



**BOARD OF APPEALS ORDINANCE
FOR THE TOWN OF SOUTHWEST HARBOR**

Approved 05/1990
Amended 05/1992
Amended 05/1994
Amended 05/1996
Amended 11/2005
Amended 05/2009

Attest a True Copy

Town Clerk

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SECTION I: GENERAL PROVISIONS

- A. Business of the Board shall be conducted in accord with Maine Statutes, Town Ordinances, and the procedures adopted by the Board in its Bylaws.
- B. It shall be the responsibility of the Board to become familiar with all the duly enacted ordinances of the Town which it may be expected to act upon as well as with the applicable State statutes.
- C. It shall be the responsibility of the Board to become familiar with the community goals, desires and policies as expressed in the Southwest Harbor comprehensive Plan, and grant the minimum relief which will insure that the goals and policies of the plan are preserved and substantial justice is done.
- D. The person filing the appeal has the burden of proof.
- E. Application fees shall be set by recommendation of the Board of Appeals and approval of the Southwest Harbor Board of Selectmen

SECTION II: APPOINTMENTS

- A. The Board shall consist of five (5) regular members and (2) two alternate members, appointed by the Selectmen of the Town of Southwest Harbor for terms of three (3) years. These terms shall be staggered so as to preserve continuity on the Board and shall expire on June 30th.
- B. Neither a Selectman nor his/her spouse may be a member of the Board.
- C. Any member of the Board may be removed from the Board, for cause, by the Selectmen before expiration of his/her term, but only after notice and an opportunity for a hearing at which time the member in question has an opportunity to refute specific charges against him/her. The term, "for cause" shall include failure to attend three (3) consecutive Board meetings or hearings without prior notification, or failure to attend at least 50% of all meetings during the preceding twelve (12) month period, or voting when the member has a "conflict of interest".

SECTION III: OFFICERS AND DUTIES

- A. The officers of the Board shall consist of a Chairperson, Acting Chairperson and Secretary, who shall be elected annually by a majority of the Board, and shall serve until their successors are elected.
- B. CHAIRPERSON. The Chairperson shall perform all duties required by law and the Bylaws and preside at all meetings of the Board. The Chairperson shall rule on issues of evidence, order and procedure, and shall take such other actions as necessary for the efficient and orderly conduct of hearings, unless directed otherwise by a majority of the Board. The Chairperson shall appoint any committees found necessary to carry out the business of the Board.
- C. ACTING CHAIRPERSON. The Acting Chairperson shall serve in the absence of the Chairperson and shall have all the powers of the Chairperson during the Chairperson's absence, disability or disqualification.
- D. SECRETARY. The Secretary, subject to the direction of the Board, and the Chairperson, shall keep minutes of all Board proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such a fact. The Chairperson and/or Secretary shall also arrange for proper and legal notice of hearings, attend to correspondence of the Board, and to other

duties as are normally carried out by a Secretary. All records are public and may be inspected at reasonable times.

SECTION IV: CONFLICT OF INTEREST

Any question whether a particular issue involves a 'conflict of interest' sufficient to disqualify a member from voting thereon, shall be decided by a majority vote of the members, except the member whose potential conflict is under consideration.

The term 'conflict of interest' shall be construed to mean direct or indirect pecuniary interest, which shall include pecuniary benefit to any member of the person's immediate family (e.g., grandfather, father, wife, son, grandson) or to his employer or the employer of any member of the person's immediate family.

SECTION V: POWERS AND LIMITATIONS

The Board shall have the following powers to be exercised only upon receipt of a written appeal by an aggrieved party:

- A. The Board may interpret the provisions of any applicable Town Ordinance which are called into question.
- B. The Board may approve the issuance of a special exception permit or conditional use permit in strict compliance with any applicable Town Ordinance.
- C. Except as provided in sub-section D below, the Board may grant a variance only where strict application of any applicable Town ordinance, or a provision thereof, to the petitioner and his property would cause undue hardship. The words "undue hardship" as used in this subsection mean:
 - 1. That the land in question can not yield a reasonable return unless a variance is granted;
 - 2. That the need for a variance is due to the unique circumstances of the property and not the general conditions in the neighborhood.
 - 3. That the granting of a variance will not alter the essential character of the locality, and
 - 4. The hardship is not a result of action taken by the applicant or prior owner.

D. Variance

1. Disability Variance

The Board may grant a variance to an owner of a residential dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The Board shall restrict any variance granted under this subsection solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability. The Board may impose conditions on the variance, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. For the purposes of this subsection, a disability has the same meaning as a physical or mental handicap under M.R.S.A 5 § 4553. The term "structures necessary for access to or egress from the dwelling" shall include railing, wall or roof systems necessary for the safety or effectiveness of the structure.

2. **Setback Variance**

The Board may grant a setback variance to a property owner of a single family dwelling where the Board finds that strict application of the zoning ordinance would cause “undue hardship” as defined in M.R.S.A 30-A § 4353(4-B):

- a. the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;
- b. the granting of a variance will not alter the essential character of the locality;
- c. the hardship is not the result of action taken by the applicant or a prior owner.
- d. the granting of the variance will not substantially reduce or impair the use of the abutting property; and
- e. that the granting of the variance is based upon demonstrated need, not convenience, and not other feasible alternative is available.
- f. Additional limitations upon this variance request are:
 1. The dwelling for which the variance is sought must be the primary year-round residence of the applicant.
 2. The variance may not exceed 20% of the required setback.
 3. The variance shall not allow a reduction in the shoreline setback, and
 4. The variance may not cause the area of the dwelling to exceed the maximum permissible lot coverage.

E. The Board shall have the power to hear and decide, using an appellate review standard, and not using the *de novo* review standard, all appeals by any person directly or indirectly affected by any decision, action or failure to act with respect to any license, permit variance or other required approval, or any application therefore, including, the grant, conditional grant, denial, suspension, or revocation of any such license, permit variance or other approval (hereinafter a “Decision”) where it is alleged that there is an error in any order, requirement, decision, or determination made by or failure to act by:

- a. The Planning Board pursuant to the Land Use Ordinance;
- b. the Selectmen pursuant to the Special Amusement Permit Ordinance or Title 28-A M.R.S.A. Section 1054 (also relating thereto);
- c. the Selectmen or the Road Commissioner pursuant to the Road Ordinance;
- d. the Planning Board pursuant to the Floodplain Management Ordinance;
- e. the Harbor Committee or the Harbormaster pursuant to the Coastal Waters and Harbor Ordinance.
- f. the Selectmen pursuant to the Policy on Warning Sign Requests;
- g. the Selectmen pursuant to the Road Opening Permit Ordinance;
- h. the Town Manager (or other designated Hearing Officer) or the Selectmen pursuant to Section 14 of the Town Personnel Rules and Regulations relating to grievances with respect to Town employees and officers.

F. The Board shall have the power to hear and decide, using a *de novo* standard, and not using an appellate standard, all appeals by any person where it is alleged that there is an error in any decision, or determination made by or failure to act by:

- a. the Selectmen or the Assessor pursuant to M.R.S.A. 36 § 841 *et seq.* (relating to the abatement of taxes);
 - b. the Code Enforcement Officer pursuant to the Land Use Ordinance.
 - c. the Code Enforcement Officer pursuant to the Flood Plain Management Ordinance.
 - d. Plumbing Inspector pursuant to the Maine State Plumbing Code.
- G. The Board shall have the power to hear and decide, using a *de novo* review standard, and not using an appellate review standard:
- a. the issuance of a special exception permit or of a conditional use permit, as provided in sub-section B., above;
 - b. the granting of an extension to the life of a building permit, as contemplated by SECTION VIII. (H)(3) of the Southwest Harbor Land Use Ordinance, and other similar situations described in other ordinances of the Town of Southwest Harbor where the Board of Appeals is required to make independent factual findings.

SECTION VI: MEETINGS

1. The regular meeting of the Board shall be held each month if there is business to conduct.
2. The annual organizational meeting of the Board shall be the first regular meeting after the Annual Town Meeting.
3. Special meetings of the Board may be called by the Chairperson. At least forty-eight (48) hours written notice of the time, place and business of the meeting shall be given each member of the Board and to the Town Manager.
4. The Chairperson shall call a special meeting within ten (10) days of receipt of a written request from any three members of the Board which request shall specify the matters to be considered at such special meeting.
5. Subject to the discretion of the Chairperson, the order of business at regular meetings of the Board shall be as follows:
 - a. Roll Call
 - b. Reading and approval of the minutes of the preceding meeting
 - c. action on held cases
 - d. public hearing (when scheduled)
 - e. other business
 - f. adjournment
6. All meetings of the Board shall be open to the public, except executive sessions. No votes may be taken by the Board except in public meeting. Deliberations may be conducted in executive session on the following matters and not others (as defined by M.R.S.A 1 § 405):
 - a. consultation between the Board and its legal counsel concerning litigation or other legal matters where premature general public knowledge would clearly place the Town or Board at a substantial disadvantage; and
 - b. discussion or consideration of the appointment, duties, disciplining, resignation or dismissal of a Board member.

SECTION VII: VOTING

1. A majority of the full voting membership of the Board shall constitute a Quorum for the purpose of deciding an appeal.
2. No hearing or meeting of the Board shall be held, nor any action taken, in the absence of a quorum; however, those members present shall be entitled to request the chairperson to call a special meeting for a subsequent date.
3. All matters shall be decided by a roll call vote. Decisions on any matter before the Board shall require the affirmative vote of a majority of the members present and no less than three (3) affirmative votes. In the absence of three (3) affirmative votes, the meeting shall be continued.
4. If a member has a conflict of interest, said member shall not be counted by the Board in establishing the quorum for such matter.
5. No member shall vote on the determination of any matter requiring public hearing unless he/she has attended the public hearing thereon or unless he/she has familiarized him/herself with such matter by studying the record.

SECTION VIII: APPEAL PROCEDURE

1. Any person aggrieved by an action which comes under the jurisdiction of the Board pursuant to Section V of this Ordinance must file such application for appeal in writing on forms provided, within thirty (30) days of the granting or denial of a permit. The applicant shall file this appeal at the office of the Town Clerk, setting forth the ground for his/her appeal. Upon receiving the application for appeal, the Town Clerk shall notify the Chairperson of the Board.
2. The fee to accompany applications for appeal shall be listed on the application. Checks are to be made payable to the Town of Southwest Harbor.

SECTION IX: HEARING

- A. The Board shall hold a hearing within a responsible time and shall schedule said Public Hearing on all completed appeal applications within forty-five (45) days of the filing of a completed appeal application. The Chairman shall determine completeness.
- B. The Board shall cause notice of the date, time and place of such hearings, the location of the building or lot, and the general nature of the question involved, to be given to the person making the application and to be published once in a newspaper of general circulation in the Town, the date of the publication to be at least ten (10) days prior to the Hearing. The Board shall also cause notice of the hearing to be given to the Town. Except for appeals related to the abatement of taxes, the Board shall cause notice of the hearing to be given to the owners of property abutting that for which the appeal is taken at least ten (10) days prior to all supporting information supplied by the applicant, shall be forwarded by the municipal officials to the Commissioner of the Department of Environmental Protection at least twenty (20) days prior to action by the Board of Appeals. Any comments received from the Commissioner prior to the action by the Board of Appeals shall be made part of the record and shall be taken into consideration by the Board of Appeals

- C. The Board shall provide as a matter of policy for exclusion of irrelevant, immaterial, or unduly repetitious evidence.
- D. The order of business at a public hearing shall consist of the following rules:
 - 1. The Chairperson calls the Hearing to order.
 - 2. The Chairperson determines whether there is a quorum
 - 3. The Chairperson gives a statement of the case and reads all correspondence and reports received.
 - 4. The Board determines whether it has jurisdiction over the Appeal.
 - 5. The Board decides whether the applicant has “standing” before the Board.
 - 6. The Board determines which individuals attending the Hearing are “interested parties”. “Interested parties” are those persons who request to offer testimony and evidence and to participate in oral cross-examination. They would include but are not limited to abutting property owners and those who might be adversely affected by the Board’s decision. Parties may be required by the Board to consolidate or join their appearances in part or in whole if their interests or contentions are substantially similar and such consolidation would expedite the Hearing. Municipal officers, the Planning Board and the Code Enforcement Officer shall automatically be made parties to the proceeding.
 - 7. Other persons attending the hearing and Federal, State, Town and other governmental agencies shall be permitted to make oral or written statements and to submit oral and written questions through the Chairperson.
 - 8. The appellant is given the opportunity to present his or her case without interruption.
 - 9. The Board, and “interested parties” may ask questions of the appellant through the Chairperson.
 - 10. The “interested parties” are given the opportunity to present their case. The Board may call its own witnesses, such as the Code Enforcement Officer.
 - 11. The appellant may ask questions of the “interested parties” and Board witnesses through the Chairperson, or directly, with the permission of the Chairperson.
 - 12. All parties are given the opportunity to refute or rebut statements made throughout the Hearing.
 - 13. The chairperson shall receive comments and questions from all observers and interested citizens who wish to express their views.
 - 14. The hearing is closed after all parties have been heard. If additional time is needed, the Hearing may be continued to a later date. All participants shall be notified of the date, time and place of the continued Hearing.
 - 15. Written testimony may be accepted by the Board for seven days after the close of the Hearing.
- E. The Board may waive any of the above rules or change the order of business if good cause is shown.

SECTION X: DECISIONS

- A. The Board shall decide all administrative appeals and variance appeals within thirty (30) days from the date of the final Hearing and shall issued a written decision on all appeals.
- B. The final decision on any matter before the Board shall be made by written order signed by the Chairperson. The transcript or tape recording of testimony, if such a transcript or tape recording has been prepared by the Board, and the exhibits, together with all papers and requests filed in the proceedings, shall constitute the public record.
- C. The Board, in reaching said decision, shall be guided by standards specified in the applicable State Laws, Local Ordinances, policies specified in the Comprehensive Plan and by Findings of Fact by the Board in each case.
- D. In reviewing an application on any matter, the standards in any applicable local ordinance or statute shall take precedence over the standards of these rules whenever a conflict occurs. In all other instances, the more restrictive rule shall apply.
- E. When the Board of Appeals reviews a decision of the Code Enforcement Officer, the Board of Appeals shall hold a “de novo” hearing which allows the Board to receive and consider new evidence and testimony, be it oral or written. When acting in a “de novo” capacity, the Board of Appeals shall hear and decide the matter afresh, undertaking its own independent analysis of evidence and the law, and reaching its own decision.

When acting in an appellate capacity, the Board of Appeals may reverse the decision of the Planning Board, or other applicable administrative board, but only upon a finding that the decision was contrary to specific provisions of the Ordinance under review before the Planning Board, or other applicable administrative board, or contrary to the facts presented to the Planning Board, or other applicable administrative board. Alternatively, the Board of Appeals may remand the matter to the Planning Board, or other applicable administrative board for further consideration.
- F. The Board shall cause written notice of its decision to be mailed or hand-delivered to the applicant within seven (7) days of the Board's decision. Any decisions affecting the Shoreland Zone shall be mailed or hand-delivered to the Department of Environmental Protection within seven (7) days. Copies of written decision of the Board of Appeals shall be given to the Planning Board, Code Enforcement Officer and the municipal officers..
- G. Decisions of the Board shall be filed in the office of the Town Clerk and shall be made public record. The date of filing of each decision shall be entered in the official records and minutes of the Board.
- H. Variances granted must be recorded by certificate in the Hancock County Registry of Deeds within thirty (30) days of final approval. (Variances not recorded within this time shall be invalid.) The certificate must be prepared in recordable form and provided to the applicant. It must indicate the name of the current property owner, identify the property by reference to the last recorded owner, identify the property by reference to the last recorded deed or deeds of ownership in its chain of title, and indicate the fact that a variance including any conditions on the variance, has been granted and the date of the granting.
- J. Unless otherwise specified, any order of decision of the Board for a permitted use shall expire if building permit for the use is not obtained by the applicant

within ninety (90) days from the date of the decision; however, the Board may extend this time an additional ninety (90) days upon written request from the appellant within the original ninety (90) day period.

SECTION XI: RECONSIDERATION

In accordance with 30-A M.R.S.A. section 2691(3)(F), the Board may reconsider any decision. The Board must decide to reconsider any decision, notify all interested parties and make any change to its original decision within forty five (45) days of the date of the vote on the original decision. A request to the Board to reconsider a decision must be filed within ten (10) days of the decision that is being reconsidered. A vote to reconsider and the action taken on that reconsideration must occur and be completed within forty-five (45) days of the date of the vote on the original decision. Reconsideration of a decision shall require a positive vote of the majority of the Board members originally voting on the decision, and proper notification to the landowner, petitioner, planning board, code enforcement officer, and other parties of interest, including abutters and those who testified at the original hearing(s). The Board may conduct additional hearings and receive additional evidence and testimony

Appeal of a reconsidered decision to Superior Court must be made within (fifteen) 15 days after the decision on reconsideration.

SECTION XII: APPEAL TO SUPERIOR COURT

The decision of the Board of Appeals may be taken, within forty-five (45) days of the date of the vote on the original decision, by any party to Superior Court in accordance with the Maine Rules of Civil Procedure, Rule 80B. This time period may be extended by the court upon motion for good cause shown.

SECTION XIII: SEVERABILITY

The invalidity of any Section or provision of this Ordinance shall not be held to invalidate any other section or provision within the Ordinance.

SECTION XIV: AMENDING THE ORDINANCE

- A. This Ordinance may be amended by a majority vote of the legislative body present at any regular or special town meeting.
- B. Any proposed amendment to the Ordinance shall be presented at a public hearing before the town meeting. The Board of Selectmen may hold a public hearing on the proposed amendments to the Ordinance and report in writing its opinion on the desirability of the proposed change(s).
 1. If the vote on the amendment is by local referendum ballot, the Selectmen shall have a public hearing at least 60 days prior to the Town Meeting. If the amendment is ~~or~~ at an open assembly town meeting, a public hearing must be held within thirty (30) days of the duly authorized town meeting.
 2. Notice of any public hearing on an amendment to this Ordinance shall be given in a newspaper with local circulation at least five (5) days before the hearing.