

## **Appeal Authority Options – Fact and Fiction**

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- FACT:** Every municipality that has a land use ordinance must have an appeal authority. The appeal authority is created by ordinance, after the planning commission has recommended to the city council or town board how appeals should be conducted.
- FICTION:** It has to be a Board of Adjustment composed of residents of the municipality.
- FACT:** The appeal authority can be one person or several; can be residents or non-residents; can be a professional planner or attorney or not. An appeal authority needs to be trained, impartial, and credible to those appearing before it. A group of municipalities could all use the same appeal authority.
- FICTION:** State law requires that an appeal authority hold hearings.
- FACT:** An appeal authority can meet with those who are parties to the issue. If the appeal authority is an individual, he or she does not need to hold a public meeting. If the appeal authority is a board, a meeting notice must be posted, but it is a public meeting, not a public hearing. An appeal authority does not need to even hold a meeting if that does not assist in resolving the issues. The entire process could be completed via email.
- FICTION:** Neighbors must be notified and allowed to speak.
- FACT:** Those who are parties must be allowed to speak, but every neighbor may or may not be a party. Those who filed the appeal must be allowed to speak – they are parties. Those who made the decision that is appealed must also be allowed to speak. No one else need be notified of the issue. Public comment and public clamor are irrelevant. The issues are “Was the decision correct?” “Was the ordinance correctly interpreted and applied?” and “Was the action legal?” not “What do the neighbors want?” or “Do we like the person challenging the decision?” or “Do we like the result?”. Appeal authorities interpret the law – they don’t make policy.
- FICTION:** An appeal authority does not need any formalities.
- FACT:** An appeal authority should be careful to respect due process from all parties. Due process includes: An impartial decision-maker; a fair chance for the parties to be heard on the issues; the chance to respond to evidence presented by those with opposing points of view; notice of any proceedings or process where the issue is to be heard and evidence is to be gathered. So long as these requirements are met, excess formality can get in the way of fairness.
- FICTION:** An appeal authority is mainly to handle variances.
- FACT:** While the state statute assigns variance issues to appeal authorities, its most important function is to resolve disputes involving the administrative application of the land use

ordinances. If that is not being accomplished, then either no one ever disagrees with the zoning administrator or planning commission, or the rights of appeal that state statute guarantees to those participating in the land use process are being denied.

FICTION: The appeal authority is to assist the city in enforcing the ordinances.

FACT: The appeal authority is an independent entity, and its job is to assist all parties to the land use process achieve a correct and legal resolution of disputes. Its job is to help the city avoid errors as well as private parties.

FICTION: Using the appeal authority to resolve administrative disputes is optional.

FACT: Usually, no one can challenge an administrative decision in court unless the appeal authority first hears the matter and renders a final decision.

FICTION: Ten days is the ideal amount of time to allow for the appeal of a land use decision.

FACT: Ten days is the statutory default time period. Local governments should review their own circumstances and decide what the ideal time will be. The deadline applies to everyone, so local governments themselves are bound by the deadline too.

FICTION: An appeal authority must act immediately when an appeal is filed.

FACT: An appeal authority cannot act on a dispute until the record of the decision is available to it. The minutes have to be finalized of a meeting where a decision was made. The record of the decision must be complete and available for the appeal authority to review.

FICTION: An appeal authority must deliberate in public.

FACT: Once an appeal authority has gathered evidence in a process that is open to the parties, it can go into a closed meeting to deliberate. In that closed meeting, only evidence provided by the parties and reviewed by those opposing the party providing it can be considered. A closed deliberation should not include any parties, including those involved in local government who made the decision or even the city's legal counsel if the city is a party to the dispute.

FICTION: The appeal authority can meet in a work session before convening an open meeting.

FACT: All meetings of an appeal authority board dealing with an issue before all the facts are gathered on that issue must be public meetings with all parties notified of the time, place, and agenda for the meeting. There should be no meetings before the parties appear. Where a party is challenging the decision of a planning staff member, and that staff member is allowed to address the appeal authority out of the presence of the person making the challenge, due process is violated and the rights of the person making the challenge have been seriously violated.