

TOWN OF DAVIDSON BOARD OF ADJUSTMENT
RULES OF PROCEDURE

Adopted 2/25/19

SECTION 1: AUTHORITY AND RESPONSIBILITY

1.1 Purpose

The Board of Adjustment (the "BOA") has the following duties and responsibilities in accordance with the Davidson Planning Ordinance (the "Ordinance"):

- a. To hear and decide appeals from any order, decision, determination, or interpretation made by the Town of Davidson Planning Director pursuant to or regarding the Ordinance;
- b. To hear and decide petitions for variances from the requirements of the Ordinance; and
- c. To serve as the Watershed Review Board and rule on all petitions in accordance with the procedures specified in Section 17 of the Ordinance and these Rules.

The BOA shall follow quasi-judicial procedures in conducting public hearings in the performance of said duties. The BOA may also hold meetings for purposes other than hearings and may adopt or amend its own Rules of Procedure, provided said Rules are not inconsistent with rules of procedure adopted by the Board of Commissioners.

SECTION 2: MEMBERSHIP AND STAFF

2.1 Membership/Participation

The BOA shall be composed of Town of Davidson Planning Board members. Each Planning Board member shall be a member of the BOA and shall participate in all meetings of the BOA that do not constitute hearings, as provided hereinbelow.

2.2 Hearings

The Chair of the BOA and four members, at least one of whom shall reside within the Town's extraterritorial jurisdiction (ETJ), along with two alternate members, shall be designated from the BOA's rolling member roster to conduct hearings on behalf of the BOA. The Chair will publish the rolling member roster at the beginning of each calendar year. A member who conducts a hearing will roll to the end of the member roster for purposes of designating members to conduct a subsequent hearing, such that the roster continually turns over with different members conducting hearings. Alternates who do not participate in a hearing will be the first members designated to conduct a subsequent hearing. The Chair (or, the Vice Chair in the Chair's absence) and at least one ETJ member shall always participate in hearings, unless they are unable to attend or disqualified by these Rules. The Chair shall have discretion to make any necessary adjustments in the rolling member roster during a calendar year as he/she may deem warranted.

2.3 Hearing Alternates

Alternates are seated when members designated to hear a case are absent, tardy, excused early from the hearing, or not eligible to vote due to a conflict of interest. A member who is not present at the call to order is considered tardy. Alternates prepare themselves for hearings in the same manner as regular members and are subject to the same attendance policies as regular members. Alternates and nonseated members do not participate in discussions, ask questions, or vote in hearings; however, all members are seated and may vote at work sessions and during the consideration of business other than cases at public hearings.

2.4 Term

BOA members serve 3-year terms, unless otherwise appointed to fill a vacancy or shorter term, in accordance with their individual appointments by the Board of Commissioners to the Town of Davidson Planning Board. Terms begin on January 1, unless otherwise appointed by the Board of Commissioners. BOA members may serve successive terms. The appointments and terms of ETJ members on the BOA are determined by the ETJ member's appointment to the Planning Board in accordance with N.C. Gen. Stat. § 160A-362.

2.5 Vacancies

Vacancies on the BOA are filled by the Board of Commissioners through new appointments to the Planning Board, with any vacancy in the requisite ETJ representation being addressed in accordance with N.C. Gen. Stat. § 160A-362. If a departing member resigns or is removed midterm, the new appointee serves the balance of the replaced member's term.

2.6 Removal

Members may be removed from the BOA by the Board of Commissioners for cause, which includes violation of Section 4 of these Rules (Conduct of Members). Prior to any action, the Board of Commissioners shall notify the BOA's Chair and the member being considered for removal of the reasons for removal and give such member an opportunity to respond.

2.7 Officers/Terms

- a.** The officers of the BOA consist of a Chair and Vice Chair. The Chair presides at all hearings/meetings, excuses members from hearings as provided in these Rules, makes other decisions provided for in these Rules, and determines all issues, or a process for deciding such issues, not governed by these Rules. The Vice Chair serves as Chair in the Chair's absence or incapacity.
- b.** Officers must be regular members of the BOA. The Board of Commissioners appoints the Chair. The Vice Chair is elected by majority vote of all members present at the first meeting of a term and takes office immediately upon election. The Chair and Vice Chair serve terms in accordance with their appointment and election, respectively. Officers may serve successive terms.
- c.** A vacancy in the office of the Chair is filled by the Vice Chair for the balance of the Chair's term, or until the Board of Commissioners appoints a new Chair, whichever occurs first.

2.8 Clerk & Staff to the BOA

The Town Clerk shall serve as clerk to the BOA, and the Planning Director or his/her designee shall serve as the primary staff person to the BOA. Requests to staff during a meeting that could interfere with the BOA's activities should be made through the Chair.

SECTION 3: MEETINGS AND HEARINGS

3.1 Rules of Procedure

The BOA, by majority vote, shall adopt Rules of Procedure. These Rules may be amended by majority vote provided that the general substance of such amendment is presented in writing at a meeting preceding the meeting at which the amendment is adopted. The Rules may be suspended for good cause by majority vote of the members eligible to vote on the matter being considered.

3.2 Public Hearings

The BOA shall hold a public hearing on a case no later than forty-five (45) days after a complete application has been filed with the Planning Director in accordance with Section 14.18.4 of the Ordinance, or within fifteen (15) days of the filing of a request for an expedited hearing pursuant to N.C. Gen. Stat. § 160A-388(b1)(6). BOA members shall receive at least ten (10) days' advance notice prior to a hearing. An emergency public hearing may be called without ten days' notice if the Chair determines (a) that a case is urgent and (b) that due process for those persons entitled to receive notice pursuant to N.C. Gen. Stat. § 160A-388(a2) will not be violated.

3.3 Other Meetings

All meetings of the BOA, including hearings, are scheduled on an as-needed basis and in accordance with the applicable notice requirements set forth in these Rules, the Ordinance, and N.C. Gen. Stat. § 160A-388. Generally, meetings and hearings are held at Town Hall immediately following a regularly-scheduled Planning Board meeting, which are scheduled to occur on the last Monday of each month. The BOA may hold meetings for training, work sessions, or the conduct of business other than hearings. Such meetings shall be set by the Chair, with at least ten (10) days' notice given to members. The Chair may call an emergency meeting regarding matters that need immediate resolution, in which case at least 48 hours' advance notice shall be given. For all non-hearing meetings, a written or oral agenda for the meeting shall be prepared by Staff or the Chair and will be given to each member 48 hours prior to the meeting.

3.4 Public Access/Hearing Tapes

- a. All meetings, hearings, records, and minutes of the BOA shall be open to the public. The Clerk shall prepare and maintain records and minutes of the BOA.
- b. A duplicate hearing recording may be obtained upon payment of any applicable cost.

3.5 Notice of Public Hearings

Notice of any hearing before the BOA shall be provided in accordance with N.C. Gen. Stat. § 160A-388. Applicants may be required to furnish information or materials for mailed notices, and affidavits that they have provided the same, if required by Davidson Planning Ordinance section 14.18.3. Deficient notice will generally result in a delay of the applicant's hearing date, unless otherwise determined by the Chair.

3.6 Agenda & Staff Report for Public Hearings

Staff shall provide an agenda for each hearing with a list of cases to be heard, the order in which they will be heard, and a general order of business, together with a Staff Analysis report for each case, to all BOA members via email no less than ten (10) days prior to the hearing, except for emergency hearings, in which case said documents will be provided at the earliest time possible. Staff Analysis reports shall, at a minimum, include: a map of the location of the property that is the subject of the hearing and all parcels abutting said property; a description of the applicable planning areas and relevant provisions, uses and standards for the subject property and surrounding property; factual information regarding any Staff findings under the Ordinance; a listing of all relevant Ordinance sections; and a complete copy of the application and all supporting materials submitted by the applicant. The Staff Analysis report shall be available to the general public, upon request, at the same time it is provided to BOA members.

3.7 Setting of Agenda & Order of Business

- a. All matters requiring a hearing by the BOA shall be placed on the BOA's agenda for its next available meeting after an application is deemed complete, assuming the next meeting date allows for all requisite notices to be provided. All business and non-hearing matters shall be placed on the agenda after verification with the Chair.
- b. Items may be added to the agenda at a meeting/hearing by majority vote.
- c. The order of business at hearings shall be as follows, unless varied by majority vote:
 - 1) Call to Order
 - 2) Roll Call, Determination of Quorum, and Disclosures of Potential Conflicts of Interest or Special Knowledge of the Case Being Heard
 - 3) Changes to the Agenda
 - 4) Explanation of Quasi-Judicial Procedure
 - 5) Swearing In of Witnesses
 - 6) Hearing and Determination of Each Case
 - 7) Adjournment

SECTION 4: CONDUCT OF MEMBERS

Members must observe the following rules concerning their conduct. Failure to do so shall be reported by the Chair to the Board of Commissioners. If there is a question concerning whether a member has or has not followed these rules, the matter shall be determined by a majority vote of all members of the BOA.

4.1 Attendance

- a. BOA members, including alternates, must faithfully attend meetings and hearings for which they are designated and perform their duties. When a BOA member has missed

three (3) meetings/designated hearings held within any twelve (12) month period, the Board of Commissioners shall be notified.

- b. Alternates must remain throughout a hearing. Alternates must not engage in any communication with any person while at a hearing, except for any communication as may be necessary with the Chair. The Chair may excuse an alternate during a hearing if it is clear that they will not be needed to fill in for members who must leave early, or who have a conflict of interest, or who otherwise cannot hear a case.
- c. Members may request to be excused by the Chair from a meeting or hearing when an important conflict exists and notice of the request is given to the Chair and Clerk at least two (2) business days in advance. The member shall be counted as absent. The Chair may refuse to excuse a member when the member's absence would leave fewer than 5 members to hear a case or where circumstances otherwise warrant the member's remaining. The Chair may treat emergency situations as an exception to this Rule.

4.2 Reporting Absences

Any member who is unable to attend a meeting must give the Chair and Clerk at least two (2) business days' advance notice and indicate the general reason for being absent. The Chair may treat emergency situations as an exception to this Rule. At the meeting/hearing, the Clerk will inform the BOA of the absence and the member's reasons.

4.3 Ethics Policy

Members shall abide by applicable state statutory ethical requirements, including the Code of Ethics adopted by the Board of Commissioners, as may be amended from time to time.

4.4 Conduct Outside of Hearings

- a. No Ex Parte Communications: BOA members shall not discuss any case with, or receive or provide any information in any form or medium from or to, any party or persons outside the public hearing on a case. This does not include information received or solicited from the Chair, the Town Attorney's office, Staff or the Clerk. Site visits to properties for which applications have been made are permitted, so long as (1) BOA members do not discuss the merits of the case or any related matter with persons at the site, and (2) a member who visits the property discloses any facts indicated from said visit at the start of the public hearing and makes such disclosure part of the record. Members are cautioned to differentiate between facts and opinions when making such disclosures for the record.
- b. No Predetermined Opinions Unsusceptible to Change: Members shall not form or express opinions that are not susceptible to change concerning a case before that case is heard, except for opinions regarding procedural or scheduling issues that may be expressed to the Chair, Staff, or the Clerk.
- c. Avoid Even an Appearance of Impropriety: BOA members shall serve as impartial, quasi-judicial decision-makers and shall conduct themselves in manners, both in and outside of hearings or meetings, to avoid even the potential appearance of impropriety.

4.5 Disqualification from Participation in a Hearing

- a. Conflict of Interest. Applicants and persons affected by a hearing enjoy a due process right to an impartial decision-maker. BOA members shall avoid conflicts of interest that affect their impartiality. A member is disqualified and shall not participate in a hearing (including any discussion or vote) when a member has an impermissible conflict of interest, including without limitation:
- a member's bias (e.g., having a fixed opinion prior to hearing the matter that is not susceptible to change);
 - undisclosed ex parte communications;
 - a close familial, business, or other associational relationship with an affected person or entity; or,
 - a financial interest in the outcome of the matter.

There is no bright-line rule for recusal for such relationships and financial interests; the key inquiry is whether those matters would influence a reasonable person and make him/her unable to render an impartial decision. A member with a potential conflict of interest shall, at the earliest time possible prior to a hearing, consult with the Chair and, if necessary, with the Planning Director and/or Town Attorney regarding the potential conflict. The member may recuse him/herself or may ask the Chair to decide whether he/she is recused on account of the potential conflict. The Chair shall announce any recusals prior to the relevant hearing. If an objection is raised to a member's participation and that member does not recuse him/herself, the remaining members shall by majority vote rule on the objection.

4.6 Conduct at Hearings

- a. Disclosure of facts or prior knowledge. Prior to or during a hearing, BOA members designated for a hearing and alternates should disclose pertinent facts they are aware of through site visits or through other prior knowledge if such facts or knowledge may affect a member's opinions regarding the case. Such disclosure shall be made so that the parties are aware of all information being considered by members and so that parties may address such information in their cases as necessary. Other than this type of disclosure, a member designated for a hearing shall not testify or present evidence in a hearing.
- b. Testifying. All members, even those who are not designated to hear a case, are discouraged from testifying at hearings. If a non-designated member wishes to testify in a case in which he/she has a financial or associational interest, he/she should consult with the Chair and be recused from hearing any other case being heard on the same date.
- c. Voting. No BOA member shall vote in any final determination of the merits of a case unless that member was present for the hearing of the case or has reviewed the taped recording of the hearing and all evidence submitted. This prohibition shall not apply to procedural issues, extensions, continuances, decisions to appeal, or other similar issues.

SECTION 5: PARLIAMENTARY AND HEARING PROCEDURES

5.1 Quorum & Voting Requirements

Five (5) members constitute a quorum for public hearings and meetings. A vote to approve a request for a variance must receive a concurring vote of at least four-fifths of the full five-member BOA. Other votes require only majority approval. Where majority approval is not otherwise

defined in these rules, it means a majority of those members present and voting at a meeting where a quorum is present. For all matters not requiring a four-fifths vote, vacant positions on the BOA and members who are recused or disqualified from voting on a quasi-judicial matter shall not be considered in the calculation of the requisite majority if there are no qualified alternates available to take the place of such members. In the case of abstention or failure to vote by a BOA member who is seated and has not been excused under these Rules, the member's vote shall be counted in the affirmative.

5.2 Parliamentary Procedures

The BOA shall observe the following parliamentary procedures. Voting members may suspend these procedures by a majority vote. Deviations from these procedures shall not be grounds for voiding a vote, unless the deviation is called to the attention of the Chair at the same meeting when it occurs and members by majority vote agree that as a result of the deviation a previous vote should be voided.

- a. Authority of Chair. If a situation is not covered by these Rules, the Chair shall determine the appropriate procedure, which procedure may be changed by a majority vote of seated members.
- b. Motions. Motions shall be handled as follows:
 - Decisions to approve these Rules of Procedure, all actions concerning cases, selection of officers, and other business shall be made by motion, which, except as provided below, must be seconded. The mover may withdraw the motion at any time before a vote on it occurs. Only one substantive motion and friendly amendment(s) to such motion may be considered at a time.
 - Motions may be made to approve a request, to approve it with conditions, to deny the request, or, where appropriate, to continue the hearing.
 - Friendly amendments are the norm in BOA proceedings, and all amendments to a motion must be offered as friendly amendments. A motion proposing a friendly amendment does not need a second. A friendly amendment is valid only when accepted by the maker of the original motion and, once accepted, it becomes a part of the original motion. An unlimited number of friendly amendments are allowed. If a friendly amendment is not accepted by the motion maker it may be offered as a subsequent motion after the vote on the first motion has occurred, assuming that only one substantive vote has then occurred on the case.
 - Motion to Continue: After debate but prior to the first vote on a case, the Chair shall ask all parties and BOA members if there is any relevant and material information that has not been presented that would be useful and reasonably necessary for a full and proper determination of the case. If there is such additional, relevant and material information that cannot be presented at the hearing, then a motion to continue may be granted. A motion to continue may be made at any time and takes precedence over substantive motions or amendments on the table. It requires a majority of seated members for approval. When the matter is reopened after continuance, any substantive motions on the table at the prior meeting will still be on the table.
 - A motion to adjourn is not in order if there are motions or amendments pending on a case that has not been continued.

- c. Voting
- For a vote to occur the Chair may call for a vote or a member may call the question and the Chair must agree.
 - Votes deciding cases shall be by roll call. Votes on other matters may be taken by a show of hands or in any other reasonable fashion determined by the Chair.
 - Before a vote, motions as they may have been amended shall, upon request, be restated by the Chair, the Clerk, or a member who proposed either the motion or amendments to such motion, unless the motion was made immediately prior to the vote without discussion or any amendments occurring. The restatement shall include all proposed conditions.
 - Cases may be voted on more than once if the votes are taken at the same meeting or at a subsequent meeting that is a continuance of a prior meeting concerning the case. Examples of situations in which additional votes may need to be taken are 1) cases in which a first vote has not resulted in sufficient votes to approve, where the addition of conditions could result in approval; and 2) approved cases in which, after consideration but before adjournment, it appears necessary to either add conditions or clarify conditions.

5.3 Hearing Procedures & Guidelines for Determining Cases

- a. The Chair, after members' disclosures of any potential conflicts of interest/special knowledge and prior to swearing in witnesses, shall briefly explain the nature of a quasi-judicial hearing, the right to ask questions and to object to evidence, and the standards followed for the decision of the case.
- b. Following the swearing in of witnesses, evidence shall be presented as follows: 1) Staff report; 2) applicant's evidence; 3) opponent's evidence; and 4) rebuttal (if requested).
- c. The Chair must recognize speakers and BOA members before they may be heard.
- d. Direct and cross-examination (and rebuttal evidence if requested) are allowed.
- e. The Chair shall allow every sworn-in speaker to be heard, but may limit and/or cut off evidence or testimony that is irrelevant, repetitive, incompetent, or hearsay. Attorneys summarizing evidence presented by others or presenting legal arguments for a client do not need to be under oath for such statements; however, an attorney seeking to offer evidence directly must be sworn in like any other witness.
- f. BOA members may ask questions of any witness.
- g. The party who filed the request bears the burdens of proof and production of evidence.
- h. The Chair shall rule on any objections or requests from participants in the hearing regarding the procedure of the hearing or evidence presented. Although the BOA is not required to strictly adhere to all of the NC Rules of Evidence and may relax certain evidentiary rules, all case decisions must be based on evidence that is competent (legally admissible), material (relevant and essential or influential to a decision), and substantial (adequate to support a conclusion by a reasonable person; more than a mere scintilla).
- i. Decisions shall not be based on speculation or conjecture. Non-expert or layperson opinion evidence shall not form the basis of a decision, as such opinions lack the competency required for fact finding in the quasi-judicial process. Only properly qualified expert witnesses with expertise on the subject matter shall offer opinion evidence. Two non-exclusive examples of matters on which non-expert opinion testimony is specifically prohibited from forming the basis of a decision include how a project would affect

property values and how traffic would affect public safety.

- j. Hearsay evidence (a statement, being offered as proof of the truth of the matter asserted, that was made by someone outside of a hearing who is not present at the hearing or able to be questioned about said statement) is generally not competent evidence. There are exceptions to the admissibility of hearsay. If there is no better evidence available on a material issue, the BOA may allow the hearsay evidence but should consider what, if any, weight or credibility to give it. Hearsay evidence alone and without other evidence shall not be sufficient to form the basis of a decision.
- k. The Chair may issue subpoenas compelling individuals to appear and testify as a witness and/or produce evidence. Persons with standing under N.C. Gen. Stat. § 160A-393(d) may make a written request to the Chair for a subpoena, with an explanation in the request stating why it is necessary to compel the desired witnesses or evidence. The Chair shall issue requested subpoenas that he/she deems relevant, reasonable in nature and scope, and not unduly oppressive. The Chair shall rule on any motion to quash or modify a subpoena. Any such decisions by the Chair may be appealed to the BOA.
- l. Upon the close of all testimony and evidence, the BOA shall discuss and deliberate the case and the facts established by evidence in order to reach a decision.
- m. The Chair, upon a motion, may allow for additional testimony or evidence to be offered and admitted as may be warranted as a result of the BOA's deliberations.
- n. A vote to decide a case shall follow a motion that has been seconded to: 1) approve as requested; 2) approve with conditions; or 3) deny the request.
- o. If an applicant withdraws a request, the case is closed. An applicant may withdraw a request at any time prior to a vote being taken on the approval or denial of the request. A new application and fee must be submitted if the request is reviewed thereafter.
- p. Cases continued by the BOA for lack of information or for necessary actions to be taken by the applicant shall be to a date certain. If the applicant does not submit the information or take the actions by the continuance date, the BOA shall either continue the case again or dismiss the case without prejudice to the applicant's right to initiate a new application. The BOA shall not grant multiple continuances without good cause.
- q. BOA members who realize they have a conflict of interest during a hearing shall recuse themselves immediately upon such realization, and an alternate shall take his/her place.
- r. The BOA may limit the length of a public hearing or set a time for adjournment by majority vote.

5.4 Written Decisions; Findings; Transmittal and Filing

- a. A written decision, signed by the Chair, shall be issued for every case voted on by the BOA and shall include the pertinent ordinance sections that were met or were not met. Findings of fact are not required to be included in a written decision when the record sufficiently reveals the basis for the BOA decision, such as may be the case in uncontested approvals or when material facts are undisputed. In the case of denials and contested approvals, subsidiary factual findings relating to the evidence heard by the BOA shall be included. All findings of fact must be based upon competent, material and substantial evidence presented to the BOA at the hearing. Approvals shall include any conditions imposed by the BOA.
- b. In addition to the vote that determines the outcome of a case, the BOA shall vote on a written decision that requires factual findings to be included. A majority of the BOA

members who voted on the prevailing side shall vote on the content of the decision. For denials, the members voting for denial shall discuss the Ordinance sections not met and the facts and evidence relevant to their decision to deny. For contested approvals, members shall discuss the facts and evidence relevant to the decision to approve. (For example, if a motion to approve receives a 3/2 vote, resulting in denial, then the majority of those voting to deny, in this case, 2 of 2 members, must approve the written decision with factual findings supporting the denial. If, in a contested case, a motion to approve receives a 4-1 vote, a majority of 4 members, or 3, must approve the written decision.)

- c. Written factual findings may be approved at the same meeting or at a later meeting, which shall generally be the next scheduled meeting. A party may submit proposed findings to the Staff and/or BOA to be considered for incorporation into the written decision. Proposed findings may also be the subject of emails shared among BOA members prior to the final vote on the wording of the decision. Where absences result in the inability to get majority approval of findings at the next scheduled meeting by the members necessary for consideration of such findings, absent members may be polled by phone, with confirmation in writing. Any such approvals rendered by phone, email, or mail shall be recorded in writing and added to the BOA's minutes.
- d. The written decision for each case shall be signed by the Chair or other duly authorized member of the BOA. It shall be effective upon being filed in the Clerk's file, where a copy of all decisions shall be maintained. The written decision shall be delivered as provided in N.C. Gen. Stat. § 160A-388.

5.5 Reconsideration/Rehearing

The BOA lacks authority to hear the same matter a second time. Substantive decisions on the merits of a request cannot be reconsidered and decided cases cannot be reopened following the approval of a written decision. If an applicant wishes to present evidence of the requisite substantial change in circumstances to permit a second hearing on the same matter, the applicant may do so and the BOA shall decide if such a substantial change exists. If the BOA decides there has been a substantial change, the applicant may proceed with the second application and the BOA shall treat it the same as any other matter seeking a hearing. If the BOA decides there has not been a substantial change, it shall deny the second hearing.

5.6 Appeal of BOA Decision

An appeal from a decision of the BOA must be filed with the Superior Court of Mecklenburg County by the later of thirty (30) days after the decision is effective or after a written copy thereof is given in accordance with N.C. Gen. Stat. § 160A-388.