

## **CHAPTER 02-06 APPEALS AND VARIANCES**

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### **02-06-001 APPEALS AND VARIANCES HEARING OFFICER ESTABLISHED**

#### **A. Creation**

The position of Appeals and Variances Hearing Officer is created pursuant to the enabling authority granted by the municipal land use, development, and management act, section 10-9a-701 of the Utah Code Annotated.

#### **B. Jurisdiction and Authority**

The Appeals and Variances Hearing Officer shall have the following powers and duties in connection with the implementation of this title:

1. Hear and decide appeals from any administrative decision made by the Land Use Authority pursuant to the procedures and standards set forth in this code;
2. Authorize variances from the terms of this title pursuant to the procedures and standards set forth in section 02-06-003, "Variances", of this code;
3. Hear and decide appeals from final determinations of fees paid by the applicant for any land use application.

#### **C. Qualifications**

The Appeals and Variances Hearing Officer shall be appointed by the Mayor with the advice and consent of the City Council. The Appeals and Variances Hearing Officer shall be appointed for a term of two (2) years and thereafter may be appointed for succeeding two-year terms. The Appeals and Variances Hearing Officer shall either be law trained or have significant experience with land use laws and the requirements and operations of administrative hearing processes.

#### **D. Conflict Of Interest**

The Appeals and Variance Hearing Officer shall not participate in any appeal in which the Appeals and Variances Hearing Officer has a conflict of interest. If an appellant alleges that the Appeals and Variances Hearing Officer has a conflict of interest, and the Appeals and Variances Hearing Officer does not recuse himself/herself, the matter shall be brought before the City Council which will make the final decision concerning the existence of a conflict and what remedies are necessary to mitigate the conflict.

#### **E. Removal of the Appeals and Variances Hearing Officer**

The Appeals and Variances Hearing Officer may be removed by the Mayor for violation of this title or any policies and procedures adopted by the Land Use Administrator following receipt by the Mayor of a written complaint filed against the Appeals and Variances Hearing Officer. If requested by the Appeals and Variances Hearing Officer, the Mayor shall provide the Appeals and Variances Hearing Officer with a public meeting conducted by a different hearing officer appointed by the Mayor.

**F. Employment Agreement**

The Appeals and Variances Hearing Officer shall be an independent contractor; and will enter into a contract for services at the beginning of each appointed term. Terms for compensation and reimbursement will be determined and agreed upon in the contract. The terms and conditions of the contract shall be approved by the City Council.

**02-06-002 APPEALS OF ADMINISTRATIVE DECISIONS**

**A. Authority**

As described in Section C of this chapter, the Appeals and Variances Hearing Officer shall hear and decide appeals alleging an error in any administrative decision made by the Land Use Authority in the administration or enforcement of this title. In addition, the Appeals and Variances Hearing Officer shall hear and decide applications for variances.

**B. Parties Entitled to Appeal**

An applicant or any other person or entity within the jurisdiction of the Appeals and Variances Hearing Officer adversely affected by a decision administering or interpreting this title may appeal to the Appeals and Variances Hearing Officer.

**C. Procedure**

Appeals of administrative decisions made by the Land Use Authority, to the Appeals and Variances Hearing Officer shall be taken in accordance with the following procedures:

1. Filing of appeal: An appeal shall be made in writing within fourteen (14) days of the administrative decision by the Land Use Authority and shall be filed with the Land Use Administrator. The appeal shall specify the decision appealed, the alleged error made in connection with the decision being appealed, and the reasons the appellant claims the decision to be in error, including every theory of relief that can be presented in district court.
2. Fees: Non-refundable application and hearing fees shown on the Naples City consolidated fee schedule shall accompany the appeal.
3. Stay of Proceedings: An appeal to the Appeals and Variances Hearing Officer shall stay all further proceedings concerning the matter about which the appealed order, requirement, decision, determination, or interpretation was made unless the Land Use Administrator certifies in

writing to the Appeals and Variance Hearing Officer, after the appeal has been filed, that a stay would, in the Land Use Administrator's opinion, be against the best interest of the City.

4. Notice Required:

a. Public Meeting: All public meetings shall be conducted as meetings open to the attendance of the general public. Upon receipt by the Land Use Administrator of an appeal of an administrative decision, the Appeals and Variances Hearing Officer shall be notified of the appeal and shall schedule and hold a public meeting in accordance with the standards and procedures adopted for such meeting.

b. Notice of Appeals of Administrative Decisions of the Land Use Authority: Appeals from a decision of the Land Use Authority are based on evidence in the record. Therefore, testimony at the appeal meeting shall be limited to the appellant and the respondent. Upon receipt of an appeal of a decision by the Land Use Authority, the Appeals and Variances Hearing Officer shall schedule a public meeting to hear arguments by the appellant and respondent. Notification of the date, time and place of the meeting shall be given to the appellant and respondent, by the hearing officer, a minimum of twelve (12) calendar days in advance of the meeting. The Appeal and Variances Hearing Officer may give e-mail notification, or other form of notification chosen by the Appeals and Variances Hearing Officer, a minimum of twelve (12) calendar days in advance of the hearing.

**D. Standard of Review**

1. The standard of review for an appeal, other than as provided in subsection D2 of this section, shall be de novo. The appeals hearing officer shall review the matter appealed anew, based upon applicable procedures and standards for approval, and shall give no deference to the decision below.

2. An appeal from a decision of the Land Use Authority shall be based on the record made below.

a. No new evidence shall be heard by the Appeals and Variances Hearing Officer unless such evidence was improperly excluded from consideration below.

b. The Appeals and Variances Hearing Officer shall review the decision based upon applicable standards and shall determine its correctness.

c. The Appeals and Variances Hearing Officer shall uphold the decision unless it is not supported by substantial evidence in the record or it violates a law, statute, or ordinance in effect when the decision was made.

**E. Burden of Proof**

The appellant has the burden of proving the decision appealed is incorrect.

**F. Action by the Appeals and Variances Hearing Officer**

The Appeals and Variances Hearing Officer shall render a written decision on the appeal. Such decision may reverse or affirm, wholly or in part, or may modify the administrative decision. The Appeals and Variances Hearing Officer shall have fourteen (14) calendar days to render a decision. A decision by the Appeals and Variances Hearing Officer shall become effective on the date the written decision is signed.

**G. Notification of Decision**

Notification of the decision of the Appeals and Variances Hearing Officer shall be sent by mail to all parties to the appeal within ten (10) days of the Appeals and Variances Hearing Officer's decision.

**H. Record of Proceedings**

The proceedings of each appeal hearing shall be recorded on audio equipment. The audio recording of each appeal hearing shall be kept in accordance with the records retention requirements of the State of Utah. Copies of the tapes of such hearings may be provided, if requested, at the expense of the requesting party.

**I. Appeals**

Any person adversely affected by a final decision made by the Appeals and Variances Hearing officer may file a petition for review of the decision with the district court within thirty (30) days after the decision is rendered.

**J. Administrative Procedures**

The Land Use Administrator shall adopt administrative procedures, consistent with the provisions of this section, for processing appeals, the conduct of an appeal hearing, and for any other purpose considered necessary to properly consider an appeal.

**K. Stay of Decision**

The Appeals and Variances Hearing Officer may stay the issuance of any permits or approvals on the decision for thirty (30) days or until the decision of the district court in any appeal of the decision in accordance with State statute under UCA 10-9a.

**02-06-003 VARIANCES**

The variance procedures are intended to provide a narrowly circumscribed means by which relief may be granted from unforeseen particular applications of this title that create unreasonable hardship. When such hardship may be more appropriately remedied, if at all, pursuant to other provisions of this title, the variance procedure is inappropriate.

**A. Authority of Appeals and Variances Hearing Officer**

The Appeals and Variances Hearing Officer may grant variances from the provisions of this title only in compliance with the procedures set forth in section C of this section and only in accordance with each of the standards enumerated in this chapter.

**B. Parties Entitled to Seek Variances**

Applications for variances may be filed by an owner of the property affected or by the property owner's authorized agent. All applications for variances shall be filed on forms approved by the Land Use Administrator.

**C. Procedures**

1. Application: An application for a variance shall be filed with the Land Use Administrator and shall include the following items and information unless determined inapplicable by the Land Use Administrator:
  - a. The property owner's name and address and the owner's signed consent to the filing of the application;
  - b. The applicant's name and address, if different than the owner, and the applicant's interest in the subject property;
  - c. The names and addresses of all professional consultants, if any, advising the applicant with respect to the application;
  - d. The address and legal description of the subject property;
  - e. County ownership plat numbers identifying the property; and
  - f. Noticing and posting requirements shall be met as specified in this title.
  - g. A site plan drawn to scale identifying all property lines, structures, including primary and accessory structures, fences, right-of-way, and their respective distances from the property lines;
  - h. An elevation drawing to scale showing all elevations of existing and proposed structures;
  - i. When the variance involves building height a streetscape plan showing the height of the buildings on both sides of the street to the nearest intersection;
  - j. When the variance involves grade changes, a topographical drawing prepared by a licensed surveyor shall be included. The existing topography shall be shown in dashed lines at two foot (2') intervals and the proposed grade shall be shown in solid lines at two foot (2') intervals. All retaining walls shall be identified and the height shall be shown on the plan relative to the proposed grades. Retaining walls shall be designed by a structural engineer licensed to practice in the State; and
  - k. When a variance request involves setbacks or height or grade changes a complete landscape plan shall be provided. Plans shall

show landscape design and identify all species and caliper of proposed plants.

- l. A color aerial plat map of the area, not less than 14" x 20" and showing the area of the requested variance and at least 500 feet on each side of the area.
  - m. The specific feature or features of the proposed use, construction or development that require a variance;
  - n. The specific provision of this title from which the variance is sought and the precise variance being sought;
  - o. A statement of the characteristics of the subject property that prevent compliance with the provisions of this title and result in unnecessary hardship;
  - p. A statement of the minimum variation of the provisions of this title that would be necessary to permit the proposed use, construction or development;
  - q. An explanation of how the application satisfies each standard set forth in this chapter;
  - r. Any other information identified by the Land Use Administrator to be pertinent to the requested variance.
2. Fees: Non-refundable application and hearing fees shown on the Naples City consolidated fee schedule shall accompany the application for a variance.
  3. Public Meeting: Upon receipt of a complete application for a variance, the appeals hearing officer shall hold a public meeting with notice in accordance with the requirements of this title.
  4. Action By Appeals Hearing Officer: Upon the close of the public meeting, the Appeals and Variances Hearing Officer shall render its decision, granting, granting with conditions, or denying the variance, unless the Appeal and Variances Hearing Officer determines that additional time to study the information presented is necessary and which case a written decision shall be promptly rendered and delivered to each of the parties by mail or email.
  5. Special Procedures in Connection with Other Applications: Whenever a variance is needed in addition to a zoning amendment or a conditional use, the zoning administrator shall not schedule a hearing on the variance until a final approval has been rendered on these other applications by the Planning Commission or the City Council, as applicable.

#### **D. Prohibited Variances**

The Appeals and Variances Hearing Officer shall not grant a variance that:

1. Is intended as a temporary measure only; or
2. Is greater than the minimum variation necessary to relieve the unnecessary hardship demonstrated by the applicant; or,
3. Authorizes uses not allowed by law (i.e. a "use variance").

**E. Standards for Variances**

Standards shall be governed by State statute 10-9a.

**F. Variances Less Than Requested**

A variance less than or different than that requested may be authorized when the record supports the applicant's right to some relief but not to the relief requested.

**G. Conditions on Variances**

In authorizing a variance, the Appeals and Variances Hearing Officer may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary in the public interest to mitigate any harmful effects of the variance or that will serve the purpose of the standard or requirement that is waived or modified. The Appeals and Variances Hearing Officer may require a guarantee or bond to ensure that the conditions imposed will be followed. These conditions shall be expressly set forth in the Appeals and Variances Hearing Officer's decision granting the variance. Violation of any condition or limitation on the grant of a variance shall be a violation of this title and shall constitute grounds for revocation of the variance.

**H. Effect of Granting Variances**

The granting of a variance shall not authorize the establishment or extension of any use, nor the development, construction, reconstruction, alteration or moving of any building or structure but shall merely authorize the preparation, filing and processing of applications for any permits and approval that may be required by the regulations of the City, including, but not limited to, a zoning certificate, a building permit, a certificate of occupancy, subdivision approval, and site plan approval.

**I. Limitations on Variances**

Subject to an extension of time granted upon application to the Land Use Administrator, no variance shall be valid for a period longer than one (1) year unless a building permit is issued or complete building plans have been submitted to the division of building services and licensing within that period. The Land Use Administrator may grant an extension of a variance for up to one additional year when the applicant is able to demonstrate no change in circumstance that would result in an unmitigated impact. Extension requests must be submitted prior to the expiration of the variance.

**J. Appeal of Decision**

Any person adversely affected by a final decision made by the Appeals and Variances Hearing Officer may file a petition for review of the decision with the district court within thirty (30) days after the decision is rendered.

**K. Stay of Decision**

The Appeals and Variances Hearing Officer may stay the issuance of any permits or approval based on its decision for thirty (30) days or until the decision of the district court in any appeal of the decision in accordance with State statute 10-9a.

**02-06-004**

**APPEAL OF FEES**

Any person aggrieved by the fees charged or assessed for a land-use application may file a petition for review of the decision or assessment with the Appeals and Variances Hearing Officer in accordance with the provisions of this ordinance within five (5) business days after the fee is finally established. An application for a land use is not considered filed until the fee required for that application is paid. In the event a fee is appealed, the applicant may pay the disputed fee and proceed to have the application considered while the appeal is being processed with any subsequent increase in the fee determined after the appeal or decrease in the fee determined after the appeal to be adjusted and paid or refunded at the time of the decision of the Appeals and Variances Hearing Officer.

**02-06-005**

**EXHAUSTION OF ADMINISTRATIVE REMEDIES**

No person may challenge in district court the City's actions on any petition under this title until that person has exhausted all available administrative remedies.

**02-06-006**

**EX PARTE COMMUNICATION**

Ex Parte communication between the appeals and variance hearing officer and parties involved in an appeal pending before the hearing officer relating in any way to the subject of the appeal is prohibited.