications, proceedings.

- (a) The non-legal staff of the town may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. The applicant, landowner, or his agent or attorney may have ex parte communications with a member of the board prior to the hearing but may not discuss the facts or law relative to a particular case. If any ex parte discussion of facts or law in fact occurs, the party engaging in such communication shall inform the

other party as soon as practicable and advise the other party of the substance of such communication. For purposes of this section, regardless of whether all parties participate, ex parte communications shall not include (i) discussions as part of a public meeting or (ii) discussions prior to a public meeting to which staff of the governing body, the applicant, landowner, or his agent or attorney are all invited.

- (b) Any materials relating to a particular case, including a staff recommendation or report furnished to a member of the board, shall be made available without cost to such applicant, appellant or other person aggrieved under Code of Virginia, § 15.2-2314, as soon as practicable thereafter, but in no event more than three business days of providing such materials to a member of the board. If the applicant, appellant, or other person aggrieved under Code of Virginia, § 15.2-2314 requests additional documents or materials be provided by the locality other than those materials provided to the board, such request shall be made pursuant to Code of Virginia, § 2.2-3704. Any such materials furnished to a member of the board shall also be made available for public inspection pursuant to subsection F of Code of Virginia, § 2.2-3707.
- (c) For the purposes of this section, "non-legal staff of the town" means any staff who is not in the office of the attorney for the town, or for the board, or who is appointed by special law or pursuant to Code of Virginia, § 15.2-1542. Nothing in this section shall preclude the board from having ex parte communications with any attorney or staff of any attorney where such communication is protected by the attorney-client privilege or other similar privilege or protection of confidentiality.
- (d) This section shall not apply to cases where an application for a special exception has been filed pursuant to subdivision 6 of Code of Virginia, § 15.2-2309.

(Ord. No. 2016-5, 8-23-2016)

Secs. 42-573—42-590. - Reserved.