

## **Rules of Conduct of Business for the Zoning Board of Appeals**

### **A. ORGANIZATION & MEETINGS**

1. (a) **Meetings.** All meetings and training sessions of the Board of Appeals for Zoning Special Exceptions (hereafter “Board of Appeals” or “Board”) shall be open to the public as required by the New Mexico Open Meetings Act, Section 10-15-1 et seq. NMSA 1978. Notice of all Meetings and training sessions shall be given to the public as provide below.
- (b) **Regular Meetings.** The regular meeting of the Board of Appeals is on the fourth Tuesday of each month during which the Board has one or more appeals of decisions of the Zoning Hearing Examiner (ZHE) scheduled for hearing and/or other business items. In the event such day is a public holiday as provided in the Merit System Ordinance of the City of Albuquerque, the meeting shall be rescheduled and notice shall be given to the public as provided below. The day of the month for the regular meeting may be changed in order to meet any deadline established in the Revised Ordinances of the City of Albuquerque that the Board must satisfy to begin a hearing on an appeal, or such deadline may be met by holding a special meeting.
- (c) **Special Meetings.** A special meeting of the Board of Appeals is any meeting held other than on the fourth Tuesday of the month. A special meeting may be held in lieu of, or in addition to, a regular meeting. A special meeting may be called by:
  - i. the Chair or by two Board Members, provided written notice of such meeting is given to each Board Member at least ten (10) calendar days before the time set for the meeting. Written notice to Board Members of a special meeting is not required when the date, time and place of the special meeting is established at a regular or special meeting of the Board.
  - ii. Staff, provided written notice of such meeting is given to each Board Member at least ten (10) calendar days before the time set for the meeting, in cases when a quorum cannot be obtained or when either an appellant or a ZHE applicant requests deferral of a case. The party requesting the deferral must state the reason(s) in writing. The deferral must not conflict with the requirement that a hearing be opened with 45 calendar days of the expiration of the appeal period for the ZHE decision (see B.9 of these rules).
- (d) **Reconvened Meetings.** The Board may recess and reconvene a meeting to a day subsequent to the day stated in the meeting notice if, prior to recessing, the Board specifies the date, time and place for continuation of the meeting. Immediately following the recessed meeting, notice of the date, time and place for the reconvened meeting shall be posted on or near the door of the place where the original meeting was held and in the lobby adjacent to the Hearing Room, Plaza Del Sol, Lower Level, 600 2<sup>nd</sup> Street NW, Albuquerque, New Mexico. The Board may consider only matters appearing on the agenda of the original meeting at any reconvened meeting.
- (e) **Training Sessions.** The Board may, from time to time, call a training session for educational and training purposes, which Board members are expected to attend;

however, no information related to any pending appeal shall be heard or discussed, and no official action shall be taken at such training session. Notice shall be given to the public as provided at Section 2, below.

**2. Notice.**

- (a) Notice to the public shall be given at least ten (10) calendar days in advance of any meeting of a quorum of the members of the Board of Appeals. Such notice shall be given by posting a written notice in the lobby adjacent to the Hearing Room, Plaza Del Sol, Lower Level, 600 2<sup>nd</sup> Street NW, Albuquerque, New Mexico. The notice is sufficient as long as the date, time, place and agenda of such meeting are given. This notice provision does not apply to reconvened meetings.
- (b) The agenda for any meeting may be amended by posting an amended agenda in the lobby adjacent to the Hearing Room, Plaza Del Sol, Lower Level, 600 2<sup>nd</sup> Street NW, Albuquerque, New Mexico at least twenty-four (24) hours in advance of the meeting.
- (c) The Board shall review this notice provision at least annually to assure that it provides reasonable notice to the public.

**3. Quorum.** A majority of the members of the Board of Appeals shall constitute a quorum for the transaction of business. Whenever a quorum is not present at a regular or special meeting, no action shall be taken except to adjourn the meeting to another time.

**4. Election of Officers.** Annually at a regular meeting, the members of the Board shall elect by majority vote a Chair and a Vice-Chair. Should a vacancy occur in either office, a special election shall be held at the next regular or special meeting of the Board to fill the unexpired term.

**5. Presiding Officer.** The Chair shall preside at all meetings of the Board, except that, in the event of the absence or disability of the Chair, the Vice-Chair shall preside. In the event of the absence or disability of both the Chair and the Vice-Chair, a Chair Pro-Tempore shall be elected by the Board members present.

**6. Staff.** The Planning Director shall appoint a senior Planning staff member to attend, and a secretary to record the minutes, of all Board meetings.

**B. APPELLANT RULES**

1. These rules shall control the conduct of business of the Board of Appeals, but no rule of the Board may violate provisions of ordinances and resolutions adopted by the City Council of the City of Albuquerque.

2. As provided in the Comprehensive City Zoning Code, the appeal of a decision of the Zoning Hearing Examiner pertaining to special exceptions shall be heard by the Board of Appeals.

**3. Appeal.**

- (a) Any party with standing that appeals the decision of the Zoning Hearing Examiner, shall have fifteen (15) days from the date of the filing of the ZHE decision to appeal it to the Board of Appeals.
- (b) An application for an appeal of a decision of the Zoning Hearing Examiner shall be on forms prescribed by the Planning Department.

- (c) An application shall clearly articulate the reasons for the appeal as stated in 14-16-4-4(B)(4) of the Zoning Code and listed below. The application shall specifically cite and explain one or more alleged errors of the Zoning Hearing Examiner:
    - (1) In applying adopted city plans, policies, and ordinances in arriving at the decision;
    - (2) In the appealed action or decision, including its stated facts;
    - (3) In acting arbitrarily or capriciously or manifestly abusive of discretion.
  - (d) An application for an appeal shall not include any evidence, exhibits or other written material, or any reference to any such item that was not timely submitted to the Zoning Hearing Examiner.
- 4. Written notice of the date, time and place of the appeal hearing (Notice of Appeal) shall be given to the appellant, the applicant (if different from the appellant), any agents, and any person with standing who both signed the sign-up sheet and spoke at the Zoning Hearing Examiner's hearing by the Planning Department within five (5) working days of receipt of an appeal. A copy of the appeal application and a copy of the Board's Rules of Conduct of Business shall be given to each person receiving written notice of the appeal at the time notice is given.
- 5. **Submissions to the Board.** A party submitting any letter, response, request or offer of proof to the Board of Appeals pursuant to these Rules concerning a pending appeal shall:
  - (a) On the face of the submission, identify the appeal by the case number and the name and address of the case contained on the Notice of Appeal;
  - (b) Serve the submission on the parties to the appeal by hand delivering or mailing a copy of their submission to all parties listed on the Notice of Appeal on the same day the submission is given to the Board of Appeals;
  - (c) A submission shall not include any evidence, exhibits or other written material, or any reference to any such item, that was not timely submitted to the Zoning Hearing Examiner, unless the submission is an offer of proof for remand (see Subsection B.16.);
  - (d) If the submission could change the opinion of the Zoning Hearing Examiner, the matter shall be remanded to the Zoning Hearing Examiner for another hearing and decision.
- 6. Any party to an appeal shall have **fifteen (15) days** from the date of mailing the Notice of Appeal to submit a written response to the appeal. A response shall not include any evidence, exhibits or other written material, or any reference to any such item that was not timely submitted to the Zoning Hearing Examiner except as provided in Section 7 below. Although a party may have missed the above deadline for submitting permitted additional written materials, the party may read them into the record during his or her testimony as provided in Section C.6 provided they have standing and spoke at the Zoning Hearing Examiner's hearing.
- 7. The Board will consider only the following additional written materials that were not part of the record from the Zoning Hearing Examiner and that were received by the Planning Department no less than 48 hours (excluding weekends and holidays) prior to the hearing:
  - (a) the appeal (see Subsection B.3.);
  - (b) any written response to the appeal (see Subsection B.6.);

- (c) a request for deferral (see Subsection B.14.);
- (d) a request for withdrawal (see Subsection B.15.); and
- (e) an offer of proof for remand (see Subsection B.16.).

**8. Communication.**

- (a) Board members shall not communicate directly or indirectly with any parties to an appeal or their representatives in connection with the merits of an appeal.
  - (b) Board members may communicate with staff of City departments (other than the Zoning Hearing Examiner, his staff or any employee who has a personal or pecuniary interest in the outcome of any appeal) at any time and by any means. Copies of any written materials from City staff shall be distributed to all parties, with the exception of communications between legal counsel and individual Board members. Board members shall not communicate with each other concerning a pending appeal except in open hearings.
9. An appeal to the Board shall have a hearing opened within forty-five (45) calendar days of the expiration of the appeal period of the Zoning Hearing Examiner's decision and concluded within seventy-five (75) calendar days of the expiration of the appeal period; however, the Board may for good cause determine that the appeal hearing should be deferred beyond the 75-day period. If the hearing is deferred, the Board shall include the reason for the deferral in the motion to defer.
10. An appeal shall be heard solely on the record, including testimony, exhibits and written material, presented to the Zoning Hearing Examiner. No new evidence, exhibits, testimony or written material shall be considered at an appeal hearing before the Board of Appeals, except as provided in Subsection B.7.
11. The Board may reverse, affirm, or remand a decision of the Zoning Hearing Examiner. In making its determination, the Board shall review the decision of the Zoning Hearing Examiner to determine whether there was error:
- (a) In applying adopted city plans, policies and ordinances in arriving at the decision;
  - (b) In the appealed decision, including its stated facts;
  - (c) In acting arbitrarily, capriciously or manifestly abusive of discretion.
12. In deciding an appeal, the Board:
- (a) shall state and adopt key Findings of Fact;
  - (b) shall base its decision on the preponderance of the evidence;
  - (c) may reweigh the evidence in the record; and
  - (d) may determine whether new evidence offered through an Offer of Proof is sufficient to warrant a remand to the Zoning Hearing Examiner. It may not reverse the Zoning Hearing Examiner's decision based on new evidence, but may only remand the case to the Zoning Hearing Examiner.
13. An appeal will be held as advertised. Parties to an appeal are expected to be present at the date and time scheduled for the appeal.
14. A request for a deferral of an appeal must be submitted in writing to the Planning Department **prior** to the scheduled appeal. The party requesting the deferral must explain the reason(s) for the deferral. Upon a showing of good cause, Staff may accept the deferral request and reschedule the hearing pursuant to these Rules. If the deferral would conflict with the requirement that a hearing be opened with 45 calendar days of the expiration of the appeal period for the ZHE decision, Staff will not

reschedule the hearing unless a quorum cannot be obtained (see Subsection A.1.c). Efforts to delay an appeal will not be accepted.

15. An appellant may withdraw an appeal at any time prior to a final decision by the Board by written request or on the record at the hearing.
16. The Board shall remand the matter to the Zoning Hearing Examiner for further testimony and/or evidence if a party is able to demonstrate by an offer of proof that:
  - (a) There is newly discovered evidence which, with due diligence, could not have been discovered prior to the original hearing in front of the Zoning Hearing Examiner; and
  - (b) An injustice would occur if the newly discovered evidence were not allowed to be heard.
17. A Board member shall withdraw from any proceedings in which the Board member has a direct or indirect financial conflict of interest or otherwise cannot accord a fair and impartial hearing.
18. The Chair, subject to these Rules, shall decide all points of procedure unless otherwise directed by the majority of the Board members present.
19. These rules, or any part thereof, may be amended, repealed, altered or rescinded by the affirmative vote of a majority of the entire membership of the Board plus one additional Board member, provided that, at least fourteen (14) days prior to the meeting at which such action will be considered, written notice is given to each Board member and to the Mayor, and notice is also given to the public in the manner provided in Subsection A.2.(a)

### **C. HEARING PROCEDURES**

1. The Chair will advise the parties of the hearing procedures prior to the start of each hearing.
2. There will be a separate sign-up sheet for each case to be heard on the agenda for the hearing. Parties and persons qualified to speak who wish to speak at the appeal of each case shall sign the appropriate sign-up sheet at the time of arrival.
3. The Chair shall swear parties, other qualified speakers and staff at the beginning of each hearing.
4. The Board will hear an appeal solely on the record that was before the Zoning Hearing Examiner. No new evidence, exhibits, testimony or written material shall be considered at the appeal hearing, except as provided in Subsection B.7.
5. The Chair will call the case and ask the parties to identify their spokespersons. The parties shall determine the speakers to use the time assigned to the applicant(s) and any opponents(s) of the appeal.
6. The sequence and times allowed shall be as follows (additional time may be allotted as circumstances warrant and will be at the discretion of the Chair);
  - (a) 10 minutes for the appellant(s) to explain fully why they believe the decision of the Zoning Hearing Examiner is erroneous and should be reversed, modified or remanded;
  - (b) 15 minutes for the opponent(s) to explain fully why they believe the decision of the Zoning Hearing examiner is correct and should be affirmed;

- (c) 5 minutes for appellant rebuttal.
  - (d) Questions by the appellants(s) or the opponent(s) shall be directed through the Chair.
7. (a) Board members may ask questions of the City staff, the appellant(s) and/or the opponent(s) at any time. The time for questions by the Board members shall not count against the time allowed for the parties.
    - (b) The parties or their agents may choose to divide their time among qualified witnesses who support their position.
    - (c) If qualified speakers other than the parties are signed up to speak, the Chair at his/her discretion may allocate additional time as needed.
  8. At the conclusion of the testimony, the Chair will close the floor and ask for discussion among Board members. The Chair may reopen the floor for a question at the request of a Board member.
  9. The Chair will close discussion and call for a motion. A motion must be seconded.
  10. The Chair may second a motion without stepping down from the Chair, but the Chair must step down before making a motion.
  11. The Chair will close the discussion and the Board shall then adopt Findings of Fact, utilizing proposed Findings prepared by staff to guide in its preparation. Copies of the proposed Findings shall be available to the parties of the appeal as well as to attendees at the appeal hearing.
  12. Following adoption of Findings of Fact, the Chair will call for a motion to reverse, affirm, or remand a decision of the Zoning Hearing Examiner. A motion must be seconded. The Chair may vote on any motion, second any motion, and may make any motions **except** to approve, deny or, remand an appeal.
  13. The Board will take a vote on the motion after discussion of the motion among Board members. A motion shall carry upon the affirmative vote of the majority of Board members present at any hearing. If a motion fails, the Board may take a second vote on the failed motion or may consider another motion.
  14. In the event of a tie vote on any motion, only that motion fails. However, if there are motions to grant or deny the appeal, or to remand the case back to the Zoning Hearing Examiner, and all three types of motions end in a tie vote and/or fail, then the appeal is denied and no findings shall be adopted.
  15. After a decision, the Chair will explain to the parties the process of appeal to the City Council.

**Approved June 27, 2012**

**Amended October 27, 2015**