



TOWN OF SULLIVAN'S ISLAND, SOUTH CAROLINA
APPLICATION TO SERVE ON A TOWN BOARD/COMMISSION
DEADLINE: 12NOON, Tuesday, August 16, 2016

PLEASE COMPLETE ALL OF THE FOLLOWING FOR POSSIBLE PARTICIPATION

1. NAME: _____

2. MAILING ADDRESS: _____

3. TELEPHONE NUMBER(S):
Home: _____ Work: _____ Cell: _____

4. E-MAIL ADDRESS: _____

5. Are you a registered voter on Sullivan's Island? Yes _____ No _____

6. Have you ever plead guilty, no contest or been convicted of a crime? If yes, please provide additional information: _____

The Town reserves the right to conduct a background check and additional information may be requested from you.

7. Indicate the real properties on Sullivan's Island in which you have a proprietary interest, identifying your primary residence:

8. Please disclose any circumstances which might pose a conflict of interest in executing your responsibilities as a member of any Board or Commission for which you are applying:

9. Please indicate that you wish to be considered for selection to a Board or Commission and, if selected, you are prepared to serve through the term below. Indicate 1 for first choice; 2 for second choice:

Planning Commission	_____	3 seats (3 yr term expiring 8/31/2019)
Board of Zoning Appeals	_____	2 seats (3 yr. term expiring 8/31/2019)
Design Review Board	_____	4 seats (3 yr. term expiring 8/31/2019)
Municipal Election Commission	_____	1 seat (6 yr. term expiring 8/31/2022)
Tree Commission	_____	2 seats (3 yr. term expiring 8/31/2019)

NOTE:

No member of a Town Board or Commission may hold an elected office in the Town of Sullivan's Island or County of Charleston.

If appointed, you must successfully complete a minimum of six (6) hours State mandated planning and zoning training as soon as possible, plus required continued education thereafter. (S.C. Code §§ 6-29-1340-6-29-1370; §5-15-90 (for Municipal Election Commission) Failure to complete required training will result in discontinuation of service and ineligibility for re-appointment (§6-29-1380)

(Initial)

You must return a completed Town questionnaire for your desired Board/Commission(s) for consideration and a personal resume is encouraged.

By signing herein, I have read and understand the requirements for serving as a member of the Commission &/or Board requested and attest the information provided is accurate.

Applicant signature

Date

Questions: Lisa Darrow (843-883-5744; ldarrow@sullivansisland-sc.com) at Town Hall (2050-B Middle Street) or Administrator Andy Benke (843-883-5726; abenke@sullivansisland-sc.com)



TOWN OF SULLIVAN'S ISLAND, SOUTH CAROLINA

**BOARD OF ZONING APPEALS
QUESTIONNAIRE**

1. Why do you wish to serve on the Board of Zoning Appeals (BZA)?
2. BZA meets on average one evening per month. Are you able to attend meetings at this frequency?
3. Please read the attached summary of the role of the Board of Zoning Appeals and review the Town's Code regarding this Board (Chapter 21, XVIII).
 - As you can see, the BZA operates within a well-defined framework. Please articulate how you would apply your judgment, knowledge and experience while working within this type of structure.
4. Are there any provisions of the Zoning Ordinance with which you disagree?
5. Do you see any conflicts between the BZA's decisions and property rights?
6. What are your thoughts on the following ordinance topics:
 - a.) Historic Preservation
 - b.) Zoning Ordinances which restrict house size and lot size, and, setbacks from adjacent properties
 - c.) Town Commercial District
7. How would you handle having to make decisions that might be unfavorable to a neighbor, friend, business associate, client or family member?

Thank you for taking the time to respond to these questions. Please submit your answers along with the application and your resume to Lisa Darrow (843-883-5744; ldarrow@sullivansisland-sc.com) or Administrator Andy Benke (843-883-5726; abenke@sullivansisland-sc.com) at Town Hall (2050-B Middle Street or mail to PO Box 427) **by 12NOON on Tuesday, August 16, 2016.**

ARTICLE XVIII. Board of Zoning Appeals.

Sec. 21-172. Purpose

The Board of Zoning Appeals (Board) hears and decides upon issues related to appeals of administrative decisions, variances, and special exceptions and to remand a matter to an administrative official if the Board determines the record is insufficient for review.

Sec. 21-173. Board membership and removal.

A. Appointment and terms

- (1) The Board of Zoning Appeals shall consist of seven (7) members all of which are citizens of Sullivan's Island appointed by the Town Council. (9-19-06)
- (2) No Board member shall hold any other public office or position in the Town.
- (3) The Board members shall serve overlapping terms of three (3) years each.

B. Election/appointment of officers.

The Board shall elect one of its members as chair. The chair shall serve for one (1) year or until he or she is re-elected or his or her successor is elected. The Board shall appoint a secretary who may be an officer of the governing authority or a member of the Board of Zoning Appeals.

C. Removal and replacement of board member.

The Town Council may remove any Board member for repeated failure to attend meetings of the Board or for any other cause deemed sufficient cause. A member appointed to replace a removed member shall serve the balance of the removed member's unexpired term. At the completion of the unexpired term, the member is eligible for reappointment to a full term.

Sec. 21-174. Powers.

A. The Board of Zoning Appeals shall have the following powers:

- (1) Administrative appeal.
To hear and decide appeals when it is alleged that there is error in any order, requirement, decision or determination made by a Town administrative official in the enforcement of this Zoning Ordinance.
- (2) Special exception.
To hear and decide special exceptions to the terms of this Zoning Ordinance upon which the Board of Zoning Appeals is authorized to pass under all of the provisions of this Zoning Ordinance
- (3) Variance.
To hear and decide variances from the terms of this Zoning Ordinance as will not be contrary to the public interest when, owing to special conditions, a literal enforcement of the provisions of this Zoning Ordinance will result in unnecessary hardship and so that the spirit of this Zoning Ordinance shall be observed and substantial justice done.

B. Remand back for insufficient information.

The Board of Zoning Appeals may also remand back a matter to an administrative official, upon motion by a party or the Board's motion, upon determining the record is insufficient for review. A party's motion for remand may be denied if the Board determines that the record is sufficient for review.

Sec. 21-175. Meetings, quorum and time limits.

A. Application and fees.

Administrative appeals, request for variances and special exceptions shall be submitted on forms provided by the Zoning Administrator and accompanied by an application fee the amount of which shall be established by resolution of the Town Council.

B. Appeals.

Appeals to the Board of Zoning Appeals may be taken by any person aggrieved or by any officer, department, board, or commission of the municipality.

C. Public notice of meetings.

- (1) Public notice of all meetings of the Board of Zoning Appeals shall be published in a newspaper of general circulation in the Town at least fifteen (15) days prior to the meeting.
- (2) Written notice of the hearing date shall be mailed to the applicant, or the agent for the applicant, and, in the case of Administrative Appeals, the administrative officer from whom the appeal is taken.
- (3) In cases involving special a exception or a variance, conspicuous notice shall be posted on or adjacent to the property affected, with at least one such notice being visible from each public thoroughfare that abuts the property. A sign that is conspicuous in color, size and location shall be posted on the property. Such sign shall be posted at least ten (10) days prior to the Board of Zoning Appeals meeting. The sign provided by the Zoning Administrator shall indicate that a special exception or variance is being sought, shall furnish the time and date of the Board of Zoning Appeals meeting and shall describe the type of variance or special exception sought.

D. Meetings and record of actions.

- (1) Meetings of the Board shall be held at the call of the Chair and at such other times as the Board shall determine.
- (2) All meetings of the Board of Zoning Appeals shall be open to the public.
- (3) The chair or, in his or her absence, the acting chair, may administer oaths and compel the attendance of witnesses by subpoena.
- (4) In all matters of Administrative Appeals, Special Exceptions and Variances, findings of fact and conclusions of law shall be separately stated in final decisions or orders of the Board. These shall be delivered to parties of interest by certified mail.
- (5) The Board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating that fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed at Town Hall and be considered a public record.
- (6) Every action, ruling, decision or determination of the Board shall be immediately filed at Town Hall and become a public record.

E. Quorum and required vote.

Four (4) members are required for a quorum. A majority of the members present shall be necessary to take any action on (1) remanding back for insufficient information; (2) an administrative appeal; (3) a special exception, or (4) a variance. (9-19-06)

F. Contempt and penalty.

In case of contempt by a party, witness, or other person before the Board of Zoning Appeals, the Board may certify this fact to the circuit court (Charleston County) and the judge of the court, in open court or in chambers, after hearing, may impose a penalty as authorized by law.

G. Time limitations.

- (1) When it shall appear to the Zoning Administrator that a request regarding the same lot for (1) an administrative appeal, (2) a special exception, or (3) a variance, presents substantially the same issues that have been decided by the Board of Zoning Appeals within the previous two (2) years, the Zoning Administrator shall notify the Board of Zoning Appeals. The Zoning Administrator shall not advertise the hearing or give notice to interested parties until the Board of Zoning Appeals shall determine that an amendment of this Zoning Ordinance or other changed conditions requires reopening the issue. The Zoning Administrator's written notice to the Chair of the Board of Zoning Appeals regarding these concerns shall stay any other time deadlines that are required elsewhere within this Article.
- (2) If after a special exception or variance has been authorized by the Board of Zoning Appeals, and no completed application for a Certificate of Zoning Compliance or Building Permit been has been applied for within one (1) year from the date of authorization, then such authorization shall be null and void.

Sec. 21-176. Remand back for insufficient information.

- A. The Board of Zoning Appeals may remand a matter to an administrative official, upon motion by a party or the Board's motion, upon determining the record is insufficient for review. A party's motion for remand may be denied if the Board determines that the record is sufficient for review.
- B. The Board shall set a rehearing on the remanded matter without further public notice within sixty (60) days unless otherwise agreed to by the parties. The Board shall maintain a list of persons who express an interest in being informed when the remanded matter is set for rehearing, and notice of the rehearing shall be mailed to these persons prior to the rehearing.

Sec. 21-177. Administrative appeal.

A. Appeal process.

A party may appeal to the Board of Zoning Appeals an allegation that there is error in an order, requirement, decision or determination made by an administrative official in the enforcement of this Zoning Ordinance.

B. Time limit.

Such appeal shall be taken within thirty (30) days of the action of said administrative officer by filing with the administrative officer from whom the appeal is taken and with the Board of Zoning Appeals a notice of appeal specifying the grounds thereof. The administrative official or officer shall immediately transmit to the Board all the papers constituting the record relating to the appeal.

C. Effect of appeal.

An appeal stays all proceedings in furtherance of the action appealed until the hearing before the Board of Zoning Appeals. However, if the officer, after receiving notice of the appeal, provides the Board with certification of facts that a stay would in his/her opinion cause imminent peril to life or property, then proceedings shall not be stayed other than by a restraining order which may be granted by the Board of Zoning Appeals or by a court of record on application, on notice to the officer from whom the appeal is taken, and on due cause shown.

D. Hearing and order.

Upon the hearing any party may appear in person or by agent or by attorney. The Board of Zoning Appeals may reverse or affirm wholly or partially or may modify or reverse the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as should be made.

Sec. 21-178. Special exception.

- A. An application for a Special Exception, along with any applicable fee, shall be filed with Town Hall pursuant to the terms stated on said application. The property owner or the owner's authorized agent shall submit the application.
- B. A special exception may only be granted for a use that is permitted in the district for which the special exception is being requested.
- C. In order to approve a Special Exception, the Board of Zoning Appeals shall find that:
 - (1) Adequate provision is made for such items such as setbacks, fences, and buffered or planting strips to protect adjacent properties from possible adverse influence of the proposed use, such as noise, vibration, dust, glare, odor, traffic congestion, and similar factors.
 - (2) Vehicular traffic and pedestrian movement on adjacent roads shall not be hindered or endangered.
 - (3) Off-street parking and loading areas and the entrance and exits of these areas shall be adequate in terms of location, amount, design, and construction to serve the proposed use.
 - (4) The proposed use shall be compatible with existing uses to the extent that such use will not adversely affect the level of property values, general character, or general welfare of the nearby area.

- D. In approving a Special Exception, the Board of Zoning Appeals may attach to it such reasonable terms and conditions, as it may consider necessary to accomplish the intent of this Article and this entire Zoning Ordinance.
- E. Upon approval of a Special Exception, an application shall be made for a Certificate of Zoning Compliance which shall be forwarded by the Zoning Administrator to the Design Review Board.
- F. Applicants are encouraged to discuss the Special Exception with the Design Review Board prior to submission to the Board of Zoning Appeals.

Sec. 21-179. Variance.

- A. The Board of Zoning Appeals may grant a variance from the terms of this Zoning Ordinance when strict application of the provisions of the Zoning Ordinance would result in unnecessary hardship.
- B. A variance may be granted in an individual case of unnecessary hardship if the Board makes and explains in writing the following findings:
 - (1) There are extraordinary and exceptional conditions pertaining to the particular piece of property;
 - (2) These conditions do not generally apply to other property in the vicinity;
 - (3) Because of these conditions, the application of the Zoning Ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; and
 - (4) The authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the granting of the variance will not harm the character of the district.
- C. **The Board of Zoning Appeals may not grant a variance, the effect of which would be to**
 - (1) Allow the establishment of a use not otherwise permitted in a zoning district,
 - (2) Extend physically a nonconforming use of land; or,
 - (3) Change the zoning district boundaries shown on the official zoning map.
- D. **The fact that property may be utilized more profitably, if a variance were granted, shall not be grounds for granting a variance.**
- E. **Granting of use variance.**

The Board of Zoning Appeals shall not grant variances for the use of land building or structure that are prohibited in specific districts.

Sec. 21-180. Protection against liability.

Any member of the Board of Zoning Appeals acting within powers granted by the Ordinance shall be relieved from personal liability for any damage and held harmless by the Town of Sullivan's Island. Any suit brought against any member of the Board shall be defended by a legal representative furnished by the Town of Sullivan's Island until the termination of the proceedings.

Sec. 21-181. Appeal to circuit court.

- A. A person who may have a substantial interest in any decision of the Zoning Board of Appeals or an officer or agent of the Town of Sullivan's Island may appeal a decision of the Zoning Board of Appeals to the circuit court in Charleston County, by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal shall be filed within thirty (30) days after the decision of the board is mailed.
- B. A property owner whose land is the subject of a decision of the Zoning Board of Appeals may also appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with South Carolina Code, Section 6-29-825. Any notice of appeal and request for pre-litigation mediation shall be filed within thirty (30) days after the decision of the Zoning Board of Appeals is postmarked.

Sec. 21-182. Reserved.

Sec. 21-183. Reserved.

2014 Comprehensive Planning Guide for Local Governments

Board of Zoning Appeals

The 1994 Comprehensive Act specifically authorizes the zoning ordinance to provide for a board of zoning appeals as a part of the administrative mechanism designed to enforce the zoning ordinance. The governing body may create a board of zoning appeals by provisions in the zoning ordinance. S.C. Code § 6-29-780. The board of zoning appeals has the authority to make final administrative decisions for the local government concerning the zoning ordinance, subject to appeal to circuit court.

Local governing bodies with a joint planning commission and a common zoning ordinance may create a joint board of zoning appeals.

Creation of Board

A zoning ordinance creating a board of zoning appeals should include the following points.

1. **Size** of the board is limited to three to nine members.
2. A **quorum** consists of a majority of the membership.
3. The governing authority **appoints** members.
4. Members are appointed for **overlapping terms** of three to five years.
5. The **number of terms** a member may serve may be limited.
6. Members continue to serve until their **successors** are appointed.
7. **Vacancies** are filled for unexpired terms in the same manner as initial appointments.
8. The appointing governing body can **remove** a member for cause.
9. **Compensation**, if any, for board members may be set by ordinance.
10. Members cannot hold any **other public office** or position in the appointing local government.

Organization and Operation

It is important for the board of zoning appeals to organize itself and operate in accordance with the 1994 Act and the zoning ordinance creating the board. S.C. Code § 6-29-790. The essential elements of the organizational structure of the board include the following.

1. **Chairperson.** The board must elect one of its members as chairperson. The chairperson serves for one year or until a successor is elected and qualified. The chairperson may be reelected.

2. **Secretary.** The board must appoint a secretary. The secretary may be an officer of the governing authority or of the zoning board. It is customary for the zoning administrator to be appointed as secretary.
3. **Rules of Procedure.** The board must adopt rules of procedure complying with the 1994 Act and the zoning ordinance. The rules of procedure should address the following elements as a minimum.
 - a. Election of a chairman and duties
 - b. Procedure for electing acting chairman
 - c. Appointment of a secretary and duties
 - d. Procedures for calling meetings
 - e. Time and place for meetings
 - f. Public notice of meetings to comply with the Freedom of Information Act and with S.C. Code § 6-29-790 (these include public notice of all meetings of the BZA by publication in a newspaper of general circulation in the municipality or county. For cases involving variances and special exceptions, posting of conspicuous notice on or adjacent to the property affected, with at least one such notice visible from each public thoroughfare that abuts the property)
 - g. Setting agenda
 - h. Quorum and attendance requirements
 - i. Rules of procedure for conducting meetings
 - j. Time for appeal from decision of zoning official
 - k. Time and procedure for hearing appeals, variances and special exceptions
 - l. Time and procedure for rendering and serving decisions
 - m. Procedure for making and keeping records of actions (including minutes of all meetings)
 - n. Procedure for ordering remands to the zoning administrator and otherwise granting rehearings by the board
 - o. Oath administered to witnesses

Although there is no express requirement for due process in a board hearing, it is appropriate to provide for some rules of evidence and for a method of examining witnesses that avoids intimidation. Sample rules of procedure are provided in Appendix D.

4. **Meetings.** The board meets at the call of the chairperson and at other times determined by the board.
5. **Notice.** The board must give public notice of all meetings in a general circulation newspaper in the municipality or county.
6. **Posting property.** In cases involving variances or special exceptions, the board must post conspicuous notice on or adjacent to the property affected. At least one posted notice must be visible from each street that abuts the property.

7. **Witnesses.** The chairperson may administer oaths and subpoena witnesses.
8. **Minutes.** The board must provide for taking minutes of its proceedings. They must be kept as public records on file in the office of the board. Minutes must record the vote of each member on each question.

Freedom of Information Act

The Freedom of Information Act (S.C. Code § 30-4-10, et seq.) requires all public bodies (including committees of public bodies) to conduct their meetings in public, except when an executive session is authorized. An executive session is authorized only for the reasons specified in the FOIA, such as receipt of legal advice, employment matters and contract negotiations. S.C. Code § 30-4-70. Written public notice of regular meetings (including dates, times and places) must be given at the beginning of each calendar year. The agenda for regular meetings must be posted at the meeting place 24 hours prior to a meeting. Notice and agenda of a called, special or rescheduled meeting must be posted at least 24 hours before the meeting. The board also must notify persons, organizations and news media that request meeting notifications. S.C. Code § 30-4-80.

Educational Requirements for Board of Zoning Appeals

Members of the board of zoning appeals are subject to the mandatory orientation and continuing educational requirements mandated by the Comprehensive Planning Act. S.C. Code § 6-29-1310 through § 6-29-1380. See the discussion of these requirements in Chapter 1.

Powers of the Board of Zoning Appeals

The Comprehensive Planning Act lists the powers of the board of appeals. S.C. Code § 6-29-800. The powers and required findings of the board are explicit in many instances. It may be useful to include these sections of the law in the rules of procedure. The powers of the board are limited to three specific subject matter areas: determining appeals from administrative decisions of the zoning administrator, granting or denying applications for variances, and granting or denying applications for special exceptions.

A 2003 amendment to the Act listed as a fourth “power” for the BZA, the power to remand a matter to the zoning administrator if the record is insufficient for the board’s review. S. C. Code § 6-29-800 (A)(4). This does not broaden the board’s areas of subject matter authority but does allow the board, either upon the motion of a party or on its own motion, to obtain additional information to assist the board in its determinations. The new provisions on remand specify that the board must schedule a rehearing of the remanded matter for a time certain without further public notice within 60 days unless otherwise agreed to by the parties; however, those persons who expressed an interest in being informed of the rehearing date must be mailed a notice of the rehearing in advance.

Sample forms for appeals and applications to the board are provided in Appendix F.

Administrative Review

The board has the exclusive power to hear and decide appeals where it is alleged the zoning administrator, in the enforcement of the zoning ordinance, erred in an order, requirement, decision or determination. In such cases, the board may reverse or affirm, wholly or in part, or may modify the order, requirements, decision or determination of the zoning administrator. The board has all the powers of the zoning administrator in such cases and may issue or direct the issuance of a permit. S. C. Code § 6-29-800 (A)(1) and (E).

When deciding an administrative appeal from a decision of the zoning administrator, the board is not bound by the conclusion or reasoning of the zoning administrator and may consider and apply the appropriate provisions of the zoning ordinance as dictated by the facts before it. *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 602 S.E.2d 76 (Ct. App. 2004)(BZA not restricted on appeal to denial of billboard permit on sole basis offered by zoning administrator).

Variances

The board has the power to hear and decide appeals (requests) for variances when strict application of the zoning ordinance would result in unnecessary hardship. S.C. Code § 6-29-800(A)(2).

A variance allows the board to modify an otherwise legitimate zoning restriction when, due to unusual conditions, the restriction may be more burdensome than was intended. The variance must not impair the public purpose. To obtain a variance on the ground of unnecessary hardship, there must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation. *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 752 (1953); *Colbert v. Krawcheck*, 299 S.C. 299, 384 S.E.2d 710 (1989); *Restaurant Row Associates v. Horry County*, 335 S.C. 209, 516 S.E.2d 442 (1999), certiorari denied, 528 U.S. 1020, 120 S.Ct. 528, 145 L.Ed 2d 409 (1999). An owner is not entitled to relief from a self-created or self-inflicted hardship. A claim of unnecessary hardship cannot be based on conditions created by the owner nor can one who purchases property after the enactment of a zoning regulation complain that the nonconforming use would work a hardship upon him. *Rush v. City of Greenville*, 246 S.C. 268, 143 S.E.2d 527 (1965); *Georgetown County Building Official v. Lewis*, 290 S.C. 513, 351 S.E.2d 584 (Ct. App. 1986); *Restaurant Row Associates v. Horry County*, *supra*.

When deciding whether to grant or deny a variance, the board has some discretion; however, the board is not free to make whatever determination appeals to its sense of justice. The board must apply the standards prescribed by the zoning ordinance and the 1994 Act. Courts will not uphold a decision of the board to grant or deny a variance based on errors of law, fraud or lack of supporting evidence, or a board action that is arbitrary, unreasonable, discriminatory or an abuse of discretion. *Hodge v. Pollock*, *supra*.

Standards for Granting Variances

The board may grant a variance in an individual case of unnecessary hardship if the board makes and explains **in writing all** of the following findings. S.C. Code § 6-29-800 (A)(2).

- 1. Extraordinary conditions.** There are extraordinary and exceptional conditions pertaining to the particular piece of property. Extraordinary conditions could exist due to size, shape, topography, drainage, street widening, beachfront setback lines or other conditions that make it difficult or impossible to make an economically feasible use of the property.
- 2. Other property.** These conditions do not generally apply to other property in the vicinity. See *Bennett v. Sullivan's Island Board of Adjustment*, 313 S.C. 455, 438 S.E.2d 273 (Ct. App. 1993).
- 3. Utilization.** Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property.
- 4. Detriment.** The authorization of a variance will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance.

Other factors applicable to a variance also are prescribed by S.C. Code § 6-29-800(A)(2)(d).

- 1. Profitability.** The fact that the property may be used more profitably, if a variance is granted, may not be considered as grounds for a variance. See *Groves v. Charleston*, 226 S.C. 459, 85 S.E.2d 708 (1955).
- 2. Conditions.** In granting a variance, the board may attach conditions to it. These conditions may affect the location, character or other features of the proposed building, structure or use as the board may consider advisable to protect established property values in the surrounding area or to promote the public health, safety or general welfare.
- 3. Use variance.** Generally, the board may not grant a variance that would allow the establishment of a use not otherwise permitted in a zoning district, physically extend a nonconforming use of land or change the zoning district boundaries shown on the official zoning map. However, the 1994 Act does allow use variances to be authorized by a local zoning ordinance. S.C. Code § 6-29-800 (A)(2)(d)(i). Nevertheless, granting use variances is not a good zoning practice and is not recommended. A use variance may be subject to attack as an unlawful delegation of legislative authority. Zoning is a legislative power in this state. Uses permitted in a zoning district are listed in zoning ordinance district regulations. In effect, granting a use variance amends the ordinance administratively for the benefit of one landowner.

The zoning ordinance also may provide other requirements for a variance. S.C.Code § 6-29-800(A)(2)(d)(i).

Special Exceptions

The board of appeals has the exclusive power to permit uses by special exception subject to standards and conditions in the zoning ordinance. S. C. Code § 6-29-800(A)(3). The zoning ordinance must include the standards and conditions the board must follow when considering such appeals. Standards and conditions for special exceptions could relate to access, noise, screening, lighting, compatibility with adjoining uses and traffic generation. In some zoning ordinances, conditional uses granted after review should be designated as special exceptions.

As with considerations of variance requests, the board, in granting or denying a request for a special exception, must apply the standards and conditions imposed by the zoning ordinance. Generally, reviewing courts will not disturb the findings of the BZA unless such findings or decision resulted from action of the board which is arbitrary, an abuse of discretion, illegal or in excess of lawfully delegated authority. *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999). In *Bannum*, the court reversed the board's denial of a special exception to a residential halfway house facility for released federal prisoners. The court determined that the board's decision arbitrarily discounted or disregarded all evidence offered by the applicant to show satisfaction of the ordinance requirements. The court concluded that the board's decision was based on the fears of neighboring residents rather than on the requirements for a special exception set out in the ordinance.

Appeals to Board

Appeals to the board and appeals from decisions of the board must follow the prescribed procedures. Appeals from administrative actions and decisions of the zoning administrator are taken to the board of zoning appeals, then to circuit court and finally to the state appellate courts. An appeal from an administrative decision of the zoning administrator is never taken to the governing body. Except for appeals of board decisions on use variances (see S.C. Code § 6-29-800 (A)(2)(d)(i) which provides that the local governing body may overrule a BZA use variance decision), appeals from decisions of the BZA on variances or special exceptions also are taken to circuit court and finally to the state appellate courts. A checklist of times and steps in an appeal and sample forms are provided in Appendix F.

Time Limits for Appeals

- 1. Appeal to Board.** The time for an appeal to the board of zoning appeals from an administrative action or decision of the zoning administrator may be set by ordinance or rules of the board. If no time is set, S.C. Code § 6-29-800(B) provides that an appeal must be filed within 30 days from the date the appealing party received actual notice of the action appealed. The "actual notice" provision can cause confusion. It is recommended that the zoning ordinance or rules of the board start the time for appeal from the date the decision becomes a matter of public record by denial or issuance of a

permit, or the filing of a written decision in the office of the zoning administrator. See sample rules in Appendix D.

- 2. Appeal to Circuit Court.** An appeal petition to circuit court from a decision of the board must be filed with the clerk of court within 30 days after the decision of the board is mailed. S.C. Code § 6-29-820(A). Failure to file an appeal petition within the prescribed time deprives the court of jurisdiction to hear the matter. *Botany Bay Marina, Inc. v. Townsend*, 296 S.C. 330, 372 S.E.2d 584 (1988), overruled in part on other grounds by *Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E. 2d 392 (1995); *Sadisco of Greenville, Inc. v. Greenville County Board of Zoning Appeals*, 340 S.C. 57, 530 S.E.2d 383 (2000); *Vulcan Materials Company v. Greenville County Board of Zoning Appeals*, 342 S.C. 480, 536 S.E. 2d 892 (Ct. App. 2000).

A 2003 amendment to the Comprehensive Planning Act allows an alternative appeal procedure for a property owner whose land is the subject of a BZA decision. Such a property owner can file either an appeal petition **or** a notice of appeal accompanied by a request for pre-litigation mediation (S.C. Code § 6-29-820(B)). Any notice of appeal and request for pre-litigation mediation must be filed within 30 days after the decision of the board is postmarked. This mediation procedure is discussed further below.

- 3. Appeal to State Appellate Courts.** A decision of the circuit court may be appealed to the state appellate courts in the manner provided by the South Carolina Appellate Court Rules. S.C. Code § 6-29-850. Rule 203, South Carolina Appellate Court Rules, requires service of a notice of appeal on all respondents within 30 days after receipt of written notice of entry of the circuit court order or judgment. The notice of appeal is filed with the clerk of the circuit court and with the clerk of the state Court of Appeals unless the order or judgment involves, as the principal issue, a challenge to the constitutionality of a county or municipal ordinance. In that event, the notice of appeal is filed with the clerk of the circuit court and with the clerk of the state Supreme Court. Rule 204 of the Appellate Court Rules allows either appellate court to transfer an appeal filed in the wrong court and allows the state Supreme Court, in its discretion and on motion of any party to the case, to obtain jurisdiction by certification of an appealed case involving an issue of significant public interest or a legal principle of major importance. The state Supreme Court also has the discretion, on motion of any party or on its own motion, to issue a writ of certiorari to review a final decision of the state Court of Appeals. Rule 226, South Carolina Appellate Court Rules.

Procedure for Appeals to Board

- 1. Notice of appeal.** Any person aggrieved by a zoning officer's action (or any officer, department, board or bureau of the local government) may appeal to the board of zoning appeals by filing with the zoning officer and with the board a notice of appeal specifying the grounds for the appeal. The applicant and parties to the permitting process are parties in interest and are entitled to notice of the appeal. Citizens and residents who are not parties to the permitting process are not entitled to notice. *Botany Bay Marina, Inc. v. Townsend*, 296 S.C. 330, 372 S.E.2d 584 (1988), overruled in

part on other grounds by *Woodard v. Westoaco Corp.*, 319 S.C. 240, 460 S.E. 2d 392 (1995); *Spanish Wells v. Board of Adjustment of Town of Hilton Head Island*, 295 S.C. 67, 367 S.E.2d 160 (1988). The zoning administrator should provide a form for the appeal notice that requires all of the necessary information for the appeal. A sample form is provided in Appendix F. The officer from whose action the appeal is taken must immediately send the board all papers constituting the record upon which the action was taken. S.C. Code § 6-29-800(B).

2. **Stay of proceedings.** Filing an appeal to the board stays all legal proceedings to enforce the appealed action unless the officer appealed certifies to the board that a stay would cause imminent peril to life and property. In such cases, the board or a court of record, on notice to the officer and for due cause shown, may grant a restraining order to stay the enforcement of the appealed action. S.C. Code § 6-29-800(B).
3. **Time and notice of hearing.** The board must set a reasonable time for hearing an appeal or other matters referred to the board. It must give at least 15 days' public notice of the hearing by publication in a general circulation newspaper and must give due notice to parties in interest. Notice to parties should be given by mail. S. C. Code § 6-29-800(D). See Notice Form in Appendix G. The zoning ordinance may require other forms of notice to persons whose property interests might be affected by the variance or other action. In cases involving variances or special exceptions, conspicuous notice must be posted on or adjacent to the property affected, with at least one such notice visible from each public street that abuts the property. S.C. Code § 6-29-790.
4. **Conduct of hearing.** Any party may appear at the hearing in person, by agent or by attorney. S. C. Code § 6-29-800(D). The board may subpoena witnesses. S.C. Code § 6-29-800(E) and § 6-29-790. The chairperson (or, in his or her absence, the acting chairperson) may administer oaths. S. C. Code § 6-29-790. The board may certify contempt to the circuit court. S.C. Code § 6-29-800(E). Board hearings must comply with the Freedom of Information Act and with the further procedural requirements of S. C. Code § 6-29-790. The rules of the board should set out the hearing procedure. Sample rules are provided in Appendix D. At the start of the hearing, the chairperson should explain the procedure to be followed in presenting and examining witnesses, receiving evidence, the role of attorneys and how the board will make and serve a decision. The concept of procedural due process is "flexible" and does not require a trial-type hearing in every case. *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165, 656 S.E.2d 346 (2008).
5. **Rehearing.** The board may provide in its rules of procedure for a rehearing when there is justification by reason of newly discovered evidence, fraud, surprise, mistake, inadvertence, or change in conditions. *Bennett v. City of Clemson*, 293 S.C. 64, 358 S.E.2d 707 (1987). The board also must schedule a rehearing if it orders a remand to the zoning administrator for the purpose of obtaining a record sufficient for its review. See S.C. Code § 6-29-800(A)(4).

6. **Board decisions.** The board must decide the appeal or matter “within a reasonable time.” Section 6-29-800(D). The board has the same powers as the zoning official and may affirm or reverse (wholly or in part) or modify his actions and may issue or direct issuance of a permit. Absentee ballots are not authorized. A member must be present to vote. *Bennett v. City of Clemson, supra*.

All final decisions of the board must be in writing, delivered to parties in interest by certified mail and permanently filed in the office of the board as public records. **All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board.** S.C. Code § 6-29-800(F). This is a critical requirement because the board’s findings of fact are binding on the circuit court on appeal. A form should be used for the decision which contains a checklist or reminder regarding the necessity for written findings and conclusions. A sample form is provided in Appendix F.

A letter sent by the zoning administrator, findings of fact and conclusions prepared by the zoning administrator, and a virtually indecipherable transcript of board hearings were held to be insufficient to constitute the final decision of the board in *Massey v. City of Greenville Board of Zoning Adjustments*, 341 S.C. 193, 532 S.E.2d 885 (Ct. App. 2000). In *Massey*, the court ruled: “Written findings of fact and conclusions of law should be promulgated and either signed by the Board or ratified on the record by the Board before written notice of the Board’s decision is given to the applicant.” 341 S.C. at 201, 532 S.E. 2d at 889. See also *Vulcan Materials Company v. Greenville County Board of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) in which the appeals court held that a document signed by the chairman and secretary with no evidence of assent by the other board members was not a final decision. However, the transcript was sufficient to be treated as the board’s final decision because it contained findings of fact and conclusions of law separately stated.

In *Austin v. Board of Zoning Appeals, Town of Hilton Head Island*, 362 S.C. 29, 606 S.E. 2d 209 (Ct.App. 2004), the appeals court held that a letter from the zoning officer and a hearing transcript which clearly laid out the evidence were sufficient for the court’s review given the case’s narrow factual issue. The court cautioned local governments, “Our decision today, however, should not be interpreted as an indication that state and municipal agencies need not follow the mandate of section 6-29-800 and other statutory provisions requiring fully formed written decisions . . . While an exhaustive written decision may not be required when a narrow issue may be addressed succinctly by the Board, further detail will surely be required in more complicated cases. Indeed, thorough written findings and determinations eliminate potential confusion and ensure the will of the Board is accurately transmitted to the affected parties and reviewing courts.” 362 S.C. at 35, 606 S.E. 2d at 212.

Appeal to Circuit Court

1. **Petition/ Notice of Appeal and Request for Pre-litigation Mediation.** A person with a “substantial interest” in any decision of the BZA (or an officer or agent of the appropriate governing authority) may appeal a board decision to the circuit court in

the county by filing with the clerk of court a written petition setting forth “plainly, fully, and distinctly” why the decision is contrary to law. The appeal petition must be filed within 30 days after the decision of the board is mailed. Although the statutes do not require service of the petition on the board, it is advisable to do so. The clerk of court is required to give immediate notice of the appeal to the board secretary. Filing an appeal does not automatically stay or supersede the board decision, but the circuit judge may grant an order of supersedeas upon such terms and conditions as may seem reasonable and proper. S.C. Code § 6-29-820, § 6-29-830.

A 2003 amendment to the Comprehensive Planning Act allows an alternative appeal procedure for a property owner whose land is the subject of a BZA decision. Pursuant to S.C. Code § 6-29-820(B), such a property owner can file either an appeal petition or a notice of appeal accompanied by a request for pre-litigation mediation. Any notice of appeal and request for pre-litigation mediation must be filed within 30 days after the decision of the board is postmarked.

- 2. Pre-litigation Mediation.** Mediation is a negotiation session, facilitated by a neutral third-party mediator, in which the parties can arrive at a voluntary, mutually agreeable resolution of their dispute. S.C. Code § 6-29-825 provides for mediation of a property owner’s appeal prior to court hearing. The mediation is mandatory if the property owner properly and timely files a request for mediation under S.C. Code § 6-29-820(B). The mediation is to be conducted in accord with the South Carolina Circuit Court Alternative Dispute Resolution Rules and S.C. Code § 6-29-825. A person who is not the owner of the property at issue may petition to intervene as a party in the mediation. This motion must be granted if the person has a “substantial interest” in the board’s decision. S. C. Code § 6-29-825(A).

All property owners or representatives and intervenors must be notified and have the opportunity to attend the mediation. The governmental entity must be represented at the mediation by at least one person. S.C. Code § 6-29-825(B).

The mediation may result either in an impasse (as determined by the mediator) or a mediation settlement agreement (reduced to writing by the mediator within five working days of a successful mediation). The settlement agreement does not become effective until approved by the local legislative governing body (the municipal or county council) in public session **and** by the circuit court judge. S.C. Code § 6-29-825 (C) and (D).

Any land use or other change agreed to in mediation which affects existing law is effective only as to the subject real property and sets no precedent as to other property. S.C. Code § 6-29-825 (E).

If the mediation is not successful or if the mediated settlement is not approved by the local legislative governing body, the property owner has the option to pursue an appeal of the BZA decision by filing a petition for appeal as provided in S.C. Code § 6-

29-820(A). The petition must be filed with the circuit court within 30 days of the report of impasse filed by the mediator or the council's failure to approve. S.C. Code § 6-29-825 (F).

The circuit court judge must approve the mediated settlement if it has a rational basis in accord with the standards of the Comprehensive Planning Act. If the court does not approve the settlement, it must schedule an evidentiary hearing and must issue a written opinion containing findings of law and fact. A party may appeal from that decision to the appellate courts or may pursue a petition for appeal. S.C. Code § 6-29-825(F). S.C. Code § 6-29-825(G).

[Identical mediation procedures are prescribed for an appeal from a decision of a board of architectural review (S.C. Code § 6-29-900 and S.C. Code § 6-29-915,) and for an appeal from a decision of the planning commission involving compliance of plans under land development regulations (S.C. Code § 6-29-1150 and S.C. Code § 6-29-1155.)]

3. **Transcript.** Within 30 days after notice from the clerk of court of the filing of an appeal with a petition, the board secretary must file with the clerk of court a certified copy of the board proceedings, including a transcript (if any) of the evidence heard by the board, and the board decision including its findings of fact and conclusions. S.C. Code § 6-29-830(A). Although there is no requirement that the certified record be served on parties in interest, it is common practice for the attorney for the board to file a return to the petition and serve it with a copy of the certified record on counsel for the appealing party.
4. **Standard of review.** The findings of fact by the board are treated in the same manner as findings of fact by a jury. The court may not take additional evidence. The court can determine only whether the board's decision is correct as a matter of law. S.C. Code § 6-29-840(A); *Austin v. Board of Zoning Appeals, Town of Hilton Head Island*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004). The decision of the board must be allowed to stand unless there is "no evidence" which reasonably supports the findings. *Austin v. Board of Zoning Appeals, Town of Hilton Head Island, supra*. However, a decision of a zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board abused its discretion. *Restaurant Row Associates v. Horry County*, 335 S.C. 209, 516 S.E.2d 442 (1999), certiorari denied, 528 U.S. 1020, 120 S.Ct. 528, 145 L.Ed. 2d 409 (1999).

If the record is insufficient for review, the circuit judge may remand to the board for rehearing. S.C. Code §6-29-840(A). Lack of a good record is a frequent problem in zoning appeals. See *Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992), in which the court allowed the applicant to supply missing portions of the transcript by affidavit.

5. **Mode of Trial.** S. C. Code § 6-29-840(B) deals with the mode of trial for an appeal from a board decision. The judge determines the appeal without a jury when the appeal

involves no issues for which there is an established right to a jury or when the parties consent. However, the subsection also provides that a property owner is not precluded from asserting a pre-existing right to a jury trial for any issue beyond the subject matter jurisdiction of the BZA, such as a determination of the amount of damages due for an unconstitutional taking. In *Cobb v. South Carolina Department of Transportation*, 365 S.C. 360, 618 S.E. 2d 299 (2005), the court determined that, in an inverse condemnation case, a property owner and the government have a right to elect a jury trial on the issue of compensation.

Exhaustion of Administrative Remedies

The courts ordinarily dismiss suits challenging zoning actions as premature when the party has failed to exhaust available administrative remedies by appeal to the board of zoning appeals. A party may not go directly to court when administrative procedures and remedies are available. *Dunbar v. City of Spartanburg*, 226 S.C. 360, 85 S.E.2d 281 (1954). A claim that the zoning ordinance was unconstitutional was dismissed for failure to exhaust administrative remedies in *Stanton v. Town of Pawley's Island*, 309 S.C. 126, 420 S.E.2d 502 (1992).

Constitutional "taking" claims frequently arise when application of zoning regulations results in denial of use of property. A taking claim is premature when there was no application for a variance or exception pursuant to administrative procedures provided by the zoning ordinance. *Moore v. Sumter County Council*, 300 S.C. 270, 387 S.E.2d 455 (1990); *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).