

RULES AND PROCEDURES FOR ZONING BOARD OF APPEALS TOWN OF FORESTBURGH

Zoning Board of Appeals
Town of Forestburgh, Sullivan County, New York

SECTION 1: GENERAL GOVERNING RULES

1.1 The Zoning Board of Appeals of the Town of Forestburgh shall be governed by the provisions of these rules, and all applicable state statutes, local laws and ordinances, including Chapters 10 (Code of Ethics), 28 (Planning and Zoning Board of Appeals), and 180 (Zoning). To the extent these rules conflict with applicable state or local law, such laws shall be deemed to supersede these rules.

1.2 The term "Board" as used in these rules shall mean the duly appointed five (5) members of the Zoning Board of Appeals of the Town of Forestburgh and any duly appointed alternate Board members.

1.3 The Board shall become familiar with all duly enacted ordinance and laws of the Town under which it may be expected to act as well as with the applicable state statutes.

1.4 The Board shall become familiar with the community goals, desires, and policies as expressed in the master plan, and grant the minimum relief, which will ensure that the goals and policies of the plan are preserved, and substantial justice is done.

1.5 Board members shall review the Town Code of Ethics.

SECTION 2: MEETINGS

2.1 MEETINGS. Meetings shall be held at the call of the Chairman or at other times as the Board of Appeals shall determine. There may be a work session of the Board held prior to such meeting.

2.2 PROCEEDINGS. The order of business at regular meetings shall be as follows:

1. Roll Call (ascertainment of a quorum), minutes approved, reading of all public hearings;
2. Action on held cases;
3. New business;
4. Other business;
5. Adjournment.

SECTION 3: VOTING

3.1 QUORUM. A quorum shall consist of three (3) of the five (5) Board members including any alternate members substituting for a disqualified or absent Board member. 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 to be held on a future date. All subsequent hearings shall be re-advertised in accordance with the requirements of all applicable laws.

3.2 VOTING. All matters shall be decided by a roll call vote. Decisions on any matter before the Board shall require the affirmative vote of three (3) members of the Board.

1. A tie vote or affirmative vote by a number less than the required majority shall be considered a disapproval of the application under consideration.
2. No member of the Board shall sit in a hearing or vote on any matter which would violate the Town Code of Ethics or other applicable law. Said member shall not be counted by the Board in establishing the quorum for such matter.
3. No member shall vote on the determination of any application requiring a public hearing unless he has attended the public hearings held thereon; however, where such member has familiarized himself with such application by reviewing the established record in the matter, he/she shall be qualified to vote on same.

SECTION 4: APPEALS AND PROCEDURES

4.1 APPEALS. The Board shall review, hear and decide appeals from any order, requirement, decision, or determination made by the Zoning Enforcement Officer charged with the enforcement of any ordinance or local law adopted pursuant to Article 16 of the Town Law. It shall also bear and decide all matters referred to it, upon which it is required to consider or by authority granted to the Board under any other law of the Town or State.

4.2 FILING OF APPEALS. An appeal must be made within sixty (60) days of the filing of the order, decision or interpretation of the administrative official. The Petitioner must file a notice of appeal/application with the Board Secretary with the form provided for that purpose. The Board Secretary shall be responsible, at the direction of the Board, for providing the Petitioner with the proper forms for filing said application.

4.3 EX PARTE RULES.

1. Except as provided below, a Board member must not directly or through a representative, communicate with any party or party representative that relates in any way to the merits of the proceeding without providing notice and an opportunity for all parties to participate.

2. A Board member may communicate with any person on ministerial matters, such as scheduling or the location of a hearing.

3. Parties or their representatives must not communicate with any Board member in connection with any issue without providing proper notice to all the other parties. Board members are required to disclose to the Board if a party has attempted to communicate in violation of these rules.

4.4 HEARING COSTS. Within 30 days of the close of the evidentiary record, the Petitioner must pay for the cost of: physical accommodations, if not held in Town facilities; publishing any required notices; and any necessary stenographic transcriptions. The Board Chairperson may require that the Petitioner post a bond or other acceptable financial guarantee for the costs of the hearing. Such guarantee must be provided to the Board prior to commencing the hearing or the hearing will be adjourned until the guarantee is made available.

4.5 WAIVER OF FORMAL HEARING. Upon the joint request of Petitioner and Department Staff, and with approval of a majority of the Board, any or all of the formal hearing procedures detailed in Section 5 below may be waived or modified as the Board deems appropriate.

SECTION 5: FORMAL HEARINGS

5.1 TIME OF HEARING. The Board shall schedule a hearing on all appeals or applications within sixty (60) days of its receipt of a complete appeal/application. The decision as to whether or not an appeal/application is complete shall be left at the sole discretion of the Board, in consultation with the Zoning Administrator / Building Inspector.

5.2 NOTICE OF HEARING-ZONING APPEALS. The Board shall give notice of the hearing at least ten (10) days prior to the date thereof by publication in the official paper. The Board shall mail notice of the hearing to the parties and other municipalities within five hundred (500) feet of the property affected (if applicable) by the appeal at least ten (10) days prior to the hearing.

5.3 FORM OF NOTICE. Such notice shall state the location of the building or lot, the general nature of the question involved, the date, time, and place of the hearing, and the nature of the relief sought.

5.4 PRELIMINARY MATTERS. If deemed necessary or appropriate, the Chairperson may schedule a preliminary conference at a public meeting with Petitioner Building Department officials or other Town representatives, and other interested persons to determine:

1. Party Status. Participation in the hearing may be as a full party or as amicus, depending upon the demonstrated compliance. The Petitioner and assigned department staff are automatically full parties to the proceeding.

A person desiring party status must file a petition in writing at or before the preliminary conference specifying:

- (i) full identity of the proposed party, including names of the person or persons who will act as representative of the party;
- (ii) identify proposed party interest and standing in the proceeding;
- (iii) identify whether proposed party seeks full party or amicus status;
- (iv) identify the grounds for opposition or support; and
- (v) a statement attesting that its party status may be denied or revoked at the Board's discretion and with no right to appeal.

The Board shall decide on the party status of each proposed party based on its finding that such proposed party has a demonstrated adequate interest and standing and that it can make a meaningful contribution to the record regarding the subject of the hearing. The Board retains the right to deny or revoke party status of any proposed party granted status at the Board's sole discretion.

2. Hearing Record. The Board shall request that the Building Department prepare a full permit record related to the petition / appeal. Such record shall include (i) the Building Department's records and files; (ii) the Petitioner's application for interpretation and appeal, brief, and all supporting documents; (iii) Department staff's response to Petitioner's appeal, including permitting history, the basis for the Department's determination at issue, its findings and recommendations; and (iv) Petitioner's rebuttal brief (if any). The Department shall deliver copies all records and files intended to be made part of the hearing record to Petitioner who shall prepare a proposed joint record and exhibit list. A Petitioner may elect not to prepare the proposed joint record, in which case the Department shall be responsible at Petitioner's cost.

The hearing record may be supplemented by any party, subject to the rules of evidence herein, if such proposed record or document is served upon the Board and parties at least 10 days before the hearing in which it will be used.

3. Prefiled Testimony. The parties may present prefiled expert witnesses or party representatives testimony to the Board. Such testimony must be attested to at the hearing and the witness must be available to be cross-examined on the testimony. Prefiled expert witnesses testimony must include the witness's qualifications to testify on the subject matter of testimony, and any expert or technical reports such witness intends to rely on. Party affidavits or affirmation may be considered by the Board but shall not be accepted into the hearing record unless the witness is made available for cross examination at the hearing. Any party seeing to offer prefiled testimony must notify the Board and parties 30 days before the hearing in which it will be used and provide such prefiled testimony to the Board and parties at least 15 days before such hearing. Rebuttal testimony, limited to the scope of the direct testimony shall be provided at least 5 days before the date of the hearing. Upon

notice to the parties, the Board may require the party submitting prefiled testimony to make available all raw data, logs, laboratory notes, and other basic materials.

4. Non-parties. Non-parties who wish to comment will be permitted to submit oral at the preliminary conference or written comments before the hearing. Such statements will not constitute evidence in the hearing or be made part of the hearing record, but may be used by the Board as a basis to inquire further of all parties and potential parties at the issues conference.

5. Scheduling. After all preliminary matters are addressed, the Board shall schedule date(s) for the hearing, and if necessary, schedule dates for submission of the record, Department's response to the petition, Petitioner's rebuttal, and any direct or rebuttal testimony.

5.5 PROCEEDINGS. The order of business at a hearing shall be as follows:

1. The Chairperson shall read the public notice, give a brief statement of the case and read correspondence and reports received thereon. Department staff shall offer the proposed joint record for the evidentiary record, subject to party objections.

2. The Petitioner shall present its case by offering its prefiled testimony, and any other exhibits or relevant evidence previously disclosed. A Petitioner that has elected to provide prefiled testimony shall make such witness available for cross-examination. A Petitioner that has elected to not provide prefiled testimony may rest on its brief(s) and record. The burden of proof in all cases is one of a preponderance of the evidence and is on the Petitioner to show by competent, material, and substantial evidence, that he or she is entitled to the relief requested and that the request meets all prescribed standards and requirements.

3. Department staff may present arguments. If direct or rebuttal testimony is presented, such witnesses must be made available for cross examination. If none, may rest on its brief and record.

4. Other parties with party status shall present its case, including making prefiled or rebuttal testimony witnesses available for cross examination.

5. Rebuttal by Petitioner and Department staff.

6. Close of evidentiary record.

7. Post-hearing briefs, if Board determines it necessary.

8. Close of hearing

9. Board deliberation.

5.6 GENERAL RULES.

1. Any party may appear in person or be represented by an agent or attorney with written authorization from the party appealing being presented to the Board.

2. Each witness must be sworn or make an affirmation before testifying. All persons testifying in a case shall give his/her name and address and shall be required to take the following oath given by the Chairperson: "Do you solemnly promise to speak truthfully in the testimony you are about to give?" Opening, closing and other unsworn statements, if any, are not evidence but will be considered part of the evidentiary record.

Any member of the Board and the Board's legal counsel, upon recognition by the Chairperson, may question any witness presented for cross-examination.

All matters of law raised by any party during a hearing shall be ruled on by the Chairperson after consultation with legal counsel attending the Board. The rulings of the Chairperson may be reserved, or, subject to the concurrence of a majority of the Board, or be final, but objections thereto shall be entered in the transcript and part of the record of the proceedings and preserved for appeal.

The Board may recess and/or leave the record open in a case to receive additional evidence at a later time if it deems that it is essential in making a proper decision. At the time the Board recesses and/or leaves the record open for the receipt of additional evidence, it shall specify how parties may receive copies of the additional evidence, and how much time parties have to respond before the record is closed.

Except for the introduction of official documents and reports as provided below, the Board shall not accept written testimony into the record unless it is presented by a witness appearing in person subject to cross-examination. Upon agreement of all parties, however, the Board may accept into the record written testimony.

5.7 RULES OF EVIDENCE

(1) All evidence submitted must be relevant and all rules of privilege will be observed. Other rules of evidence need not be strictly applied. Hearsay evidence may be admitted if a reasonable degree of reliability is shown. Relevant evidence may be excluded if its value as proof is substantially outweighed by a potential for unfair prejudice, confusion of the issues, undue delay, waste of time or needless presentation of repetitious or duplicative evidence.

(2) Where a part of a document is offered as evidence by one party, any party may offer the entire document as evidence.

(3) Each witness must be sworn or make an affirmation before testifying. Opening, closing and other unsworn statements are not evidence but will be considered as arguments bearing on evidence.

(4) The Board Chairperson, in consultation with the Board's attorney, may take official notice of all facts of which judicial notice could be taken. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party must be given notice thereof and, on timely request, be afforded an opportunity, prior to decision, to dispute the fact or its materiality.

SECTION 6: REFERRALS/SEQR

6.1 **ZONING REFERRALS.** All matters requiring referral, as specified by any statute, ordinance or local law enacted under Article 16 of the Town Law, shall be referred to the proper agency for its recommendations. Within sixty (60) days (or as specified in the particular law or ordinance) after receipt of such referred matter, said agency shall report its recommendations thereon to the Board, with a full statement of the reasons for such recommendations. If such agency fails to respond within the prescribed time, the Board may act without such report. The Board shall not act contrary to any agency's recommendations without first fully setting forth in the official record the reasons for such reports at the hearing on the matter under review.

6.2 **COUNTY ZONING REFERRALS.** Prior to taking action on any application as specified in Section 239-m of the General Municipal Law, the Board shall refer said application to the Sullivan County Planning Agency for its consideration. The County Planning Agency shall have thirty (30) days after receipt of said application to file its recommendations/decision with the Board. The Board shall not act contrary to such a modification or disapproval recommendation except by a vote of majority plus one of entire Board for such contrary action. If such a Planning Agency fails to report to the Board within said thirty (30) days period, or longer period as may have been agreed upon by the parties, the Board may act without such report.

6.3 **SEQRA.** The Board shall comply with the requirements of the State Environmental Quality Review Act ("SEQRA") in its review of appeals/applications.

SECTION 7: DECISIONS

7.1 **TIME OF DECISIONS.** Decisions by the Board shall be made not later than sixty two (62) days from the closing of the evidentiary record. The decision to grant or to deny a petition shall be by majority vote of the entire Board, and the vote of each member shall be recorded and made a part of the record of the case. A lack of majority vote of the entire Board shall constitute a denial thereof. Board members who were absent from all of or part of a case may take part in the Board's decision by listening to the recording of the hearing and reviewing the exhibits presented and attesting to said action in the Decision and Order.

7.2 **FORM OF DECISIONS.** The final decision on any matter before the Board shall be made by written order signed by the Chairperson. Such decision shall state the findings of fact, which were the basis for the final determination. After such determination, the Board may reverse or affirm, wholly or partly, or may modify the order or requirement of

the administrative official whose action is the subject of appeal. The decision shall also state any conditions and safeguards necessary to protect the public interest. Any members of the Board may file a dissent from the majority opinion. Such dissenting opinion(s) shall be made a part of the record of proceedings and the Decision and Order.

7.3 BASIS FOR DECISIONS. The Board, in reaching said decision, shall be guided by standards specified in the applicable ordinance as well as by community goals and policies as specified in a comprehensive plan, if any, and by findings of the Board in each case.

7.4 FINDINGS OF FACTS FOR USE VARIANCE:

The Board shall make the following findings prior to granting a Use Variance for relief from the strict application of the Zoning Law. The Petitioner must demonstrate to the Board of Appeals showing that:

1. Under the applicable zoning regulation, the Petitioner is deprived of all economic use or benefit from the property.
 2. The hardship is unique and does not apply to a substantial portion of the district or neighborhood.
 3. The Variance shall not alter the essential character or quality of the neighborhood.
 4. The alleged hardship is not self-created.
- All four (4) tests must be met for a Use Variance to be granted and same must meet the intent of the Town Master Plan.

7.5 FINDINGS OF FACT FOR AREA VARIANCE

When an Petitioner requests an Area Variance, the Board of Appeals shall balance two (2) elements; the benefit to the Petitioner from the Variance and the detriment to the health, safety, and welfare of the community or neighborhood that would occur if the Variance would be granted. The provisions set forth five (5) factors for the Board to consider in balancing these interests:

1. Whether an undesirable change will be produced in the character of the neighborhood, or a detriment to nearby properties will be created by the granting of the variance.
2. Whether the benefit sought by the Petitioner can be achieved by some feasible method other than a Variance.
3. Whether the requested Variance is substantial.
4. Whether the proposed Variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.
5. Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the Board of Appeals, but shall not necessarily preclude the granting of the Area Variance.

An Area Variance shall not include change in the use or density.

IMPOSITION OF CONDITIONS. The Board of Appeals shall, in granting of both Use Variances and Area Variances, have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property or the period of time such Variance shall be in effect.

7.6 CONFLICTS WITH OTHER LAWS OR REGULATIONS. In reviewing an application on any matter, the standards in any applicable local law or ordinance or state statute shall take precedence over the standards of these rules whenever a conflict occurs. In all other instances, the more restrictive rule shall apply.

7.7 PAYMENT OF HEARING COSTS. A final decision will not be issued until the Petitioner has paid the costs of the hearing referred to in 4.4, above.

7.7 FILING OF DECISIONS. Decisions shall be filed in the office of the Town Clerk within 5 days of such decision. The date of the filing of each decision shall be entered in the official records and minutes of the Board.

7.8 NOTICE OF DECISION. Copies of the decision shall be forwarded to the Petitioner, any other party with status in the hearing, and all involved agencies.

SECTION 8: APPEALS

8.1 REHEARING. A rehearing may be held in accordance with Section 267-A(12) of the Town Law.

8.2 APPEAL. Petitioners seeking to appeal decisions of the Board must appeal by Article 78 proceeding pursuant to the provisions of Section 267-c of the Town Law.

SECTION 9: ADOPTION AND AMENDMENT OF RULES AND REGULATIONS

9.1 ADOPTION. Upon adoption of these rules by the Board, the secretary shall file a copy of these rules with the Town Clerk and they shall be a public record

9.2 AMENDMENT. These rules may be amended by an affirmative vote of not less than three (3) members of the Board at a Board meeting.

9.3 FILING. All amendments adopted shall be filed with the Board Secretary and Town Clerk.

Dated: February 14, 2022