

## CHAPTER 9. APPEALS

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### SECTION 1. BOARD OF APPEALS

Board of Appeals: There is hereby created a Board of Appeals, which Board shall function as provided by 30-A M.R.S.A. Section 2691. The function of the Board of Appeals is to hear appeals from any decision or failure to act by the Code Enforcement Officer, Plumbing Inspector, or Planning Board with regard to China's Land Development Code and to review and act on variances.

- A. This Board consists of seven members appointed by the Select Board. Prior to the date of this ordinance, all members were appointed to a 5-year term and all terms will stay in effect until their expiration. All appointments after the date of this ordinance will be staggered 3-year terms.
- B. A Chair and a Secretary shall be elected annually by members of this Board. Neither a Select Board member, a spouse nor a domestic partner of a Select Board member may be a member of the Board of Appeals.
- C. When there is a permanent vacancy, the Select Board shall, within sixty (60) days of its occurrence, appoint a person to serve for the unexpired term. A vacancy shall occur upon resignation or death of any member, or when a member ceases to be a voting member of the town. The Select Board may dismiss a member of the Board of Appeals for cause before the member's term expires.
- D. All Board members must complete a Maine Municipal Association (MMA) approved training course within one year of appointment, or at the next scheduled MMA training session, whichever is earlier.
- E. All Board members must familiarize themselves with the latest versions of the Town of China, ME Land Development Code and the Comprehensive Plan and all applicable State Statutes.

### SECTION 2. ORGANIZATION

- A. The Chair or the Chair's designee shall call meetings of the Board as required. The Chair shall also call meetings of the Board when requested to do so by a majority of the members or by the Select Board. A quorum of the Board necessary to conduct an official Board meeting must consist of a majority of the Board's members. The Chair or the Chair's designee shall preside at all meetings of the Board and be the official spokesperson of the Board.

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- B. Any question of whether a member shall be disqualified from voting on a particular matter due to a conflict of interest shall be decided by a majority vote of the members except the member who is being challenged.
- C. 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.
- D. The Board shall adopt rules for the transaction of business, and the Secretary shall keep a record of its resolutions, transactions, correspondence, findings, and determinations. In the absence of its own rules, Roberts Rules of Order, latest edition, will be used.
- E. The Secretary shall maintain a permanent record of all Board meetings and all correspondence of the Board. The Secretary is responsible for maintaining those records, which are required as part of various proceedings that may be brought before the Board. All records to be maintained or prepared by the Secretary are public records unless otherwise provided by state statute. All records shall be filed in the Town Clerk's office and may be inspected during regular business hours.
- F. The Chair of the Board of Appeals will vote only when there is a tie.

### SECTION 3. VARIANCE APPEALS

#### A. Variance Appeals

The Board of Appeals may, upon written application of the affected landowner, grant a variance from the strict application of Chapter 2 or Chapters 4-8 of the town's Land Development Code if the Board of Appeals, based on clear and convincing evidence presented to it by the applicant finds:

The strict application of the terms of Chapter 2 or Chapters 4-8 would result in undue hardship to the applicant. The term "undue hardship" shall mean:

- a. That the land in question cannot yield a reasonable return unless a variance is granted;
- b. That the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;
- c. That the granting of a variance will not alter the essential character of the locality; and
- d. That the hardship is not the result of action taken by the applicant or a prior owner

Notwithstanding Section 3(A) above, in accordance with 30-A M.R.S.A. Section 4353-A, the Code Enforcement Officer may approve a permit to the owner of a residential dwelling unit

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for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses that dwelling. The permit is deemed to include the variance, which shall be solely for installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability. The Code Enforcement Officer may impose conditions on the permit, including limiting the permit to the duration of the disability or to the time that the person with the disability lives in the dwelling. The term "structures necessary for access to or egress from the dwelling" shall include ramps and associated railings, and wall or roof systems necessary for the safety or effectiveness of the structure.

## B. Dimensional Variances

A variance may be granted only from dimensional requirements including, but not limited to lot width, lot area, lot coverage, height of a structure, and setback requirements, and shall not be granted to permit a use otherwise prohibited.

A variance, however, is not authorized to permit construction of principal structures as prohibited by Chapter 2, Section 2(D) in the Resource Protection, Stream Protection and Shoreland Districts on lots of less than 20,000 square feet.

Variances granted from setback requirements shall be in accordance with 30-A M.R.S.A. Section 4353(4-B). Upon written consent from an affected abutting landowner, a variance may be allowed to exceed 20% up to a maximum of 50% of a setback requirement, except for minimum setbacks from a wetland or waterbody required within shoreland zones by rules adopted pursuant to 38, M.R.S.A., subchapter I, article 2-B.

Variances granted from dimensional standards may be granted where strict application of the Land Development Code would cause a practical difficulty and the following conditions exist:

- 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 abutting property; and
- e. That the granting of a variance is based upon demonstrated need, not convenience, and no other feasible alternative is available.

## C. Variances in Designated Flood Hazard Areas

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Variances in designated flood hazard areas as set forth in Chapter 5 shall comply with the following additional standards.

- a. Variances shall not be granted within any designated regulatory floodway if any increase in flood levels during the base flood discharge would result.
- b. Variances shall be granted only upon showing of good and sufficient cause and a determination that should a flood comparable to the base flood occur, the granting of a variance will not result in increased flood heights, additional threats to public safety, public expense, or create nuisances, cause fraud or victimization of the public or conflict with existing local laws and ordinances; and,
- c. Variances shall only be granted if the failure to grant the variance would result in undue hardship as defined in Section 3.A.
- d. Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.
- e. Variances may be issued for new construction, substantial improvements, or other development for the conduct of a functionally dependent use provided that:
  1. other criteria of Chapter 5, Section 6 are met; and,
  2. the structure or other development is protected by methods that minimize flood damage during the base flood and create no additional threats to public safety.
- f. Variances may be issued for the reconstruction, rehabilitation, or restoration of structures listed on the National Register of Historic Places or a State Inventory of Historic Places—if the development meets the criteria set forth in paragraphs a through e above, and the proposed repair, reconstruction, rehabilitation, or restoration will not preclude the structure’s continued designation as a Historic Structure and the variance is the minimum necessary to preserve the historic character and design of the structure.
- g. Any applicant who meets the criteria of paragraphs a through f above shall be notified by the Board of Appeals in writing over the signature of the Board Chair that:
  1. The issuance of a variance to construct a structure below the base flood level will result in greatly increased premium rates for flood insurance up to amounts as high as \$25 per \$100 of insurance coverage;
  2. such construction below the base flood level increases risks to life and property; and,

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3. the applicant agrees in writing that the applicant is fully aware of all the risks inherent in the use of land subject to flooding, assumes those risks and agrees to indemnify and defend the municipality against any claims filed against it that are related to the applicant's decision to use land located in a floodplain and claims the applicant may have against the municipality that are related to the use of land located in a floodplain.

#### D. Timing and Content of Variance Applications

- a. All variance applications shall be in writing and shall be submitted to the Town Clerk.
- b. The application along with supporting documents shall clearly state the basis and need for the variance.
- c. The Board of Appeals shall hold an initial hearing open to the public within forty-five (45) days of the receipt of a variance application unless this time period is extended by written agreement of both parties. All subsequent hearings shall be conducted within fourteen (14) days of each other. The Board of Appeals shall issue a written decision on the variance within fourteen (14) days after the close of the final hearing. The written decision shall be prepared by the Chair and approved by the Board of Appeals members at an in-person meeting.

#### E. Evidence in Variance Hearings

In hearing a variance application, the Board may receive any oral or documentary evidence but shall provide as a matter of policy for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. Every party to a variance hearing has right to present the party's case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct any cross-examination that is required for a full and true disclosure of the facts.

#### F. Board of Appeals Record; Notice of Decision

The transcript of testimony, if any, and exhibits, together with all papers and requests filed in the Board's proceeding, constitute the record. All decisions become a part of the record and must include a statement of findings and conclusions, as well as the reasons or basis for the findings and conclusions, upon material issues of fact, law or discretion presented and the appropriate order, relief, or denial of relief. Notice of any decision shall be mailed or hand delivered to the parties, a party's representative or agent, the Planning Board, agency or office and the Select Board members with seven (7) days of the Board's decision.

#### G. Reconsideration.

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In accordance with 30-A M.R.S.A. Section 2691 (3)(F) the Board of Appeals may reconsider any decision within forty-five (45) days of its prior decision. A request to the Board to reconsider a decision shall be filed within ten (10) days of the decision that is being reconsidered. A vote to reconsider and the action taken on the reconsideration shall 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 reconsideration decision to Superior Court shall be made within fifteen (15) days after the decision on reconsideration.

#### H. Notification of Variance Appeals

Public notice shall be given in a newspaper of general circulation for the hearing scheduled by the Board of Appeals fourteen (14) days prior to the hearing, and the abutting landowners shall be notified by certified mail, return receipt, with the applicant to be responsible for all costs of the mailing and the public notice.

- a. A copy of each request for a variance with respect to property in a Shoreland or Resource Protection District shall be forwarded by the Town Clerk to the Department of Environmental Protection at least twenty (20) days prior to action by the Board of Appeals, pursuant to the State Shoreland Zoning Law, 38 M.R.S.A. Section 438-A(6).
- b. A copy of all variances granted for the Resource Protection, Stream Protection and Shoreland Districts shall be submitted to the Department of Environmental Protection within fourteen (14) days of the decision.
- c. The Board of Appeals shall submit to the Planning Board a report of all variance actions, including justification for the granting of the variance and an authorization for the Planning Board to issue a Flood Hazard Development Permit, which includes any conditions to be attached to said permit.
- d. All granted variances shall be recorded in the Kennebec County Registry of Deeds by the Town Clerk within ninety (90) days of a written decision. The recording fees shall be the responsibility of the landowner.

#### I. Appeals to Superior Court:

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Except as provided by 30-A M.R.S.A. Section 2691(3)(F), any aggrieved party who participated as a party during the proceedings before the Board of Appeals may take an appeal to Superior Court in accordance with State laws within forty-five (45) days from the date of any decision of the Board of Appeals.

#### SECTION 4. ADMINISTRATIVE APPEALS

The Board of Appeals may, upon written application of an aggrieved person, and/or the landowner, after public notice, hear appeals from determinations of the Planning Board or Code Enforcement Officer in the administration of Chapters 2 -8 of the Land Development Code. As described below in Section 4(D)(c), enforcement-related matters may not be appealed to the Board of Appeals.

##### A. Timing and Content of Application for Administrative Appeal

- a. Any application for an appeal shall be in writing and shall be submitted to the Town Clerk no later than thirty (30) days after the date of the determination being appealed.
- b. The application shall clearly state the basis for the appeal and the specific findings of fact or conclusions of law being appealed. No party will be allowed to submit any written documents within three (3) business days of a scheduled hearing.
- c. The Board of Appeals shall hold an initial hearing open to the public within forty-five (45) days of receipt of an administrative appeal application unless this time period is extended by written agreement of both parties. All subsequent hearings shall be conducted within fourteen (14) days of each other. The Board of Appeals record and notice of decision shall be consistent with Section 3.F. The Board of Appeals shall issue a written decision within fourteen (14) days after the close of the final hearing. The written decision shall be prepared by the Chair and approved by the Board of Appeals members at an in-person meeting.

##### B. Notice of Appeal, Record on Appeal

- a. When an application for an appeal is filed, the Town Clerk shall immediately notify the Planning Board, Code Enforcement Officer, or Plumbing Inspector as appropriate, and shall inform them of the date, time, and place of the hearing on the appeal.
- b. The Planning Board, Code Enforcement Officer, or Plumbing Inspector as appropriate, shall immediately forward to the Board of Appeals the record of the proceeding on the original application. The record shall clearly state the basis for the determination being appealed, including findings of fact and conclusions of law supporting the determination.

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- c. Any Planning Board member(s), the Code Enforcement Officer, and/or the Plumbing Inspector as appropriate, shall be permitted to appear and to heard at the hearing regarding the determination being appealed and the basis for it.

#### C. Notification

Public notice shall be given in a newspaper of general circulation for the hearing scheduled by the Board of Appeals fourteen (14) days prior to the hearing, and the abutting landowners shall be notified by certified mail, return receipt, with the applicant to be responsible for all costs of the mailing and the public notice.

#### D. Scope of Review

- a. To hear and decide administrative appeals on an appellate basis where it is alleged by an aggrieved party that there is an error in any order, requirement, decision, or determination made by, or failure to act by, the Planning Board in the administration of Chapters 2-8 of the Land Development Code.
- b. To hear and decide administrative appeals on a de novo basis where it is alleged by an aggrieved party that there is an error in any order, requirement, decision, or determination made by, or failure to act by, the Code Enforcement Officer in his or her review of and action on a permit application under Chapters 2-8 of the Land Development Code.
- c. Any order, requirement, decision, or determination made, or failure to act, in the enforcement of the Land Development Code is not appealable to the Board of Appeals.
- d. The Board of Appeals may reverse the determination of the Planning Board, the Code Enforcement Officer, or the Plumbing Inspector if it determines that either:
  - 1. Any finding of fact is unsupported by substantial evidence and/or;
  - 2. Any conclusion of law is clearly erroneous.

#### E. Remand

In the event the Board of Appeals reverses a Planning Board, Code Enforcement Officer, or Plumbing Inspector decision, the matter will be remanded to the Planning Board, Code Enforcement Officer, or Plumbing Inspector for proceeding in accordance with the decision of the Board of Appeals unless such reversal is appealed as provided below.

#### F. Reconsideration

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The Board of Appeals may reconsider a decision consistent with the provisions of Section 3.G.

G. Appeals to Superior Court

Except as provided by 30-A M.R.S.A. Section 2691(3)(F) any aggrieved party, who participated as a party during the proceedings before the Board of Appeals may take an appeal to Superior Court in accordance with State laws with forty-five (45) days from the date of any decision of the Board of Appeals.