

## CHATHAM TOWNSHIP ZONING BOARD OF ADJUSTMENT

### A GUIDE FOR PUBLIC PARTICIPATION

If you find yourself sitting in the back of the room at a Board of Adjustment meeting, the odds are pretty good that you have received a Legal Notice from an applicant advising that their development application has been scheduled for a hearing that evening. You have received this notice because the Municipal Land Use Law (MLUL), which regulates the municipal exercise of zoning powers, recognizes that property owners within 200 feet of a property have a statutory interest in the application owing to its proximity.

If potential issues reach beyond this distance, you may also be in attendance in response to the Legal Notice concerning the application published in the newspaper or in response to requests from noticed property owners. Either way, notice is required to protect your right to observe and participate in the Board of Adjustment hearing process.

That process is quasi-judicial. The Board of Adjustment is composed of seven members and two alternates appointed by the Township Committee. The primary jurisdiction of the Board is to decide applications for variances from Township Ordinance requirements. Building setback and other ordinance standards are the subject of “c” variance relief which requires a majority of the quorum of Board members in attendance. The alternates vote in the absence of a regular member. Where an applicant is seeking approval for a use prohibited by the zoning ordinance, “d-1” variance relief is required which needs a super majority of the Board for approval (five affirmative votes). The Board also has jurisdiction over site plan approvals where an applicant is requesting “d” variance relief, which also includes relief from conditional use standards, density standards and height variances greater than 10%. Conditional uses are permitted in a zone if ordinance standards are met; examples in residential zones are schools and churches. Where a variance from a conditional use standard is requested, the question becomes whether the property remains appropriate for the conditional use if the variance is granted.

Of special note is to understand the impact of federal laws on certain issues common to applications for telecommunications facilities. Where federal laws have been adopted and regulations interpreting and applying them promulgated by the FCC, those federal laws, rules and related judicial decisions preempt the MLUL and the Board has to apply them. An example are alleged health issues associated with electromagnetic emissions: if the expert testimony and report calculating the amount of emissions are within the FCC Rule standards, the Board may not consider alleged health issues associated with them. The FCC requirement for telecommunications carriers to satisfy licensed coverages underlies all such applications.

As with judicial proceedings, sworn testimony and evidence are introduced into the record. The decorum is formal and without public demonstration. Witnesses are subject to

questioning by the Board and cross examination by members of the public. The hearings are taped. While the Rules of Evidence are not strictly applied, the Board cannot consider written comments or give any weight to a petition since an applicant must be provided with the same right to cross examine witnesses. Based on the record at the hearing, the Board renders a decision to approve or deny the application which is memorialized by a Resolution adopted by the Board, generally at the next regular Board Meeting. The Board's decision is subject to judicial review in Superior Court. Provided the decision is supported by substantial evidence in the record, it should be sustained.

Applicants often represent themselves, but generally retain counsel in complicated or potentially controversial matters. Testimony is presented by the applicant regarding their proposed development and the needs and justifications for variance relief requested. Expert architectural and engineering witnesses are common. Professional planners often testify to offer their opinion as to whether the requirements for variance relief have been satisfied. Where potential impacts on property values are at issue, a professional real estate appraiser may be presented.

As a member of the public, you may participate in the hearing by questioning any witness concerning their testimony after the Board has completed its questioning. General comments or concerns about the application are made after an applicant has completed its presentation and the Board has opened the hearing for Public Comment on the application.

In addition to making comments, you may want to participate as an objector to the application. An objector may present testimony and evidence including expert testimony.

You have a right to be represented by counsel. An objector counsel is identified on the record at the hearing and participates on your behalf asking questions of applicant's witnesses and presenting your case during the Public Comment period as to why an approval should not be granted. Based on the level of your concern and the quasi-judicial nature of the proceedings, you may wish to consult with counsel at the outset. An attorney can also assist in identifying potential expert witnesses. Both the Board's decision and a Judge's decision reviewing that decision are limited to the record presented.

The Board generally conducts at least two evening hearings on applications. The first evening an applicant presents a general overview of the application to provide the Board and members of the public with a sufficient understanding of the issues to conduct a site inspection. The time of the site inspection is announced and the hearing is carried to a specific time, generally the next regular board meeting. Members of the public may attend the site inspections. A Board member prepares a written report summarizing the site inspection which is read into the record when the hearing resumes.

Before the hearing is scheduled, the Township Engineer reviews the application and issues a written report finding the application complete. The report describes the application, identifies the variance relief requested, and makes technical comments which may be required

as conditions for an approval. You may inspect the application file at the Zoning Office during regular business hours which will contain any reports from Township Professionals. Where a use variance is involved, there will also be a report from the Board's Professional Planner. The Board also retains additional experts on certain applications requiring expertise to assist the Board including a radio frequency engineer, an acoustic engineer and a traffic engineer when needed. These experts also attend hearings to render advice for the Board, question applicant witnesses, and help insure there is a proper record to justify the Board's decision.

The Chatham Township Environmental Commission also reviews applications and, if it deems appropriate, issues a report with recommendations to the Board. A member of the Commission is often present at site inspections for applications raising environmental concerns.

Although the Board is a neutral fact-finder, it is the practice of the Board to seek to minimize variance relief wherever possible. In response issues raised during the hearings by the Board and its experts, an applicant may decide to modify their plans to reduce variance relief or to address details such as landscaping and buffering.

In summary, an applicant carries the burden of proof to establish the legal and factual basis for the variance relief requested. For a "c-1" variance, an applicant must demonstrate that the variance is required by a peculiar hardship affecting the property, most commonly from the shape of the property or the location of the existing dwelling. The internal layout of an existing dwelling and topography are also a frequent hardship condition. For a "c-2" variance, an applicant must demonstrate that the proposed variance relief promotes one of the enumerated purposes listed in the MLUL and the benefits of the deviation substantially outweigh any detriments. For a "d" use variance, in addition to demonstrating the promotion of the purposes of the MLUL, an applicant needs to demonstrate that the property is uniquely suited for the proposed use. All variance relief must satisfy the "negative criteria": that the character of the neighborhood and Township zone plan and ordinances will not be substantially impaired if the variance relief is granted. For use variances, the Board also has to weigh whether the public good justifying the variance outweighs any adverse effects.

After the Public Comment period is closed and summation by counsel (if any), the Board will discuss the application on the record, identify any approval conditions, and act on a motion to approve or deny the application. Where a motion to approve fails, a motion to deny the application is adopted. The memorialization record must clearly set forth the basis for the Board's decision identifying support from the record. If challenged, the findings of the Resolution are controlling over any comments made by Board members

Every effort is made by the Board to insure that due process and fairness are afforded to both applicants and the public. This Guide is intended to provide the public with a general understanding of Board proceedings to better assert your interests.

