

Appeal Authority (Formerly Board of Adjustment) and Variances

Every city and town is required, if they have land use ordinances, to establish by ordinance one or more appeal authorities to hear and decide requests for variances from the terms of the land use ordinances to hear and appeals from decisions applying to the land use ordinances¹.

The appeal authority can be called anything your want to call it. It can be one person or a board or commission. It can even, under certain circumstances, be either your planning commission or city or town council.

The appeal authority must act in a quasi-judicial manner. What this means is that the appeal authority will act like a judge and hear and decide issues of fact and interpret the local land use ordinances as necessary. The appeal authority must be given the authority to serve as the final arbiter of issues involving the interpretation or application of land use ordinances.

Whoever or whatever is established as the city or town appeal authority may not entertain an appeal of a matter in which the appeal authority, or any participating member, has first acted as the land use authority. This means that whoever hears the appeal, whether it be a board like the planning commission or city council, it cannot be the same board, council or person who made the decision which is being appealed.

The city or town ordinance that creates the appeal authority must go through the same process for adoption as a traditional zoning ordinance. The planning commission must make a recommendation and post proper notice and hold public hearings. The ordinance adopted by a city or town may designate a different appeal authority to hear requests for variances than the appeal authority it designates to hear other types of appeals. A city or town can have a different appeal authority for each different type of land use decision. For example, the process for simple permits like home occupations could consist of a city clerk who says “yes or no” initially to the permit or it could consist of the planning commission as the body who hears appeals of the decisions of the clerk. In more complicated matters, the planning commission could be designated as the body that makes the initial decision with the city council designated to hear the appeals.

The ordinance can set forth the rules of procedure for any appeal. The rules can include that any adversely affected party must present to an appeal authority every theory of relief that it can raise in district court but they can not require an adversely affected party to pursue duplicate or successive appeals before the same or separate appeal authorities as a condition of the adversely affected party's duty to exhaust administrative remedies. The ordinance can provide that specified types of land use decisions may be appealed directly to the district court.

¹ Utah Code 10-9a-701.

If the city or town establishes a multiperson board, body, or panel to act as an appeal authority, such as what was formerly called the Board of Adjustments, at a minimum the board, body, or panel must notify each of its members of any meeting or hearing of the board, body, or panel; it must provide each of its members with the same information and access to municipal resources as any other member; it must convene only if a quorum of its members is present; and it must act only upon the vote of a majority of its convened members.

While a city or town's ordinance establishing the appeal authority(s) can be customized to each city and town, there are some minimum requirements. The applicant for a land use application, a board or officer of the municipality, or any person adversely affected by the land use authority's decision administering or interpreting a land use ordinance may, within the time period provided by ordinance, appeal that decision to the appeal authority by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance. The ordinance setting up the appeal authority should establish a reasonable time period by which an appeal has to be filed. If the ordinance is silent on the time for appeal, the default in state law is, at a minimum; ten calendar days to appeal. If the appeal is not filed in time, the right to appeal is waived. The person appealing the decision has the burden of proving that the land use authority erred. Each appeal authority must conduct each appeal and variance request as provided in local ordinance.

Special appeal processes must be in place for decisions that are based on alleged geological hazards. If a landowner is appealing a decision that the city or town made based on the existence of a geological hazard such as a slide area or a fault the landowner can insist that the appeal authority be made up of experts in that field. The landowner will be able to appoint at least one of the experts to hear the appeal and the City will appoint the second with the third chosen by the two.² The cost of these experts is to be shared.

Each appeal authority has to respect the due process rights of each of the participants. This means that all interested persons in the appeal must be given an adequate notice, the right to be heard, and the right to have a fair and impartial hearing officer or panel. The ordinance setting up the appeal authority may designate the standard of review for appeals of land use authority decisions. If the city or town does not include the standard of review in the ordinance, then the appeal authority reviews the matter de novo. This is "lawyer speak" for the principle that the appeal authority will not look at whether the land use authority erred in its decision but will re-examine the whole issue as if it was being presented for the first time.

Only those decisions in which a land use authority has applied a land use ordinance to a particular application, person, or parcel may be appealed to an appeal authority.³ This means that a person cannot appeal the adoption of zoning ordinances or other legislative

² Utah Code 10-9a-703(2).

³ Utah Code 10-9a-707(4).

acts to the appeal authority. The appeal authority, who ever it may be, can only hear appeals from the interpretation of ordinance and the granting of permits and variances. These are generally described as administrative acts. The acts of the city and town council in enacting new laws and ordinances cannot be appealed to any other city or town board or officer. Legislative decisions of the city or town, such as zone changes and annexations, can be reviewed by the district court. If a person is challenging a legislative decision and if proper notice of the public hearing for the enactment of the decision has been given, the person's challenge must be filed in the court within 30 days from when the decision is final. The court will find the legislative decision is valid is the decision, was reasonably debatable. This means that if there is any good reason for the decision the court will respect to the city or town council's decision and uphold it⁴.

A decision of an appeal authority takes effect on the date when the appeal authority issues a written decision or as otherwise provided by ordinance. A written decision, or other event as provided by ordinance, constitutes a final decision or a final action. The decisions of the appeal authority can be reviewed by a district court. The petition to review a decision of an appeal authority must be filed with the court within 30 days from when the decision is final. The petition to review is barred if not filed within 30 days. When reviewing a decision of an appeal authority, the district court presumes the city or town's appeal authority's decision is valid and only overturn it if it is found to be arbitrary, capricious, or illegal. The court will uphold the decision if there is substantial evidence to support the decision. Substantial evidence sounds like a lot, but it isn't. The courts have said that substantial evidence is more than a scintilla (little bit) but not a preponderance, in other words—at least some, but not necessarily most.

If a petition is filed with district court then the city or town must prepare a record of what happened at the city or town level⁵. This record consists of all the minutes, applications, orders, and written decisions made by the city or town. If the meetings were taped, then the city or town must have the tapes transcribed. If there is a good record, the court will just use this as the factual basis for reviewing the decision. However, if there is not a good, complete record, then the court will rehear all the issues including calling witnesses and receiving evidence. In other words, if you want the district court to uphold your decisions, you must have a good paper trail of what occurred and why you decided what you did. If this record does exist, the district court will be forced to make its own determination without deference to the decisions of the city land use authority or appeal authority.

Variations

Any person or entity desiring a waiver or modification of the requirements of a land use ordinance as applied to a parcel of property that he owns, leases, or in which he holds some other beneficial interest has the right to apply to whomever the city or town designates as the proper appeal authority for a variance from the terms of the ordinance. The appeal authority may grant a variance only if certain conditions are met. The terms are that literal enforcement of the ordinance would cause an unreasonable hardship for

⁴ Utah Code 10-9a-8801(3)(b).

⁵ Utah Code 10-9a-801(8).

the applicant, which is not necessary to carry out the general purpose of the land use ordinances; that there are special circumstances attached to the property that do not generally apply to other properties in the same zone; that granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone; that the variance will not substantially affect the general plan and will not be contrary to the public interest; and that the spirit of the land use ordinance is observed and substantial justice done. In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship, the appeal authority may not find an unreasonable hardship unless the alleged hardship meets certain criteria. These criteria are that the hardship is located on or associated with the property for which the variance is sought and comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood. In addition, the appeal authority may not find an unreasonable hardship if the hardship is self-imposed or economic. In determining whether or not there are special circumstances attached to the property, the appeal authority may find that special circumstances exist only if the special circumstances relate to the hardship complained of if and special circumstances deprive the property of privileges granted to other properties in the same zone. The short way of expressing all this legal mumbo jumbo is that a variance is not a favor to be granted, but an injustice to be solved.

The applicant for the variance bears the burden of proving that all of the conditions justifying a variance have been met. Variances run with the land. This means that they are not personal. When the property is sold the variance continues to the new owner.

The appeal authority may not grant a use variance. This means that if the request is to change the zoning on the property, the appeal authority may not do so. If the solution to the hardship requires a change in the use restrictions, the only avenue for the property owner is to seek to have the ordinance amended or repealed--not a variance from the ordinance.

If a variance is granted, the appeal authority may impose additional requirements on the applicant that will mitigate any harmful affects of the variance or serve the purpose of the standard or requirement that is waived or modified. All of this should be done very formally, in writing, and probably recorded with the county recorder against the property, so that future owners can understand both the benefits and burdens of any variance that is granted.