

Building Code Appeal / Variance Process

ABOUT THE HEARING

Hearings before the Board of Adjustments and Appeals are similar in some ways to a tribunal or court of law hearing. You have the right to be represented by legal counsel or by agent, to call witnesses, to present evidence, and to question or cross examine witnesses or evidence submitted by the Development Services Department.

Major differences between a tribunal and a Board of Adjustments and Appeals hearing are rules of evidence are less restrictive in a Board hearing and the “burden of proof” is on the applicant, not the Development Services Department. The Board has the right to place witnesses under oath and impose evidentiary rules, however, the Board seldom does so.

While a Board hearing is somewhat informal and relaxed, the rules and procedures concerning the Board’s authority and legality of its decisions are strictly applied. All appeals must be justified to the Board. While the word “justified” is somewhat ambiguous, appeals or variance requests based on financial hardship alone, or mere convenience, are seldom considered justified.

ABOUT THE APPLICATION FORM

The following information is provided to assist you in making a lawful appeal or variance request (refer to attached application form).

Job Address: Write in the street address of the property or building involved in the request.

Legal Description: This information can be found on your deed or title papers, or on the property tax receipts.

Owner Name: Appeals and variances can only be applied to real property that is lawfully owned by a person or corporation.

Agent Name: If the owner is represented by an agent or legal counsel, that person’s name should be entered here.

Applicable Code Provision: Indicate the appropriate name, title, chapter, section, etc. of the applicable code provision involved in your appeal/variance request.

NOTICE TO APPLICANTS:

The Board’s authority to grant relief through appeal is strictly limited to justified findings based on items #1, #2, or #3 below. The Board has no authority to grant a variance under item #4, however, the Board may elect to recommend approval of your variance request to the City Council. The City Council often places considerable importance on the technical expertise of the Board, when ruling on your request.

APPEALS:

1. ____ If you feel that the code or regulation causing denial of your permit or construction does not apply to your project for some particular reason, then item #1 should be selected. An example of non-applicability might be: An inspector disapproves the installation of your roof shingles, because he thought they were made of cedar, when in fact they were made of treated pine instead. If the inspector was enforcing a code section that did not apply to the treated pine, then item #1 may be a justified appeal. Know the code in these instances and submit a copy of the code provision that you feel more accurately regulates your product or material.

2. ____ If you feel that your construction or permit request does not meet the “letter of the code”, but does meet or exceed the “intent of the code”, then item #2 should be selected. An example of “an equally good or more desirable” material might be: An inspector disapproves the wood wall studs on your building because the studs are not properly grade marked by a certified grading agency. You may have purchased #1 grade material from a saw mill, but the material was never graded. Since the code required the studs to be graded and stamped by a certified grader, the material does not meet the code, but the intent behind the grading requirement, is to ensure that the material is of the specified strength. In other words, the material may be strong enough, but how can it be verified? In order to prove a justified appeal, evidence would have to be presented that proves the material is adequate. Proof may be in the form of a letter of certification, and/or testimony by a certified lumber grader who has visited the job site, etc. If the evidence justifies the “equal or better” claim, the appeal may be justified.

3. ____ If you feel that the true intent or meaning of the code or regulation has been misconstrued or wrongly interpreted, then item #3 should be selected. Appeals under item #3 are difficult to justify, unless the code section or regulation has been amended or altered from the original published code text. For example, if the original code text state “all gas pipe must be tested with a mercury manometer, at 3.0 PSI”, but the amended code text reads “all gas pipe must be tested to 3.0 PSI”, the inspector would be on shaky ground if he rejected a test performed with a simple air pressure gauge. In instances where the original code text has not been altered, the inspector can consult code interpretation manuals, code commentary books and code experts who work for code publication agencies.

VARIANCE:

4. ____ If you feel that the code or regulation is being lawfully applied to your permit or construction, but, you feel that you have a unique or unusual situation or hardship that justifies you to vary from the code, then item #4 should be selected. When determining whether your request is justified or not, you may want to ask yourself the same questions that the Board may ask:

- a) Why am I unable to comply with the code or regulation? (Was it for monetary hardship alone or mere convenience?).
- b) What is so unique or unusual about my construction or permit that makes it different from everyone else who is presently complying with the code? Citing other individuals or cases where the code was not followed is not justification to vary from the code. Variances are granted based on individual circumstances, evidence and testimony.
- c) What things can I do to mitigate (reduce the hazard or improve life safety) in lieu of complying with the code?
- d) What evidence could I use to justify my request?
- e) What witnesses could I use to justify my request (Architects, Engineers, Code Consultants, Certified Inspectors, etc.)?

APPEAL RELIEF SOUGHT & VARIANCE RELIEF SOUGHT:

This information clearly states what you hope to achieve. This is particularly important if your appeal is denied and you then decide to appeal your case to a court of competent jurisdiction (District Court). The proceedings of your hearing are tape recorded and transcribed to written minutes that are reviewed and accepted as an accurate rendering by the Appeals Boards. It is not uncommon, however, for the review court to dismiss your request for review if the court does not clearly understand what you hoped to achieve by your appeal or variance request. This summary should be written in clear understandable layman's terms. Technical jargon and complex code quotations should be avoided where possible.

AFTER THE HEARING

Board decisions concerning appeals (items #1, 2, & 3) are final. If the Board finds in your favor, your permit or construction is automatically approved. If your appeal is denied, you are required to comply with the code or regulation, or you may appeal the Board's decision to a court of competent jurisdiction for review. When a court review is made of Board decisions, the purpose of the review is to verify that the proceedings were lawful. If a court finds that an impropriety was committed, the court can order the Board to rehear the case (but omit the impropriety in the rehearing). The court seldom renders a decision on the validity of your appeal or variance, only on whether or not procedures were lawful.

Board recommendations concerning variances (item #4) are optional at the discretion of the Board. A Board of Adjustments and Appeals may recommend to the City Council that your request for variance be granted. If the Board accepts and passes a motion "not to recommend approval" of your variance request, the Board finding is forwarded to the City Council. Your variance request may proceed to City Council if you so desire, however, the City Council gives serious consideration to the technical expertise of the Board.

If the City Council finds in your favor, your permit or construction is approved. If the City Council denies your variance request, you are required to comply with the code or regulation. You may appeal the decision of the City Council to a court of competent jurisdiction if you so desire.