

**TOWN OF MOUNT WASHINGTON
ZONING BOARD OF APPEALS**

ADMINISTRATIVE RULES AND REGULATIONS

ADOPTED FEBRUARY 22, 2019

TABLE OF CONTENTS

Section 1: General Provisions

- 1.1 Purpose and Scope
- 1.2 Reference to Massachusetts General Laws
- 1.3 Amendments
- 1.4 Waiving or Suspending Rules
- 1.5 Definitions

Section 2: Organization

- 2.1 Composition of the Board
- 2.2 Election of Officers
- 2.3 Officer Powers and Duties

Section 3: Procedural Requirements

- 3.1 Appellant or Petitioner
- 3.2 Appeal or Petition
- 3.3 Requirements for Appeal or Petition
- 3.4 Filing Period
- 3.5 Appeals
- 3.6 Variances
- 3.7 Burden of Proof; Conduct of Hearing
- 3.8 Referrals
- 3.9 Dismissal of Incomplete Filings
- 3.10 Errors in Filing

Section 4: Hearings

- 4.1 Notice
- 4.2 Hearings to be Public
- 4.3 No Public Hearing on Date of Election
- 4.4 Rule of Necessity
- 4.5 Representation and Absence
- 4.6 Continuances
- 4.7 Quorum
- 4.8 Waiver of a Full Board
- 4.9 Regular Meetings

- 4.10 Special Meetings
- 4.11 Absences
- 4.12 Hearing Procedure
- 4.13 Information to be Furnished to the Board
- 4.14 Withdrawal

Section 5: Decision

- 5.1 Decision of the Board
- 5.2 Mandatory Conditions
- 5.3 Notice of Decision
- 5.4 Recording of Decision
- 5.5 Submission of Final Approved Plans
- 5.6 Appeal of Decision

Section 1: General Provisions

1.1 Purpose and Scope

1.1.1 These Rules and Regulations (“Rules”) are adopted by the Mount Washington Zoning Board of Appeals (“Board”) as authorized by Massachusetts General Laws (“MGL”), Chapter 40A, Section 12, for the purpose of establishing uniform procedures for conducting the business of the Board which, in general, but without limitation, shall consist of hearing all appeals and petitions coming under its jurisdiction by virtue of the applicable provisions of MGL Chapter 40A (the “Zoning Act”) and the Mount Washington Zoning Bylaw (the “Zoning Bylaw”) and other Bylaws.

1.1.2 The powers of the Board shall be:

1.1.2.1 To hear and decide appeals (“Appeal”) taken as provided by MGL Chapter 40A, Section 8 and the Zoning Bylaw;

1.1.2.2 To hear and decide petitions for variances (“Petition”) as set forth under MGL Chapter 40A, Section 10 and the Zoning Bylaw.

1.2 Reference to Massachusetts General Laws

Chapter 40A of the Massachusetts General Laws may be accessed online at the following website sponsored by the General Court of the Commonwealth of Massachusetts: <www.malegislature.gov>.

1.3 Amendments

These Rules may be amended by a majority of the Board except where such amendment would be contrary to requirement or limitations set by state law or the Zoning Bylaw.

An amendment may be proposed at any regular meeting of the Board after being placed on the agenda in compliance with the Commonwealth’s Open Meeting Law.

1.4 Waiving or Suspending Rules

A rule of procedure may be suspended or waived at any meeting by unanimous vote of Board members present unless such rule is set by state legislation or the Zoning Bylaw.

1.5 Definitions

Meeting, Regular: A “regular meeting” of the Board shall be a meeting called on an “as needed” basis to process appeals or petitions, or a regularly scheduled meeting if ultimately required for Board business.

Section 2: Organization

2.1 Composition of the Board

The Board shall consist of five members who shall be appointed by the Mount Washington Select Board (“Select Board”) under the provisions of MGL Chapter 40A.

2.2 Election of Officers

At the first regular meeting following the qualification of annual appointee(s), the Board shall elect a Chairperson, Vice-Chairperson, and Clerk. Each shall serve until a successor is duly elected. Each officer shall serve a term of one (1) year and may be elected to a single successive term for each post.

In the event that the regularly elected Chairperson and Vice-Chairperson are no longer capable of carrying out their duties as the result of resignation, removal, recusal, or permanent disability in performance of their duties, the Clerk shall act as Chairperson. A newly appointed Board of the proper number of regular members shall elect permanent officers as provided in the preceding paragraph at the first regular meeting after a fully-staffed Board is re-established by the Select Board.

In the event that all three of the Board officers are no longer available, the Board shall elect a Chairperson and a Clerk on a pro-tem basis.

2.3 Officer Powers and Duties

2.3.1 Chairperson

The Chairperson shall preside over all hearings and meetings of the Board. Subject to the rules as stated herein, s/he shall decide all points of order, unless overruled by a majority of the Board in session at the time. The Chairperson shall appoint such committees or subcommittees as may be deemed necessary or desirable from time to time.

In addition to powers granted by Massachusetts General Laws and the Zoning Bylaw, and subject to these Rules and further instruction of the Board, the Chairperson shall supervise the work of the Clerk, arrange for necessary help, and exercise general supervision over the Board’s activities.

2.3.2 Vice-Chairperson

The Vice-Chairperson shall serve as Acting Chairperson and preside over hearings and meetings and perform the duties of the Chairperson during the absence or unavailability of the Chairperson.

The Vice-Chairperson shall plan and monitor the budget of the Board and shall authorize the expenditure of the Board's funds, as previously approved by the Board.

2.3.3 Clerk

A Clerk shall be appointed by the Board and, subject to the direction of the Board and its Chairperson, shall undertake all the clerical work of the Board, or supervision of that work, including all correspondence of the Board, sending of all notices required by law, the Rules, and orders of the Board, receiving and scrutinizing all Appeals and Petitions for compliance with the Rules of the Board, keeping dockets and minutes of the Board's proceedings, compiling all required records, maintaining necessary files and indices, and calling the roll at all Board meetings.

2.3.4 Associate Member

The Chairperson may appoint an associate member of the Board for a term of one year. The Associate Member may act in place of a regular Board member in the event of absence or recusal.

Section 3: Procedural Requirements

3.1 Appellant or Petitioner

3.1.1 An Appeal may be taken by any person aggrieved by any decision of the Building Inspector.

3.1.2 A Petition for a variance from the Town Bylaw may be brought by a property owner or by a tenant, a licensee, a prospective purchaser or other person or entity provided that signed documentation from the owner certifying the right to file shall accompany the petition.

3.1.3 Any Appeal or Petition shall first be filed with the Town Clerk, who shall transmit it forthwith to the Board. It is strongly recommended that all new Appeals or Petitions be first reviewed by the Building Inspector to assure correctness, completeness, and clarity.

3.2 Appeal or Petition

Any communication purporting to be an Appeal or Petition shall be treated as a mere notice of intention to seek Board action, until such time as it is made on the Board's official form ("Form") with payment of the applicable filing fee. To be a complete Form, all information called for by the Form shall be furnished by the appellant or petitioner in the manner therein prescribed.

3.3 Requirements for Appeal or Petition

The following submittals are required by the Board for every Appeal or Petition:

3.3.1 Every Appeal or Petition shall be made on an official form, entitled "Zoning Board of Appeals – Application for Hearing," which shall be furnished by the Clerk upon request. All Appeals or Petitions to the Board shall be accompanied by this Form stamped by the Town Clerk.

3.3.2 Every Appeal or Petition shall state the specific sections of the Zoning Bylaw involved and the relief desired. The Board shall not grant any relief not specifically requested.

3.3.3 Every Appeal or Petition shall include a list of all parties in interest as defined in MGL Chapter 40A, Section 11, including names and addresses as they appear on the most recent applicable tax list, certified by the Board of Assessors. The list shall be prepared by the Board of Assessors and shall accompany the Form.

3.3.4 Every Appeal or Petition shall be accompanied by a non-refundable filing fee made payable to the Town of Mount Washington ("Town"), payable only by a certified or cashier's check, or an attorney's check. The Board's fees are set forth on Appendix I and may be changed from time to time. The current fee schedule shall be available at the office of the Town Clerk. Failure to pay the required fee shall constitute an incomplete application and may result in dismissal.

3.3.5 An Appeal or Petition may be accompanied by appropriate photographs of the existing conditions at the property at issue, or photographs depicting areas or lines of sight that will be affected by any proposed change.

3.3.6 Every Appeal shall include a copy of the denial of a permit, or a copy of the order or decision of the Building Inspector being appealed. The Building Inspector shall forthwith transmit to the Board all documents and papers constituting the record of the case in which the Appeal is taken.

3.3.7 A petition may be submitted even in the absence of a denial of a permit. Every Petition shall be accompanied by a Plan which shall be 8 ½" x 11" or 11" x 17" and drawn to the minimum scale of 1 inch equals 40 feet, and which shall include the following information and fee(s):

3.3.7.1 It shall have a north point and property lines and shall, for all abutting properties, provide the names of owners and the location of buildings within 100 feet of the subject property;

3.3.7.2 It shall have the dimensions of the lot, and the percentage of the lot covered by the principal and accessory buildings;

3.3.7.3 It shall show the location of all buildings or uses of the property, and the distances from adjacent buildings and property lines shall be verified in the field and shown on the Plan;

3.3.7.4 It shall show the required parking spaces;

3.3.7.5 It shall show entrances, exits, driveways, and loading areas;

3.3.7.6 All footprints of existing or proposed structures shall be clearly designated;

3.3.7.7 The Board may require that the Plan shall be certified by a licensed land surveyor, showing the location of property lines, structures, and other features that exist on the ground as shown on the Plan.

3.3.7.8 Administrative Fee. Pursuant to MGL Chapter 44, Section 53E1/2, a revolving fund may be established by vote of the annual town meeting to set up escrow accounts for appeals or petitions. Such accounts may be used to pay for costs of processing the appeal or petition, clerical costs, mailing costs, or publication costs.

3.3.7.9 Peer Review Fee. Pursuant to MGL Chapter 44, Section 53G, the Board may engage engineers, lawyers, planners, or other appropriate professionals to advise the Board when the Board determines that the Appeal or Petition involves technical, legal, or other issues beyond the ordinary understanding of a layperson. The appellant or petitioner shall provide, at the time of the opening of the public hearing, a reasonable review fee (the "53G fee"), the amount to be determined by the Board to be sufficient to enable the Board to retain consultants of its choice. Said 53G fee shall be deposited into a special separate account or line item by the town Treasurer. The funds from said account and any accrued interest thereon may be expended at the direction of the Board without further appropriation. Any excess amount remaining in the account upon completion of the Board's review shall be repaid to the payer. Minimum qualifications for outside consultants shall consist of either an educational degree in or related to the field at issue or three or more years of practice in the field at issue or in a related field. Selection of consultants and assistants shall be entirely at the discretion of the Board, subject to a majority vote. The Board's selection of an outside consultant or assistant may be appealed to the Select Board; the Select Board may disqualify such consultant or assistant only on the grounds that s/he has a conflict of interest and/or does not possess the minimum qualifications noted above.

3.4 Filing Period

An Appeal of a decision of the Building Inspector to issue a permit, refuse to issue a permit, refuse to enforce the Zoning Bylaw, or any other decision or determination of the Building Inspector shall be filed with the Town Clerk within thirty (30) days from such decision.

A variance petition may be filed at the discretion of the petitioner.

For an Appeal or Petition to be heard at a regular meeting of the Board, it must be filed no later than the last Thursday of the month preceding the month of the regular meeting.

3.5 Appeals

An appeal under MGL Chapter 40A, Sections 8 and 15, and Sections 215-8a and 215-10 of the Zoning Bylaw must be supported by written documentation as required on the Form, setting forth in detail all facts relied upon with specific reference to the reasons that the appellant was aggrieved by reason of her/his inability to obtain a permit or enforcement action from the Building Inspector and to the remedy sought.

3.6 Variances

A Petition for a variance must be supported by written documentation as required on the Form, setting forth in detail all facts relied upon with specific reference to the criteria set forth in MGL Chapter 40A, Section 10.

3.7 Burden of Proof; Conduct of Hearing

The appellant or petitioner carries the burden to make a true and complete presentation of the case, to offer evidence on each of the pertinent legal requirements, and to provide all the relevant facts and documents necessary for a fair presentation of the issues for a decision by the Board.

Opponents are under a similar burden to present their cases truthfully and completely.

Pursuant to MGL Chapter 40A, Section 15, the Chairperson, or in her/his absence the Acting Chairperson, has the power to subpoena witnesses, take sworn testimony, and compel production of documents.

3.8 Referrals

Appeals or petitions may be sent to the following agencies and officials of the Town for an advisory opinion and recommendations: Select Board, Planning Board, Building Inspector, Health Agent, Public Safety authorities, Conservation Commission, and Department of Public Works. Such advisory opinion or recommendations shall be transmitted to the Board within thirty-five (35) days. Failure to respond shall be deemed a lack of opposition thereto.

3.9 Dismissal of Incomplete Filings

The Board may dismiss an Appeal or Petition if the Form is not complete or if the submissions required by these Rules are not made. Such dismissal shall be made without a hearing on the merits and shall be deemed a withdrawal without prejudice to allow for the refiling of a complete Appeal or Petition with submissions. A public hearing shall not be scheduled until the Board by majority vote at a regular meeting determines that the Form is complete.

3.10 Errors in Filing

When, in its opinion, the Board's ability to reach a decision on merits has not been impaired by an error in filing, the Board may waive any failure to comply with the exact technical requirements for filing. Whenever a decision on the merits is rendered on an Appeal or Petition with a filing error, such failure to comply shall be deemed to have been waived.

Section 4: Hearings

4.1 Notice

An Appeal or Petition shall be considered by the Board at a public hearing held at a time and place fixed by the Board.

Pursuant to MGL Chapter 40A, Section 11, the Board shall give notice of the time and place of the public hearing and its subject matter, sufficient for identification, as follows:

4.1.1 By publication of the notice in a newspaper of general circulation in the Town, once in each of two successive weeks, the first publication to be not less than fourteen (14) days before the day of the

public hearing. The newspaper shall send the bill for the advertisement directly to the appellant or petitioner, who shall pay the bill directly to the newspaper;

4.1.2 By posting the notice in or on a conspicuous place in the Mount Washington Town Hall ("Town Hall") or on the Town's official website for a period of not less than fourteen (14) days before the day of the public hearing;

4.1.3 By sending via certified mail notice to all parties in interest as defined by MGL Chapter 40A, Section 11, as certified by the Board of Assessors and provided by the appellant or petitioner. If certified mail is not accepted and is returned to the Board, it shall nonetheless be determined to have been delivered. Postage for such mailing shall be paid by the appellant or petitioner.

4.2 Hearings to be Public

All hearings shall be open to the public and shall be conducted in accordance with the Massachusetts Open Meeting Law, MGL Chapter 30A, Sections 18 through 25.

4.3 No Public Hearing on Date of Election

No public hearing shall be held on the day on which a state or municipal election, caucus, or primary is held in the Town.

4.4 Rule of Necessity

The rule of necessity shall permit a Board member who would otherwise be disqualified due to a conflict of interest to participate in a hearing, vote, or both, when the only way that a decision can be reached is with the participation of such member. Prior to proceeding, that member who would otherwise be disqualified must disclose for the record the facts creating the conflict of interest.

4.5 Representation and Absence

An appellant or petitioner may appear on her/his own behalf or be represented by an agent or attorney. In the event the appellant, petitioner, or designated representative fails to appear at the public hearing without good cause, as determined by a majority vote of the Board, the Board may decide the matter using the information it has otherwise received, and may dismiss the matter, at its discretion by majority vote, with or without prejudice.

4.6 Continuances

A continuance may be requested by an appellant or petitioner by written request submitted to the Clerk in advance of a hearing or orally at a hearing. The Board may, at its discretion with a majority vote, allow or deny such request for a continuance. Unless otherwise notified by the Board's Chairperson or agent (an email will suffice), an appellant, petitioner, or designated representative must appear at the meeting at which the request for a continuance will be heard.

Any continuance granted upon request of an applicant, petitioner, or designated representative shall constitute an agreement by the appellant or petitioner to extend the time limits for actions by the Board

by the duration of the continuance, and such agreement shall be set forth in writing and signed by the Chairperson and the applicant or petitioner and filed with the Town Clerk.

4.7 Quorum

A quorum for the purpose of conducting public hearings and transacting other business except voting on appeals or petitions shall consist of three (3) members.

In such a case where the Board lacks a quorum, the Chairperson shall reschedule the hearing after consultation with the Board.

At the discretion of the Board by majority vote, advertised notice of continuance may also be given in a newspaper of general circulation in the Town at the expense of the appellant or petitioner.

No additional fee shall be required for a matter rescheduled because a meeting was lacking a quorum.

4.8 Waiver of a Full Board

Should an appellant or petitioner so desire, on direct request to the Board within the confines of the subject meeting, requirements for a full board may be waived by unanimous vote of the Board then acting, but in no case where less than four (4) members of the Board are seated. Any decision on an Appeal or Petition shall require the unanimous vote of the four (4) members present.

4.9 Regular Meetings

Meetings of the Board shall be held as necessary at times determined by the Board at a place specified in the meeting notice.

Meetings of the Board shall be held at the call of the Chairperson or Acting Chairperson. If the Chairperson or Acting Chairperson is unable to call a meeting, or is unreasonable in delaying a call for a meeting that is deemed to be in the best interest of the Board's business, a demand for a meeting may be called by two (2) members of the Board who shall file by certified or registered mail a written notice of intent to the Select Board and to the Chairperson or Acting Chairperson as the circumstances may require.

Notices shall be posted publicly as required by law.

4.10 Special Meetings

Special meetings may be called by the Chairperson or at the written request of two (2) members.

Written notice thereof shall be given to each member at least forty-eight (48) hours before the time set, except that announcement of a special meeting at any meeting attended by all members shall be sufficient notice. Written notice may be done by email.

Notices shall be posted publicly as required by law.

4.11 Absences

Pursuant to Town Meeting's acceptance of MGL Chapter 39, Section 23D, no member of the Board shall be disqualified from voting on any matter due solely to said member's absence from no more than a single session of the hearing at which testimony or other evidence is received; provided, however, that before any such vote, said member shall certify in writing that s/he has examined all evidence received at the missed session, which evidence shall include an audio or video recording of the missed session or a transcript thereof. Such certification to be part of the record of the hearing.

4.12 Hearing Procedure

Hearings shall start at the stated time in the notice unless delayed because of prior hearings.

At the hearing, any person, whether or not entitled to notice thereof, may appear in person or be represented by an agent or attorney.

At the hearing, the Chairperson may administer oaths, summon witnesses, and call for the production of papers.

The Board shall retain any record which has been introduced in evidence, for reference in its consideration of the case.

No person shall address a hearing of the Board without leave of the Chairperson, and all persons shall, at the request of the Chairperson, be silent. If a person, after warning from the Chairperson, persists in disorderly behavior, the Chairperson may order her/him to withdraw from the hearing, and, if s/he does not withdraw, may order a constable or any other person to remove her/him and confine her/him in some convenient place until the hearing is adjourned.

The Chairperson may close or continue the hearing immediately if, in her/his opinion, these Rules are being violated and/or the hearing is becoming disorderly.

The Chairperson shall open each hearing by reading, or causing to be read, the notice as advertised.

The appellant or petitioner or designated representative shall then present her/his case, stating fully the reason(s) why the Appeal or Petition should be granted.

When the appellant or petitioner or designated representative has concluded the presentation, the Chairperson shall allow all those in favor of the matter under consideration to speak. Those who wish to speak shall rise, address the Chairperson, give their names and addresses, and then proceed.

When all those in favor have spoken, the Chairperson shall then allow all those in opposition a similar opportunity to be heard.

Rebuttals shall only be allowed at the discretion of the Chairperson.

Similarly, no cross-examination shall be allowed except at the discretion of the Chairperson, although questions by the public seeking information and deemed relevant by the Chairperson or by a majority vote of the Board may be allowed.

Members of the Board who are hearing the matter may direct questions during the hearing. The timing of those questions shall be at the discretion of the Chairperson.

When all facts have been presented, the Chairperson, after motion, shall close the hearing and inform the appellant or petitioner or designated representative and others present that they will be notified of the Board's decision.

4.13 Information to be Furnished to the Board

An appellant or petitioner or designated representative must submit seven (7) copies of all written materials, in addition to those required in Section 3, in advance of the hearing, at the hearing, or at any time prior to close of evidence at the hearing.

Any document or materials referenced during the hearing must be provided to the Board prior to the close of the hearing. The Board may choose not to consider it.

Any such materials, including a legal memorandum, must be submitted to the Board at least seven (7) days in advance of the hearing or its continuance in order to be considered at that session of the hearing unless the Board sets a different deadline.

Any appellant or petitioner or designated representative may submit a proposed decision to the Board. All submissions shall be made to the Clerk.

In no case shall the Board allow new evidence to be admitted after the close of the public hearing.

4.14 Withdrawal

An Appeal or Petition may be withdrawn by notice in writing to the Clerk at any time prior to the opening of the public hearing by the Board. After the opening of the public hearing, such withdrawal shall be with the permission of the Board pursuant to MGL Chapter 40A, Section 16.

Section 5: Decision

5.1 Decision of the Board

A decision of the Board to grant an Appeal or Petition requires an affirmative vote of four (4) members.

Pursuant to MGL Chapter 40A, Section 15, the Board shall produce a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions.

The Chairperson may sign the decision on behalf of the Board for filing with the Town Clerk.

5.2 Mandatory Conditions

A decision granting a Petition shall include a condition that the variance shall lapse if the rights granted thereunder are not exercised within one year, measured from the date of the grant (the day the Board votes to grant the variance), including the time to pursue or await the determination of an appeal under MGL Chapter 40A, Section 17.

5.3 Notice of Decision

The Clerk shall mail notice of the decision to the parties in interest, and to every person present at the hearing who requests in writing that the notices be sent to her/him and who states the address to which such notice is to be sent.

5.4 Recording of Decision

The recording of a decision of a variance is required by MGL Chapter 40A, Section 11. The appellant or petitioner shall be responsible for recording a full and exact copy of the decision in the Registry of Deeds or the Land Court and for paying any required recording fees. Verification of the recording, including the document number and book/page number and a full and exact copy of the version accepted and stamped by the Registry of Deeds, must be submitted by the appellant or petitioner to the Clerk and to the Zoning Enforcement Officer prior to the issuance of a Building Permit, the start of any work, or any other action to implement the variance.

5.5 Submission of Final Approved Plans

Where physical changes or improvements on property are approved, the approved plan as amended by the Board in its decision of approval shall be submitted, prior to the issuance of a building permit, to the Zoning Enforcement Officer. No building permit shall be issued until the plan is found to be in compliance with the Board's decision and such endorsement has occurred.

5.6 Appeal of Decision

No variance, or any extension, modification, or renewal thereof, shall take effect until a copy of the decision bearing the certification of the Town Clerk that twenty (20) days have elapsed after the decision has been filed in the office of the Town Clerk and no appeal has been filed, or that if such appeal has been filed, that it has been dismissed or denied, or that if it is a variance which has been approved by reason of the failure of the Board to act thereon within the time prescribed, a copy of the petition for the variance accompanied by the certification of the Town Clerk stating the fact that the Board failed to act within the time prescribed, and no appeal has been filed, and that the grant of the petition resulting from such failure to act has become final, or that if such appeal has been filed, that it has been dismissed or denied, is recorded in the Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted in the owner's certificate of title.

A certified copy of the decision and an affidavit from the Registry of Deeds or the Land Court stating that the decision has been recorded are necessary before a building permit dependent upon the Board's decision can be issued by the Building Inspector.