**Introduction**

**Welcome to the Board of Adjustment**

The Board of Adjustment is a quasi-judicial board that is responsible for reviewing variance requests from the Routt County Zoning Regulations in unincorporated Routt County including the communities of Milner, Phippsburg, Toponas and Hahn’s Peak.

Your principle responsibility is neither to the developer nor to the applicant, but to determine if a variance should be approved under specific criteria in Section 3.4.6 of the Routt County Zoning Regulations that are used to determine hardships.

This handbook will help you understand the legal and policy framework for reviews. It will also provide you with a reference for the powers and duties of the Board of Adjustment. As a Board of Adjustment member you must have some understanding of the following topics:

1. How the Board of Adjustment operates
2. The authority and duties of the Board
3. Legal aspects of Board conduct
4. Standards for Board decision-making

The Board of Adjustment Handbook covers all of these topics and included in this handbook is Section 3.4 of the Routt County Zoning Regulations which is dedicated to the Board of Adjustment. The Appendix in this handbook also contains additional information for you to review.

You can also access the Routt County Zoning and Subdivision Regulations and Routt County Master Plan and community plans on-line at the Routt County Planning Department website.

Being a Board of Adjustment member and reviewing applications during a public hearing process can be challenging. This handbook will help to make the challenge easier.

The Board of Adjustment is created by Colorado state statutes. None of these statutes insure that a Board of Adjustment will be effective in the appeal process. Only the people who become Board of Adjustment members can do this.
Chapter 1

Qualifications of a Board of Adjustment Member

The most important qualification that a BOA member must have is a belief that the Zoning Regulations should be carried out. You will be asked to devote time and energy to the job and must be willing to be objective and make sound decisions. You must be open minded, willing to learn and to change ideas in the light of new evidence. You must have the ability to define what’s at issue and the strength to make effective decisions.

Responsibility of a BOA Member

To conduct effective meetings, BOA members must be informed of the application and the issue(s) associated with the application. Preparation is key to being an effective member and it starts with knowledge of the Zoning Regulations including Section 3.4 of the Zoning Regulations.

In addition, an effective member comes prepared for the meeting. This means that, before meetings you read all reports with time, if needed, for you to contact staff with any questions before the meeting. By being prepared you will be able to examine the facts on an issue, process public comments and create dialog that will be the basis of a decision.

The success of a meeting depends on active participation from a wide range of people – that is why the meeting is held. The BOA should be a forum for discussion of issues and people should feel free and encouraged to express their opinions. BOA should act in a fair, ethical and consistent manner.

Chairmanship

Knowing the role of the Chairman will help all BOA members during a meeting.

The chair or vice-chair plays a vital role in how well the BOA functions. The ability of the chair to run a meeting is important and essential if the BOA is to get its work done. BOA members will expect the chair to display leadership skills and to run well-organized and purposeful meetings. In turn, a member should be up to date on regulations and the information pertaining to the meeting to help support the chair.

Role of the Chair

The attitude and abilities of the chair are critical to the successful operation of the BOA. A capable chair understands the issues, understands his or her fellow members, can maintain order, and is able to bring the BOA to a decision even on complicated or controversial issues. A person should be named as chair for his or her leadership abilities in addition to having other qualities such as integrity and fairness.

The chair is somewhat "removed" from the meeting in that he or she may not participate as fully in the meeting as the other members. It is the chair's job to preside over the meeting and lead the group toward making a decision.

Responsibilities of the Chair

Running the meeting. It is the chair's responsibility to run an orderly meeting and conduct the BOA’s business in a fair and timely manner. Other members, the staff, and the public will look to the chair for leadership.

Maintaining order. Do not allow members of the public to clap, cheer, whistle, and so on either for or against testimony that is being presented or in response to comments by members during their deliberations. This type of display not only interrupts the meeting, but can intimidate members of the public, applicant and other
members. The chair should "gavel down" this kind of behavior and run an orderly meeting. The chair should not permit members to accuse or overtly challenge one another, members of the public, or persons testifying.

**Keeping business moving.** The BOA should not endlessly mull over matters, continually request new information, and otherwise delay making a decision when the information needed for doing so has been presented. The chair should move the meeting along by summarizing the facts and the positions presented by commission members and bringing matters to a vote. Failure to do so is unfair to the applicant, whose proposal may be unfairly delayed by indecision. There are certainly applications that may result in a tabling and it should be made clear to staff and the applicant what information the BOA needs to make a decision.

**Managing public testimony.** Testimony from witnesses should be held to a reasonable length of time, particularly if a large number of people want to address the BOA. Testimony should pertain to the matter under deliberation and the criteria used to determine a hardship. The chair should discourage successive witnesses from repeating the same testimony over and over again. The BOA also needs to show that it is interested in what the witnesses have to say.

**Preventing arguments.** The chair should prevent sharp exchanges from occurring between persons testifying and between members themselves. He or she should limit the dialogue between members and persons testifying to fact gathering that will contribute to the BOA’s decision-making ability. This is important to prevent a loss of the BOA’s objectivity and credibility.

**Understanding parliamentary procedure.** Robert’s Rules of Order will usually be used. This is crucial to the chair’s ability to run an orderly meeting. He or she must be familiar with parliamentary procedure. The chair must understand motions and amendments to motions, the order in which business is conducted, topics that are and are not debatable, and so on.

**Tying things together.** This is the ability to take into account public testimony, member deliberations, and the issue at hand, in guiding the BOA toward a decision. It is based on the chair’s ability to discern a position which is in conformance with all five (5) hardship criteria.

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**The Role of Planning Staff**

- Administers the regulations
- Prepares staff reports and notices for meetings
- Researches planning, land use, and development issues
- Advises and assists the Board of Adjustment
- Educates and assists the public
- Knows and interprets laws and ordinances
- Negotiates, facilitates, and coordinates between agencies, developers, applicants and the public
- Enforces conditions of approval stipulated by the Board of Adjustment
- Provides continuity – policy, documents, and people

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**Qualities of a Good Chair**

The chairman must be strong enough to make sure the meetings are run by the rules but fair enough to be above cutting people off before they’ve had their say or squelching arguments he doesn’t agree with. In other words, the chair person’s “gavel” should be wielded by someone who can use its power properly. Members will expect the chair to display leadership skills and to run well-organized and purposeful meetings. A good chair will be:

- **Tactful.** The chair must show tact with other
members and the public. A rude or insulting chair will reflect poorly on the whole BOA.

Decisive. The chair may have to think and act quickly in overseeing the conduct of the BOA’s business. This may include summarizing positions, clarifying motions, giving direction to staff based on the differing views of members and focusing roundtable discussion on conformance with the hardship criteria.

Respectable. A chair, whose judgment has been tested and found to be good, whose opinion is sought out, or who has support from diverse elements of the community has earned the respect of his or her peers. This can help in conducting the BOA’s business and enhancing its role in the community decision-making.

Knowledgeable about the Issues. Of all members, the chair must be able to understand the business before the BOA. Failure to understand an item which the BOA is to act on can lead to confusion and result in poor decision-making. The chair needs to put in extra effort studying the agenda items and preparing for the meeting.

Quorum
The BOA is made up of five (5) members and two (2) alternates. If an alternate member is in attendance at a meeting where there are five members, the alternate may participate in discussion, but cannot vote. A quorum is the minimum number of Board members needed to conduct business which is four (4) members. When a mere quorum is present, the applicant must obtain a 4-0 vote for approval. If five BOA members are present the applicant must obtain a 4-1 vote for approval.

It is imperative that BOA members notify the Planning Department when they know that they will be absent for meetings, such as vacations, or be able to provide ample notice when they are not able to attend a meeting. Applications before BOA have had to meet legal requirements for processing and notification. Applicants and staff have spent hours working on projects and every effort should be made to make sure that an application is heard and that the applicant and the public receive a fair and complete review.
Chapter 2

The Role of the Board of Adjustment

Colorado state statutes require that the Board of County Commissioners of any county which enacts zoning regulations provide for a Board of Adjustment (CRS 30-28-117). The statutes also set the guidelines for the Board of Adjustment members to follow for decisions. (CRS 30-28-118).

The Routt County Zoning and Subdivision Regulations require strict application of requirements for all properties in unincorporated Routt County. Regulations are established for minimum setback, lot width, lot area, floor area, and maximum allowable building height or maximum separation permitted between a secondary dwelling unit and a primary dwelling unit. The requirements are expected to be met for all buildings/properties proposed in Routt County.

A variance is the appeal process for a property owner to request that they be exempt from certain required county regulations. The State recognizes this and has created five specific criteria to help guide you in this review. All five criteria must be met in order for a hardship to be determined and a variance to be approved. The five criteria are as follows:

1) Peculiar and exceptional practical difficulties or an unnecessary and unreasonable hardship will be imposed on the property owner if the provisions of the Zoning Regulations are strictly enforced.

2) Circumstances creating the hardship were in existence on the effective date of the regulations from which a variance is requested or created subsequently through no fault of the appellant.

3) That the property for which a variance is requested possesses exceptional narrowness, shallowness, shape or topography or other extraordinary and exceptional situation or condition which does not occur generally in other property in the same Zone District.

4) That the variance, if granted, will not diminish the value, use or enjoyment of the adjacent properties, nor curtail desirable light, air or open space in the neighborhood, nor change the character of the neighborhood.

5) That the variance, if granted, will not be directly contrary to the intent and purpose of the Zoning Regulations or the Routt County Master Plan.

These five criteria are placed in your staff report for your review and staff will comment on each of these criteria.

Burden of Proof

The BOA’s task is not to solve each problem brought to it, but instead to determine whether the necessary standards of hardship have been
met and whether granting a variance will not injure the public health, safety and welfare. It is to be expected that the BOA will deny the appeal in many cases, or grant less than the all of requested variances.

The burden of proof is upon the applicant to prove that All of the criteria for a variance have been met. The job of the BOA is to strictly interpret the state statutes and local regulations meaning that the variance must be denied if one requirement has not been proven.

**Guidance**

Hardship should not be self-imposed. The development of the property should be designed to meet the regulations, not the criteria or wishes of the applicant.

Only conditions specifically affecting the land or lot should be considered.

When the property owner would have a reasonable use of his or her property without the variance, the variance request should be denied. The applicant has no right to the highest and best use of the property, and the BOA need not grant a variance to ensure this.

A variance should not be granted due to financial reasons.

An application should not be approved just because it is more convenient to have the variance.

**Routt County additional standards**

Under no circumstances shall a variance be granted on the sole bases of personal convenience, profit or special privilege to the applicant.

Variances are reviewed with specific plans. Approval must be based on the plans presented to you. The approval runs with the land and may be transferred to successive owners prior to construction if no changes are made. Construction must be completed as per the plans approved and within the approved timeframe. If approval is made, the decision should be clear and concise based on the plans before you. If you feel that a decision cannot be made due to inadequacies of the plans, you have the right to request more information to make a decision.

Under no circumstance shall the BOA grant a variance to allow a use not permissible under the terms of the Routt County Zoning Resolution.
Chapter 3

Board of Adjustment Meetings

Board of Adjustment meetings are held the second Monday of the month beginning at 6 p.m. Snacks are provided at the meeting. The meetings are held at the historic downtown courthouse complex at 522 Lincoln Ave., 3rd floor hearing room. You will be mailed a packet prior to the meeting which contains all of the items to be heard. You can also choose to have this packet sent to you by e-mail, download from the website or you can pick it up at the Planning Office. These packets are completed the Wednesday or Thursday prior to the meeting.

Agenda
A typical meeting agenda is as follows:

I. Call to Order
   a. Roll call
   b. Approval of minutes
   c. Announcements
II. Applications
III. Planning Director/staff update
IV. Adjournment

General Application Review

I. Applicant presents application
II. Staff presents any updates, new information or overview
III. BOA questions of the applicant and/or staff
IV. Public comments
V. Public comment closed
VI. Applicant’s response to public comment
VII. Staff response
VIII. BOA members ask additional questions of applicant if needed
IX. Round table comments. (This time is dedicated to comments and discussion from each BOA member. They express their opinions and comments to other members of the BOA prior to a motion and express which direction that they are planning to vote. This time can also be used to discuss proposed conditions of approval as presented in the staff report and suggested changes or additions)
X. Motion. (A motion cannot be made by an alternate member if there are five (5) regular members in attendance)
XI. Vote. (Alternate members cannot vote if there are five (5) regular members in attendance)

Meeting Hints and Process

- Review of an application may contain many different levels of presentation. Applicants and the public will present testimony and information which must be weighed to base a decision.

The most important aspect of public relations of an appointed or elected board is its public meetings

- Discussion should stay on the facts and not the presenters of the facts. Recommendations should be based on fact and not on opinion or
- Each proposal must be evaluated on its own merits.
- Stay focused on the five criteria; do not get bogged down in details or side issues.
- Do not give opinions or judgments on complex technical matters, only on policy.
- If ‘experts’ are brought in by either side, the BOA should not be afraid to make sure it is getting facts. Question the experts and the applicants.
- Do not bring up the pro’s and con’s of an item before all evidence is presented; the public will lose confidence in the BOA if they think their minds are made up already.
- Throughout your decisions there is a need for consistency in order for meetings to be effective. Consistency leads to predictability, a necessary quality in order for applicants and staff to be able to produce information and plans that do not waste the time of all parties involved.
- Clearly define the major issue involved in each case and address them before making a decision.

Once all opinions have been given, a summation of these should be proposed in the form of a motion. The motion should be based on findings of facts that address the five criteria.

**Findings of fact**

Findings are nothing more than a statement by the BOA for the evidence and reasoning it used to arrive at a decision. Findings are important in helping the public and the applicant understand its conclusion and reason to grant or deny the application. Findings must be based on the regulations and the evidence and should be clear and concise. Findings based on Routt County Zoning Regulations are suggested in the staff report. BOA should use this as a tool in creating a motion. Findings of fact should be presented as part of the motion to support the motion whether the motion is for approval or denial.

**Mission or Function of the BOA**

- The BOA does not attempt to work out a solution that ‘pleases everybody’ or to mediate/arbitrate neighborhood disputes.
- Its function is to apply legal standards to the specific application before it to determine whether the applicant has met its burden to demonstrate hardship, and to ensure that approval of a variance will not injure the public health, safety and welfare.
- It is to be expected that the BOA will deny the application in many cases, or grant less than the requested variance.

If an item is tabled, the BOA should clearly state the reasons why and what information that it needs for future review to make a decision. An application can be tabled to a specific hearing date or if it is uncertain how long it will take to get the additional information, the item can be tabled indefinitely.

A motion to deny should include findings to support the motion.

One of the most common reasons that courts overrule decisions by board’s of adjustment is that the members have failed to prepare findings to support their decision.

**Motion**

Along with the finding of facts, the motion should be clear in explaining the decision of the BOA. Stating a motion places a matter before the BOA for its consideration and permits debate to take place. Discussion can be to clarify conditions, to
suggest the addition or removal of conditions. If amendments or changes are proposed, the author of the motion can accept or reject the suggestions. This should be clearly stated before the vote is taken. During discussion on the motion, members give their reasons for support or not supporting the motion as stated. It can be important for BOA members to give their reasons to voting ‘yes’ or ‘no’ on a motion. The reasons given for or against a given matter are needed to clarify decisions and link decisions to the five approval criteria.

**Appeals**

A BOA appeal by either the applicant or member of the public is filed in District Court. The court looks at whether the BOA acted in excess of its jurisdictions (not following legal standards) or abusing discretion (making findings of fact not supported by competent evidence in the record). The findings of fact and motion will support the BOA’s decision in the appeal process.
Chapter 4

Decision Making

Board of Adjustment decisions are quasi-judicial. Substantive due process (reasonableness of decision) rules apply to legislative decision making while procedural due process (fairness of the process) rules apply to quasi-judicial proceedings.

Legislative Decision

Legislative decisions are decisions that make or interpret policy. The decision may be broad ranging such as recommending the adoption of a comprehensive plan or very specific, such a recommending amendment to the zoning and subdivision regulations. The key element of legislative decision is that they apply equally (or are meant to apply equally) to everyone in the community or to everyone in a class of persons, not just to a specific individual. The BOA will not be involved in legislative decisions.

Quasi-Judicial Decision

Generally, quasi-judicial proceedings involve decisions that have a direct effect on the right and liability of a single person or, occasionally, a small group of identified persons. Quasi-judicial proceedings deal with matters in which a determination will be made on whether a person has shown that they have met all the established requirements that give them a right to a permit or other entitlement. The BOA must determine whether, from all the evidence presented, the required standards have been met.

Due Process

No person shall ...be deprived of life, liberty, or property without due process of law; ...” – Fifth Amendment of the US Constitution.

Generally, quasi-judicial proceedings must be conducted in accordance with procedural due process. That means adequate proper notice and an opportunity to be heard; a basic fairness in procedure, including some type of impartial decision maker. The application must be processed so that parties believe in the fairness of the process and be given a fair hearing or an opportunity to be heard. An unfavorable decision perceived to be the result of an impartial consideration may be bearable, but an unfavorable decision tainted by even the appearance of partiality cannot be condoned.

Ex Parte Contact

Direct communication between a citizen and the
BOA or member of the BOA can be common for BOA members because of their visibility in the community and the nature of their work. Discussions with BOA members outside the public forum can be a beneficial way to exchange information and help keep members informed of residents’ attitudes. However, a distinction must be drawn between contact on general or legislative matters and contact on quasi-judicial matters. While such contact may be permissible on a legislative matter, it is impermissible in a quasi-judicial proceeding that is currently before the BOA or scheduled to come before the BOA.

Ex parte is a Latin term that means “from or on one side only.” It is the label for private communication between an interested party in a quasi-judicial proceeding and a member of the body that is hearing the matter. The essential feature of an ex parte contact is that someone with an interest in a quasi-judicial decision before the BOA – an applicant, representative of an applicant or opponent of the application, an adjacent property owner or member of the public is attempting to influence a decision outside of the public forum. Unless corrected, ex parte communication can result in a violation of procedural due process.

What to Do When It Occurs

Ex parte contact can occur in a number of ways, and many are quite innocent and unintentional. Telephone calls, informal meetings or even a casual encounter on the street can present the opportunity for citizens to express fact or an opinion about a quasi-judicial matter to a BOA member. As soon as a member senses that he or she are about to be involved in an ex parte contact, he or she should stop the citizen and explain that members are not permitted to discuss anything about the matter except at the hearing and recommend that the citizen submit comments in writing and/or attend the meeting.

Correcting Ex parte Contacts

If you have been involved in an ex parte contact under any circumstances, you may be able to overcome the fairness problem by disclosing the contact and the substance of what was related to you at the beginning of the application review. This will get the evidence you received into the public record. Then, you should state whether you believe that the contact has swayed your view and whether you can give an unbiased view to all of the evidence presented. (Also see Conflict of Interest below)

Site Visits

Occasionally, a site visit will be scheduled by the Planning Department for the BOA members to view an area that has an application. These visits can be beneficial to the BOA members to help make a decision, but should be handled carefully, particularly if the applicant or an opponent is present. All discussion during the site visit should be heard by members at the same time and no side-bar discussion should occur. Site visits are usually scheduled the same day as the hearing so that all members in attendance will also hear the application at the meeting.

Individual site visits are discouraged, especially if you will encounter an individual involved in the application.

Conflict of Interest

Impartiality or the appearance of impartiality may be lost by a conflict of interest. BOA members can determine a possible conflict by the following questions:

1. Do you have any financial interest in this petition or will you benefit from any approval of this petition in any way?
2. Does a relative or you stand to gain from
this petition in any way, financially, or is a relative an adjacent property owner to the property being petitioned?

3. Do you have strong outside influences that may affect your decision?

4. Can you make a strong impartial decision on this petition?

5. Based upon these questions, does the BOA member see an appearance of impropriety?

If you feel that you might have a conflict of interest your concerns should be discussed prior to the meeting with the Planning Director. If you need to step down from a meeting, Planning staff will need time to determine if a quorum will be in attendance. If it is determined that you probably do not have a conflict of interest you still must bring up the subject to the BOA prior to the application hearing so that the BOA is aware of the possible conflict and so that they can make a determination if there might be an appearance of impropriety.

If you have a conflict of interest, you cannot participate in the decision or the meeting. The recommended practice is for the member with the conflict to vacate his or her seat and leave the meeting room during the discussion. This reduces the possibility and appearance that the member’s presence is affecting or influencing the decision.
Appendix

Section 3.4 Board of Adjustment from the Routt County Zoning and Subdivision Regulations

Colorado State Statutes 30-28-117 Board of Adjustment

Colorado State Statutes 30-28-118 Appeals to Board of Adjustment

Line of measurement policy

Variance/hardship – Illustrative Case

Conflict of Interest Articles and Information
SECTION 3 - ADMINISTRATION

A. Owners of property whose land abuts the subject property or is separated from the subject property only by a public right-of-way or water course, and

B. Owners of property included within the application.

The letter shall be sent in conformance with the requirements of the Review Process Chart (3.2.1). The letter shall include information as necessary regarding the application and an announcement of the date, time and location of the scheduled hearing. The letters shall specify the kind of action requested; the hearing authority; the time, date and location of hearing; and the location of the parcel under consideration by address or approximate address or a short legal description.

Failure of a property owner to receive a mailed notice will not necessitate the delay of a hearing and shall not be regarded as constituting inadequate notice.

3.3.5 Referral Agency Notice
Prior to any public hearing that requires referral agency notification, the Planning Director shall cause to be sent, by first class U. S. mail or by email, a notice to all applicable referral agencies in conformance with the requirements of the Review Process Chart (3.2.1). Referral Agencies may include any local, state, and/or federal agencies or departments that are required by these Regulations to be notified or in the judgment of the Planning Director might have particular knowledge or interests that could be of assistance during the review of the land use change. Failure of a Referral Agency to receive a notice will not necessitate the delay of a hearing and shall not be regarded as constituting inadequate notice.

3.3.6 Public Notice Time Requirements
Unless otherwise provided in these Regulations, public notice time requirements include the day the notice is posted, appears in the newspaper, is mailed, and shall also include the day of the public hearing.

3.4 Board of Adjustment

3.4.1 Establishment
A Board of Adjustment, hereinafter referred to in this section as "BOA", is hereby established.

3.4.2 Membership
The BOA shall consist of five members, and two alternate members as may be appointed by the Board of County Commissioners. Not more than one of the members and one of the alternate members may also be members of the Planning Commission. Members shall serve without compensation. Each member and alternate shall serve a three-year term unless such member resigns or is removed for cause by the Board of
County Commissioners upon written charges and after a public hearing. Vacancies shall be filled for unexpired terms in the same manner as in the case of original appointments. Alternate members of the BOA shall take the place of any regular Board member in the event that the regular member is temporarily unable to act due to the absence from the County, illness, interest in the case before the Board, or any other reasonable cause.

3.4.3 Officers
The BOA shall, at its first meeting following appointments made each year by the Board of County Commissioners, select a chairman and vice-chairman. The Planning Director or his or her designee shall serve as secretary to the BOA.

3.4.4 Powers and Duties
The Board of Adjustment shall have the powers and duties granted by Colorado Revised Statute Sections 30-28-117 and 118, including:

A. To hear and decide appeals where it is alleged by the applicant that there is error in any order, requirement, decision or refusal made by an administrative official or agency based on or made in the enforcement of these Regulations, including the refusal to issue a building permit.

B. To grant, upon an appeal relating to appellant's property, a variance from the strict application of any regulations regarding minimum setbacks, minimum lot width, minimum lot area, minimum floor area, maximum allowable building height or maximum separation permitted between a Secondary Dwelling Unit and a Primary Dwelling Unit if, by reason of exceptional narrowness, shallowness, or shape of the specific piece of property at the time of the enactment of the regulations, or by reason of exceptional topographic conditions, or other extraordinary and exceptional situation or condition of such piece of property, the strict application of the regulations would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the owner of the said property and provided that such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of these Regulations.

C. No appeal to the BOA shall be allowed for building use violations that may be prosecuted pursuant to Colorado Revised Statutes, Section 30-28-124 (1) (b).
3.4.5 Procedure
   A. Appeals to the BOA must be made within 30 days after the
      occurrence of the grievance or decision that is the subject of
      the appeal.
   B. All appeals shall be in writing and in such form as shall be
      prescribed by the BOA. Every appeal shall indicate what
      provision of these Regulations is involved, what relief from
      these provision is being sought, the ground upon which such
      appeal is being sought, and a site plan illustrating the manner
      in which the appeal or variance, if granted, would affect the
      subject property and adjacent uses. The applicant shall have
      the burden of demonstrating that the applicable standards of
      Section 3.4.6 have been met.
   C. The concurring vote of four out of five of the seated members of
      the BOA shall be necessary to reverse any order, requirement,
      decision or determination of any administrative official or
      agency or to decide in favor of the appellant.

3.4.6 Standards for the Grant or Denial of Variances
   A. The BOA may grant a variance if all of the following are found
      to exist:

      1) Peculiar and exceptional practical difficulties or an
         unnecessary and unreasonable hardship will be imposed
         on the property owner if the provisions of this Resolution
         are strictly enforced.

      2) Circumstances creating the hardship were in existence
         on the effective date of the regulations from which a
         variance is requested, or created subsequently through
         no fault of the appellant.

      3) That the property for which a variance is requested
         possesses exceptional narrowness, shallowness, shape
         or topography or other extraordinary and exceptional
         situation or condition which does not occur generally in
         other property in the same Zone District.

      4) That the variance, if granted, will not diminish the value,
         use or enjoyment of the adjacent properties, nor curtail
         desirable light, air and open space in the neighborhood,
         nor change the character of the neighborhood.

      5) The variance, if granted, will not be directly contrary to
         the intent and purpose of this Resolution or the Routt
         County Master Plan.
B. Under no circumstances shall a variance be granted on the sole basis of personal convenience, profit or special privilege to the applicant.

C. Under no circumstance shall the BOA grant a variance to allow a use not permissible under the terms of this Resolution in the appropriate Zone District.

D. Variances shall be granted with respect to specific plans or within defined parameters. Unless otherwise specified by the BOA, a variance may be transferred to successive owners prior to construction if no changes are made to the approved plan. Variances shall run with the land after the construction of any authorized structures and only for the life of such structures.

E. The BOA may condition the granting of a variance on the issuance of a building permit within a specific time period and may require the applicant to pursue completion of the construction with due diligence. If such conditions are not satisfied, the variance shall become null and void.

F. In order to insure that the protection of the public good and the intent and purpose of these Regulations are preserved, the BOA may impose any other condition upon the grant of a variance, including those categories of conditions which may be placed upon Land Use Approvals under Section 3.2.6.

3.4.7 Appeal from BOA Decisions
Appeals from decisions of the BOA may be made to the District Court, as provided by law, with the BOA as defendant and the variance applicant as a party. All parties to such action shall have the full right and authority to appeal subsequent adverse rulings and decisions.

3.5 Non-conforming Uses and Structures
Certain uses of land and buildings may be found to be in existence at the time of passage of these Regulations or amendments thereto that do not meet the requirements of the regulations. It is the intent of these Regulations to allow the continuance of non-conforming uses and structures. In an effort to facilitate the continuance of non-conforming uses and structures, a registration program has been created.

3.5.1 Expansion or Enlargement
A. A non-conforming structure may be extended or enlarged provided the portion of the structure to be extended or enlarged conforms to the requirements of these Regulations and the portion of the structure which is non-conforming is not enlarged or extended without a variance.
30-28-117 - Board of adjustment.

(1) The board of county commissioners of any county which enacts zoning regulations under the authority of this part 1 shall provide for a board of adjustment of three to five members and for the manner of the appointment of such members. Not more than half of the members of such board may at any time be members of the planning commission. The board of county commissioners shall fix per diem compensation and terms for the members of such board of adjustment, which terms shall be of such length and so arranged that the term of at least one member will expire each year. Any member of the board of adjustment may be removed for cause by the board of county commissioners upon written charges and after a public hearing. Vacancies shall be filled for the unexpired term in the same manner as in the case of original appointments. The board of county commissioners may appoint associate members of such board, and, in the event that any regular member is temporarily unable to act owing to absence from the county, illness, interest in a case before the board, or any other cause, his place may be taken during such temporary disability by an associate member designated for that purpose.

(2) The board of county commissioners shall provide and specify in its zoning or other resolutions general rules to govern the organization, procedure, and jurisdiction of said board of adjustment, which rules shall not be inconsistent with the provisions of this part 1. The board of adjustment may adopt supplemental rules of procedure not inconsistent with this part 1 or such general rules.

(3) Any zoning resolution of the board of county commissioners may provide that the board of adjustment, in appropriate cases and subject to appropriate principles, standards, rules, conditions, and safeguards set forth in the zoning resolution, may make special exceptions to the terms of the zoning regulations in harmony with their general purpose and intent. Where feasible, special exception may be made for the purpose of providing access to sunlight for solar energy devices. The board of county commissioners may also authorize the board of adjustment to interpret the zoning maps and pass upon disputed questions of lot lines or district boundary lines or similar questions, as they may arise in the administration of the zoning regulations.

(4) Meetings of the board of adjustment shall be held at the call of the chairman and at such other times as the board in its rules of procedure may specify. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses by application to the district court. The court, upon proper showing, may issue subpoenas and enforce obedience by contempt proceedings. All meetings of the board of adjustment shall be open to the public. 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 such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

(5) The governing body of a county that has entered into an intergovernmental agreement with a municipality located or partially located within that county for the purposes of joint participation in land use planning, subdivision procedures, and zoning pursuant to the authority granted in section 31-23-227 (2), C.R.S., may enter into an intergovernmental agreement with that municipality for the purpose of establishing a joint zoning board of adjustment for a specific area designated in the intergovernmental agreement.
30-28-118 - Appeals to board of adjustment.

(1) (a) Appeals to the board of adjustment may be taken by any person aggrieved by his inability to obtain a building permit or by the decision of any administrative officer or agency based upon or made in the course of the administration or enforcement of the provisions of the zoning resolution. Appeals to the board of adjustment may be taken by any officer, department, board, or bureau of the county affected by the grant or refusal of a building permit or by other decision of an administrative officer or agency based on or made in the course of the administration or enforcement of the provisions of the zoning resolution. The time within which such appeal shall be made, and the form or other procedure relating thereto, shall be as specified in the general rules provided by the board of county commissioners to govern the procedure of such board of adjustment or in the supplemental rules of procedure adopted by such board.

(b) No such appeal to the board of adjustment shall be allowed for building use violations that may be prosecuted pursuant to section 30-28-124 (1) (b).

(2) Upon appeals the board of adjustment has the following powers:

(a) To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, or refusal made by an administrative official or agency based on or made in the enforcement of the zoning resolution;

(b) To hear and decide, in accordance with the provisions of any such resolution, requests for special exceptions or for interpretation of the map or for decisions upon other special questions upon which such board is authorized by any such resolution to pass;

(c) Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the regulation or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under this part 1 would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the owner of such property, to authorize, upon an appeal relating to said property, a variance from such strict application so as to relieve such difficulties or hardship if such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning resolutions. In determining whether difficulties to, or hardship upon, the owner of such property exist, as used in this paragraph (c), the adequacy of access to sunlight for solar energy devices installed on or after January 1, 1980, may properly be considered. Regulations and restrictions of the height, number of stories, size of buildings and other structures, and the height and location of trees and other vegetation shall not apply to existing buildings, structures, trees, or vegetation except for new growth on such vegetation.

(3) The concurring vote of four members of the board in the case of a five-member board and of three members in the case of a three-member board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official or agency or to decide in favor of the appellant.
The following memorandum sets the policy for the line of measurement in 1994.

The Zoning Regulations have been revised for the definition of a setback, but the three listed interpretations for the line of measurement for setback purposes are current policy.

Jan, 2015

MEMORANDUM

TO: Routt County Board of Adjustment
FROM: Jane Grogan, Staff Planner
DATE: March 15, 1994
SUBJECT: Line of measurement for setback purposes

At the Board of Adjustment hearing last night, a question was raised about where a structure is measured for the purpose of setback. In particular, does the line of measurement include a roof overhang.

The definition of setback in Section 13 of the Zoning Resolution states: "Set-Back: The required distance, and the land resulting therefrom, between the center line of a public roadway, or some other designated line, and the closest possible line of a conforming structure. (March 7, 1972)"

I have received an interpretation from Planning Administrator Steve Fry as follows:

1. The face of a structure will be used for measuring setback. The foundation may or may not be the same line as the face. A standard roof overhang would not be considered a face.

3. A deck that requires a building permit: i.e. 30 inches above ground level, is considered a building face.

4. Any other space that is covered: e.g., carport; covered patio: living space that is cantilevered from the structure, would also be considered to be a "face of the structure". Patios, sidewalks, driveways, and decks that do not require building permits are not subject to building setback requirements.
I was doing some reading recently when I came across a summary of a court case from Wisconsin. See attached. It was interesting because the case seemed to hit on one of the issues we had talked about during the BOA retreat, namely separating personal hardship from the physical hardship or practical difficulty unique to the land.

The case is a good illustration that "practical difficulties" or "unnecessary hardship" do not include conditions personal to the owner of the land (i.e., a disability--or in our discussions, having more kids) but require special conditions unique to the property.

I hope this helps your understanding of this issue a little. Because this is a case from Wisconsin it is not "the law" in Colorado, so please consider it accordingly. That is, use the case as an illustration or an example only and not as an iron clad rule. If you have any questions, please make a note of them and pass them on to Ellen or Chris.
Zoning

Are variances required for personal disabilities?

WISCONSIN (11/23/99) — Klint owned a cabin abutting Grindstone Creek as it flowed into Lac Courte Oreilles in Sawyer County. He and his family used the cabin on summer weekends. Klint suffered from Marfan’s Syndrome. He had congestive heart failure, pulmonary hypertension, and restrictive lung disease, which necessitated the use of a room air concentrator or oxygen. A 50-foot-long hose connected him to his oxygen supply at the cottage.

Klint hired a contractor to build an addition to the cabin. The addition permitted Klint a greater view of the water and the sandbar area where his children played. Its linear design permitted him to keep his air hose out of the traffic pattern and move about without the hose getting tangled.

The addition was placed on the lake side of the cabin, and a triangular portion of it infringed upon the 40-foot average setback from the high water mark of the creek mandated by Sawyer County’s shoreland zoning ordinance. After construction was complete, the county zoning administrator issued Klint two citations, one for building without a permit and the other for violating the minimum setback.

Klint applied to the board for an after-the-fact variance. The board rejected the variance request on the grounds that it would be for the convenience of the owner and would not be due to special conditions unique to the property. The board ordered Klint to remove eight feet from his addition.

Klint filed a disability complaint under the Wisconsin Fair Housing Act, alleging the board discriminated against him. He claimed the board refused to permit him to make reasonable modifications to the cottage or make a reasonable accommodation under the zoning ordinance for his cottage. The matter was brought before an administrative law judge, who concluded the county violated the Fair Housing Act by refusing to grant a variance.

The board took the matter to the trial court, which reversed the judge’s order. The Department of Workforce Development then appealed the trial court’s decision.

The department asserted Klint’s disability would be a special condition resulting in an unnecessary hardship if the variance was not granted.

DECISION: Affirmed.

The board’s failure to grant the variance was not discriminatory.

Practical difficulties or unnecessary hardship did not include conditions personal to the owner of the land. Only conditions especially affecting the lot in question could be considered. When the property owner would have a reasonable use of his or her property without the variance, the variance request should be denied. There was no dispute Klint had feasible uses of the property without a variance. Additionally, the ordinance prohibited all property owners from violating the setback requirements, regardless of disability.

Citation: County of Sawyer Zoning Board v. State of Wisconsin Department of Workforce Development, Court of Appeals of Wisconsin, District Three, No. 99-0707 (1999).

see also: Snyder v. Waukesha County Zoning Board of Adjustment, 247 N.W.2d 98 (1976).

see also: State v. Kenosha County Board of Adjustment, 577 N.W.2d 813 (1998).

Immunity

Homeowner finds serious defects in home’s construction

WYOMING (11/10/99) — Jensen, who applied for a building permit in 1985, originally built Helm’s residence. During the construction of the house, Jensen submitted plans and drawings for approval to the Teton County Building Department. The department reviewed the plans and responded with a detailed Plans Correction List, noting a number of concerns, including requirements for changes in the foundation and electrical system of the home.

Jensen sold the home to someone else, who eventually sold the home to Helm. While inspecting the home to build an addition, Helm found allegedly serious defects in the construction.

Helm sued, alleging the county had breached its duty in inspecting the home. The county claimed governmental immunity and asked for judgment without a trial. Helm argued the county’s insurance policy covered his claim, waiving county’s government immunity. The court determined the relevant insurance policy purchased by the county did not cover Helm’s claim.
Conflicts of Interest, Bias, Ex parte Contacts and Public Meetings

1. Quasi-judicial acts, legislative acts and administrative acts: To apply the rules concerning conflicts of interest, bias, and ex parte contacts, you must first determine whether you will be involved in a quasi-judicial act, a legislative act or an administrative act. A quasi-judicial act is applying established rules to a particular application or property. Most of what the Planning Commission does is quasi-judicial. A legislative act involves making or recommending rules of general applicability (e.g. recommending changes to zoning or subdivision regulations). An administrative act relates to running the organization such as giving direction to the Executive Director to do a particular thing. Generally speaking, you must not have a bias, prejudice or conflict of interest when involved in a quasi-judicial act. When involved in either a legislative act or an administrative act you may bring your general views and beliefs to the table and act on them. However, there are still rules concerning conflicts of interest that must be observed.

2. Bias: In any quasi-judicial proceeding, a Planning Commission member should step down and not participate in any matter in which he or she has a bias or prejudice concerning the applicant, an opponent or the application. If you are not completely confident that you can set aside your feelings about a project or an individual and fairly apply the established rules to the application you should step down and not participate in the hearing in any fashion. In this respect, your membership on the Planning Commission may mean that you will give up your right to speak for or against a particular project. The alternative is to resign from the Planning Commission.

3. Conflicts of Interest: Any local government official is subject to the obvious prohibitions against accepting or seeking bribes and self-dealing, but is also subject to portions of the Colorado Code of Ethics. The portions of the Code applicable to Planning Commission members are set out below. As a member of the Planning Commission you are a “Local Government Official” as that term is used in the Code.

4. Ex parte Contacts and Public Meetings. Planning Commission members should avoid ex parte contacts with anyone in connection with a quasi-judicial act. As a local governmental body, the Planning Commission must conduct its business only in a public meeting, unless an executive session is permitted by statute. As a matter of fairness and due process, a quasi-judicial decision should be made only on facts and considerations of which all parties are aware and have an opportunity to challenge. Ex parte contacts are ones which occur outside of a public meeting. They can be as simple as a neighbor calling you to discuss a pending application.

In a small community they are often difficult to avoid but you should, if at all possible, do so. For example, if your neighbor did call, you could say: “Listen Fred, before you continue, I need to explain something. This application has to be considered at a public hearing. I will be required to report our conversation at the hearing and let everyone know what we have discussed. I think it would be a lot better if you would wait until the hearing and discuss your concerns with the whole Planning Commission then.”
If you can not avoid the contact, then you must disclose it and its contents at the hearing. If it is known by all that you do this routinely, it is likely that you will have fewer ex parte contacts to deal with.

*Ex parte* contacts are not prohibited in connection with legislative or administrative acts although they may negatively impact public debate.

**Getting Help and Answers:** It is very important to Routt County and to individual Planning Commission members that issues concerning conflicts of interest, bias, *ex parte* contacts and public meeting requirements are promptly and properly dealt with. If you have any questions concerning these issues you should let the Planning Director know.

**CODE OF ETHICS**

§ 24-18-101. Legislative declaration

The general assembly recognizes the importance of the participation of the citizens of this state in all levels of government in the state. The general assembly further recognizes that, when citizens of this state obtain public office, conflicts may arise between the public duty of such a citizen and his or her private interest. The general assembly hereby declares that the prescription of some standards of conduct common to those citizens involved with government is beneficial to all residents of the state. The provisions of this part 1 recognize that some actions are conflicts per se between public duty and private interest while other actions may or may not pose such conflicts depending upon the surrounding circumstances.

§ 24-18-102. Definitions

As used in this part 1, unless the context otherwise requires:

1. "Business" means any corporation, limited liability company, partnership, sole proprietorship, trust or foundation, or other individual or organization carrying on a business, whether or not operated for profit.
2. "Compensation" means any money, thing of value, or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another.
3. "Employee" means any temporary or permanent employee of a state agency or any local government, except a member of the general assembly and an employee under contract to the state.
4. "Financial interest" means a substantial interest held by an individual which is:
   a. An ownership interest in a business;
   b. A creditor interest in an insolvent business;
   c. An employment or a prospective employment for which negotiations have begun;
(d) An ownership interest in real or personal property;
(e) A loan or any other debtor interest; or
(f) A directorship or officership in a business.

(5) "Local government" means the government of any county, city and county, city, town, special district, or school district.

(6) "Local government official" means an elected or appointed official of a local government but does not include an employee of a local government.

(7) "Official act" or "official action" means any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.

(8) "Public officer" means any elected officer, the head of a principal department of the executive branch, and any other state officer. "Public officer" does not include a member of the general assembly, a member of the judiciary, any local government official, or any member of a board, commission, council, or committee who receives no compensation other than a per diem allowance or necessary and reasonable expenses.

(9) "State agency" means the state; the general assembly and its committees; every executive department, board, commission, committee, bureau, and office; every state institution of higher education, whether established by the state constitution or by law, and every governing board thereof; and every independent commission and other political subdivision of the state government except the courts.

§ 24-18-103. Public trust - breach of fiduciary duty

(1) The holding of public office or employment is a public trust, created by the confidence which the electorate reposes in the integrity of public officers, members of the general assembly, local government officials, and employees. A public officer, member of the general assembly, local government official, or employee shall carry out his duties for the benefit of the people of the state.

(2) A public officer, member of the general assembly, local government official, or employee whose conduct departs from his fiduciary duty is liable to the people of the state as a trustee of property and shall suffer such other liabilities as a private fiduciary would suffer for abuse of his trust. The district attorney of the district where the trust is violated may bring appropriate judicial proceedings on behalf of the people. Any moneys collected in such actions shall be paid to the general fund of the state or local government. Judicial proceedings pursuant to this section shall be in addition to any criminal action which may be brought against such public officer, member of the general assembly, local government official, or employee.

§ 24-18-104. Rules of conduct for all public officers, members of the general assembly, local government officials, and employees

(1) Proof beyond a reasonable doubt of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty and the public trust. A public officer, a member of the general assembly, a local government official, or an employee shall not:
(a) Disclose or use confidential information acquired in the course of his official duties in order to further substantially his personal financial interests; or
(b) Accept a gift of substantial value or a substantial economic benefit tantamount to a gift of substantial value:
   (I) Which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties; or
   (II) Which he knows or which a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken.
(2) An economic benefit tantamount to a gift of substantial value includes without limitation:
   (a) A loan at a rate of interest substantially lower than the commercial rate then currently prevalent for similar loans and compensation received for private services rendered at a rate substantially exceeding the fair market value of such services; or
   (b) The acceptance by a public officer, a member of the general assembly, a local government official, or an employee of goods or services for his or her own personal benefit offered by a person who is at the same time providing goods or services to the state or a local government under a contract or other means by which the person receives payment or other compensation from the state or local government, as applicable, for which the officer, member, official, or employee serves, unless the totality of the circumstances attendant to the acceptance of the goods or services indicates that the transaction is legitimate, the terms are fair to both parties, the transaction is supported by full and adequate consideration, and the officer, member, official, or employee does not receive any substantial benefit resulting from his or her official or governmental status that is unavailable to members of the public generally.
(3) The following are not gifts of substantial value or gifts of substantial economic benefit tantamount to gifts of substantial value for purposes of this section:
   (a) Campaign contributions and contributions in kind reported as required by section 1-45-108, C.R.S.;
   (b) An unsolicited item of trivial value;
   (b.5) A gift with a fair market value of fifty-three dollars or less that is given to the public officer, member of the general assembly, local government official, or employee by a person other than a professional lobbyist.
   (c) An unsolicited token or award of appreciation as described in section 3 (3)
   (c) of article XXIX of the state constitution;
   (c.5) Unsolicited informational material, publications, or subscriptions related to the performance of official duties on the part of the public officer, member of the general assembly, local government official, or employee;
   (d) Payment of or reimbursement for reasonable expenses paid by a nonprofit organization or state and local government in connection with attendance at a convention, fact-finding mission or trip, or other meeting as permitted in accordance with the provisions of section 3 (3) (f) of article XXIX of the state constitution;
   (e) Payment of or reimbursement for admission to, and the cost of food or beverages consumed at, a reception, meal, or meeting that may be accepted or received in
accordance with the provisions of section 3 (3) (e) of article XXIX of the state constitution;

(f) A gift given by an individual who is a relative or personal friend of the public officer, member of the general assembly, local government official, or employee on a special occasion.

(g) Payment for speeches, appearances, or publications that may be accepted or received by the public officer, member of the general assembly, local government official, or employee in accordance with the provisions of section 3 of article XXIX of the state constitution that are reported pursuant to section 24-6-203 (3) (d);

(h) Payment of salary from employment, including other government employment, in addition to that earned from being a member of the general assembly or by reason of service in other public office;

(i) A component of the compensation paid or other incentive given to the public officer, member of the general assembly, local government official, or employee in the normal course of employment; and

(j) Any other gift or thing of value a public officer, member of the general assembly, local government official, or employee is permitted to solicit, accept, or receive in accordance with the provisions of section 3 of article XXIX of the state constitution, the acceptance of which is not otherwise prohibited by law.

(4) The provisions of this section are distinct from and in addition to the reporting requirements of section 1-45-108, C.R.S., and section 24-6-203, and do not relieve an incumbent in or elected candidate to public office from reporting an item described in subsection (3) of this section, if such reporting provisions apply.

(5) The amount of the gift limit specified in paragraph (b.5) of subsection (3) of this section, set at fifty-three dollars as of August 8, 2012, shall be identical to the amount of the gift limit under section 3 of article XXIX of the state constitution, and shall be adjusted for inflation contemporaneously with any adjustment of the constitutional gift limit pursuant to section 3 (6) of article XXIX.

§ 24-18-105. Ethical principles for public officers, local government officials, and employees

(1) The principles in this section are intended as guides to conduct and do not constitute violations as such of the public trust of office or employment in state or local government.

(2) A public officer, a local government official, or an employee should not acquire or hold an interest in any business or undertaking which he has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by an agency over which he has substantive authority.

(3) A public officer, a local government official, or an employee should not, within six months following the termination of his office or employment, obtain employment in which he will take direct advantage, unavailable to others, of matters with which he was directly involved during his term of employment. These matters include rules, other than rules of general application, which he actively helped to formulate and applications, claims, or contested cases in the consideration of which he was an active participant.
(4) A public officer, a local government official, or an employee should not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when he has a substantial financial interest in a competing firm or undertaking.

(5) Public officers, local government officials, and employees are discouraged from assisting or enabling members of their immediate family in obtaining employment, a gift of substantial value, or an economic benefit tantamount to a gift of substantial value from a person whom the officer, official, or employee is in a position to reward with official action or has rewarded with official action in the past.

§ 24-18-108.5. Rules of conduct for members of boards and commissions

(1) Proof beyond a reasonable doubt of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty.

(2) A member of a board, commission, council, or committee who receives no compensation other than a per diem allowance or necessary and reasonable expenses shall not perform an official act which may have a direct economic benefit on a business or other undertaking in which such member has a direct or substantial financial interest.

§ 24-18-109. Rules of conduct for local government officials and employees

(1) Proof beyond a reasonable doubt of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty and the public trust.

(2) A local government official or local government employee shall not:

(a) Engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties;

(b) Perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent; or

(c) Accept goods or services for his or her own personal benefit offered by a person who is at the same time providing goods or services to the local government for which the official or employee serves, under a contract or other means by which the person receives payment or other compensation from the local government, unless the totality of the circumstances attendant to the acceptance of the goods or services indicates that the transaction is legitimate, the terms are fair to both parties, the transaction is supported by full and adequate consideration, and the official or employee does not receive any substantial benefit resulting from his or her official or governmental status that is unavailable to members of the public generally.

(3) (a) A member of the governing body of a local government who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body and shall not vote thereon and shall refrain from attempting to influence the decisions of the other members of the governing body in voting on the matter.

(b) A member of the governing body of a local government may vote notwithstanding paragraph (a) of this subsection (3) if his participation is necessary to
obtain a quorum or otherwise enable the body to act and if he complies with the voluntary
disclosure procedures under section 24-18-110 .

(4) It shall not be a breach of fiduciary duty and the public trust for a local
government official or local government employee to:

(a) Use local government facilities or equipment to communicate or
    correspond with a member's constituents, family members, or business associates; or

(b) Accept or receive a benefit as an indirect consequence of transacting local
government business.

§ 24-18-110. Voluntary disclosure

A member of a board, commission, council, or committee who receives no compensation
other than a per diem allowance or necessary and reasonable expenses, a member of the
general assembly, a public officer, a local government official, or an employee may, prior
to acting in a manner which may impinge on his fiduciary duty and the public trust,
disclose the nature of his private interest. Members of the general assembly shall make
disclosure as provided in the rules of the house of representatives and the senate, and all
others shall make the disclosure in writing to the secretary of state, listing the amount of
his financial interest, if any, the purpose and duration of his services rendered, if any, and
the compensation received for the services or such other information as is necessary to
describe his interest. If he then performs the official act involved, he shall state for the
record the fact and summary nature of the interest disclosed at the time of performing the
act. Such disclosure shall constitute an affirmative defense to any civil or criminal action
or any other sanction.

Planning/Planning Commission/Conflicts of Interest, Bias, Ex Parte Contacts and Public Meetings (2/3/2014)
Dealing with Bias and Conflicts of Interest

By Mark S. Dennison

Zoning officials must be mindful of ethical dilemmas and prevent improper influences from swaying their decision making. A landowner applying for variances, special use permits, rezonings, and other local zoning approvals is entitled to a fair and impartial decision by the local zoning body. If an official has a personal bias or conflict of interest regarding any aspect of the application, he should remove himself from the proceedings to ensure a decision free from any taint of bias.

This issue of Zoning News examines various types of ethical dilemmas faced by local zoning and planning officials and offers guidance on how to handle potential conflicts and improper influences during the decision-making process.

Bias and Conflicts of Interest

Although zoning ordinances and state enabling legislation provide standards and criteria for deciding variances and other types of applications, zoning decisions do not always turn on straightforward assessments of objective factors. Community pressures and outside interests often infiltrate the process and threaten an applicant's right to an impartial decision. Unfortunately, the ad hoc, discretionary nature of many zoning decisions exposes them to potential abuse and unfairness.

Zoning officials are susceptible to community pressures, political influences, and personal bias because of the localized nature of zoning regulation. Zoning officials are generally appointed because of their close contact with the community, understanding of community needs, and interest in promoting the public welfare. But an official's close association with the community increases the chance of bias or conflict of interest arising in regard to a particular zoning decision.

Quasi-Judicial vs. Quasi-Legislative Decisions

The distinction between quasi-judicial and quasi-legislative zoning actions can be especially important in challenges alleging zoning bias. Some courts will accord substantial deference to decisions labeled quasi-legislative, declining to question the motives for the zoning body's decision, notwithstanding the possible presence of bias or conflict of interest.

For purposes of reviewing zoning decisions, this distinction arises predominantly in the context of rezonings. Courts universally agree that decisions on variances and special use permits, building permits, and the like are quasi-judiciary in nature and, therefore, subject to judicial review for evidence of zoning bias. On the other hand, most courts consider rezonings to be legislative in nature. The rezoning is presumed to be as valid as the enactment of the original ordinance, and the burden is on the challenger to overcome that presumption. The court will not invalidate the grant or denial of a rezoning on grounds of bias or conflict of interest—or for any other reason—unless the rezoning is clearly shown to be "arbitrary and capricious," "an abuse of discretion," "totally lacking in relationship to the public health, safety, and welfare," or some variation on the highly deferential standard applied to legislative acts.

This legislative label may not settle the issue, however, because some courts will look beyond the legislative label to evaluate the type of rezoning action taken by the zoning body. [See, e.g., North Point Breeze Coalition v. Pittsburgh, 60 Pa. Commw. 298, 431 A.2d 398 (1981) (when a governing body applies specific criteria to a single applicant and a single piece of property, the governing body is acting in its adjudicative capacity and not its legislative capacity).] A minority of jurisdictions including Oregon, Washington, and Idaho make a distinction between comprehensive rezonings and piecemeal rezonings that affect single or small parcels of land. These courts characterize small parcel rezonings as quasi-judicial in nature. [See Fafano v. Board of County Commissioners, 264 Ore. 574, 507 P.2d 23 (1973).]

Im partiality Standards

The law governing bias and conflicts of interest in zoning decision making has been refined through ongoing judicial analysis. A finding of zoning bias depends on individual facts and circumstances. If the evidence shows that a zoning decision was tainted, the usual remedy is for the court to invalidate the decision because the biased decision maker should have disqualified himself from participation. Courts have said that when a zoning official must disqualified himself because of bias or a conflict of interest, the disqualification is absolute and cannot be waived. [See, e.g., McVey v. Board of Adjustment of the Township of Montclair, 213 N.J. Super. 109, 516 A.2d 634 (App. Div. 1986).]
A biased decision maker's participation in the actual vote on a zoning application is not necessary for invalidation. A biased zoning official may disqualify herself from voting, and the court will still invalidate the decision if it finds that she participated in the proceedings or otherwise influenced the zoning body's voting members. (See, for example, State v. Zoning Board of Adjustment of the Borough of Manahawkin, 260 N.J. Super. 341, 616 A.2d 942 (App. Div. 1992); Mauk v. Blaine County, 112 Idaho 697, 735 P.2d 1008 (1987).)

Likewise, the decision would be invalidated if the biased official voted, even though the zoning action would carry without the necessity of counting that vote. Further, courts may invalidate a zoning decision even when the biased official is only a member of an advisory board that makes findings and recommendations to the zoning body that ultimately makes the decision (see Buell v. City of Bremerton, 80 Wash. 2d 409, 495 P.2d 1358 (1972) (biased planning board member participated in recommendation to city council concerning zoning change)).

Courts have found that the self-interest of one official infects the action of the other members of the zoning body regardless of their disinterestedness. One court denounced a township supervisor's appearance before the zoning board over which he had appointment powers as an imposition of duress on members of the decision-making body and a violation of basic due process. The supervisor appeared on behalf of a variance applicant. (Abrahamson v. Wendell, 76 Mich. App. 278, 256 N.W.2d 613 (1977).)

Courts have developed a number of approaches and standards for evaluating problems of bias and conflicts in zoning decisions. These approaches vary by state and take particular factual circumstances into account. Courts have articulated several tests or standards for addressing zoning bias. Many courts use a combination or variation of more than one approach.

Actual Bias. The actual bias standard is the most stringent test and distinguishes between situations where a clear benefit will be conferred on a zoning decision maker and instances when only a potential for benefit exists. Courts applying this approach require clear and tangible evidence of actual bias as opposed to the mere appearance of impropriety or the potential for partiality.

Substantial Interest or Temptation. Under this standard, an aggrieved landowner must show more than a mere appearance of unfairness but need not prove the existence of "actual" bias.

This standard is premised on the need to remove public officials from situations where a potential conflict of interest would have the capacity to tempt or improperly influence an official's decision. Under this test, direct and substantial interests provide grounds for disqualifying an official from participation in a zoning decision, whereas indirect or remote interests do not. Thus, the focus centers on the probability that particular interests may affect the ultimate outcome of a zoning decision.

Appearance of Unfairness. Some courts, in weighing evidence of potential bias, will disqualify an official and invalidate the zoning body's decisions if a mere appearance of unfairness exists. Courts using this lesser standard, most notably those in the state of Washington, emphasize the need for public perceptions of fairness and confidence in the zoning process.

In virtually every zoning bias case, the courts will discuss the importance of the appearance of fairness in zoning decisions. Most courts will not, however, rely on it as a separate standard and will not hold that an appearance of unfairness alone suffices to invalidate a zoning decision. Instead, they will consider the appearance of fairness in combination with evidence of "actual" bias or "substantial interest or temptation." In this sense, threat to public confidence in the zoning process is viewed in concert with actual or potential conflicts and operates as an additional rationale for regulating bias.

Types of Bias or Conflict of Interest

In applying their various approaches to determining bias and conflicts of interest in zoning decisions, the courts will review evidence of several relevant factors. The various types of zoning bias and conflicts of interest can be grouped into fairly distinct categories, one or more of which determines every zoning bias case.

Financial Interests. Financial interests represent the most prevalent type of conflict. When zoning decision makers stand to benefit financially from ruling in a certain way on a zoning application, the zoning official's failure to disqualify himself from participating in the decision clearly arouses an appearance of unfairness and may be evidence of actual bias or "substantial temptation," which may provide sufficient justification for the court to invalidate the zoning decision. Zoning decisions tainted by financial influences especially undermine public confidence in the process because this type of bias creates a strong impression of local government corruption and dealmaking.

Courts have invalidated zoning decisions both in cases where a local official actually benefited and in situations where the decision maker could potentially benefit. Zoning decisions have been struck down when a zoning official stood to gain financially as a neighboring landowner, as an employee, as a business associate of an affected landowner, or as the seller or purchaser of property impacted by the zoning decision. The most obvious type of financial conflict arises when the zoning official's or property will be affected financially by a proposed zoning.

Associational Interests. This type of bias arises in situations where a zoning official's impartiality may be compromised because she has a personal or business relationship with

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someone who will be affected by the decision. Although this relationship may not involve a financial conflict of interest, courts recognize that the associational interest may just as improperly bias the zoning official's decision.

Although the evidence is generally circumstantial that a zoning official's familial, business, or other relationship actually has caused a biased decision, an appearance of unfairness is usually evident. Courts applying this standard will invalidate decisions when an associational interest raises the specter of impropriety.

As with other types of potential conflicts of interest, the courts must weigh the evidence to determine whether the associational conflict is great enough to justify invalidating the zoning decision. They will generally examine the nature of both the association and the underlying interest to determine whether it warrants invalidation. Generally, the underlying interest has a greater impact on the court's determination of the issue of impartiality, but a close personal relationship may indicate just as strong a propensity toward bias.

Close family relationships are usually subject to greater judicial scrutiny. More distant familial relationships are generally tolerated, although the nature of the underlying interest may justify invalidating the zoning decision.

The potential for bias also may exist because of a zoning official's relationship to various community organizations, although the nature of the underlying interest is usually the determining factor. For instance, courts have found that mere membership in a church that has an interest in proceedings before the zoning body is not enough to warrant invalidating a zoning decision without evidence of actual bias.

*Prejudice and Bias.* This category is generally based on statements made by a zoning official that reflect a prejudice of the merits of a particular zoning application. If the landowner can prove that the zoning decision maker was somehow predisposed to decide his application in a certain way, a court may choose to invalidate the decision. However, a zoning official's particular political view or general opinion on a given issue will generally not suffice to show bias.

Courts recognize that public officials have opinions like everyone else and inevitably hold certain political views related to their public office. In fact, zoning officials are typically chosen to serve in their official capacity because they are expected to represent certain views about local land-use planning and development. For instance, a zoning official may have campaigned for office on a pro- or antidevelopment stance. The courts tolerate this type of opinion because it is part of the political process. Moreover, official opinions concerning land development generally represent community values and preferences that may implicate important public welfare concerns.

Only when the opinion rises to a level of personal or self-interest or shows prejudgment of a specific situation is the right to an impartial decision violated. This might occur if a zoning official made statements prior to or outside of the ordinary decision-making process that indicated a strong preconception about the decision. Whether a particular statement would be strong enough evidence of bias is a fact-based determination for the courts. In one case, a Rhode Island court found sufficient evidence of bias when a zoning board member told opponents of a variance application prior to the hearing that "we are going to show it down your throat." [*Barbara Realty Co. v. Zoning Board*, 128 A.2d 342, 343 (R.I. 1957)].

*Ex Parte Contacts.* Proof of ex parte contacts may also show that a zoning decision was tainted by bias, although the courts may tolerate this as a part of the political process. Ex parte contacts—discussions of a topic outside official proceedings—frequently occur through lobbying efforts by various interest groups seeking to influence the decisions of public officials. In the context of quasi-legislative decisions, such as rezonings, the courts are especially reluctant to scrutinize ex parte lobbying efforts because of the separation of powers and First Amendment rights to influence the political process. However, when ex parte contacts are present in the context of quasi-judicial zoning decisions, such as variances and special use permits, courts will be more receptive to challenges on grounds of zoning bias.

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**Idaho Code § 67-6501** (prohibits participation by members of governing boards or committees in matters in which there is an economic interest by self or by relations).

**Idaho Code § 67-6506** (regulates the economic interest of members of the governing board, their relatives, employer, and employees).

**Ind. Code Ann. §§ 36-7-4-223, 36-7-4-909** (regulating planning commission and board of adjustment conflicts).

**Md. Ann. Code art. 40A, § 3-101** (prohibits public officials from participating in matters in which they have a conflict of interest).


**Mo. Ann. Stat. § 105.462** (prohibits participation by member where decision may result in direct financial gain or loss to him).

**Mont. Code Ann. § 2-2-125(b)** (prohibits an officer or employee of local government from participating in official acts in which he has a direct and substantial financial interest).


**N.M. Stat. Ann. § 3-10-5** (any member of a governing board having any possible financial interest in any policy or decision is required to disclose matters).

**N.Y. Gen. Mun. Law § 800-809** (prohibiting conflicts of interest of municipal officers and employees).

**Ore. Rev. Stat. § 244.120(1)(a)** (requiring elected public officials other than legislators to announce potential conflicts prior to acting thereon).

**R.I. Gen. Laws § 36-14-4** (prohibits participation when there is a "substantial conflict of interest").

**S.C. Code Ann. § 8-13-410** (no municipal official or employee shall use his/her position for financial gain).


**Wis. Stat. Ann. § 19.46** (no public official shall take official action on any matter in which he/she has a substantial financial interest).
State Conflict-of-Interest Statutes
A few state statutes specifically regulate bias and conflicts of interest in zoning decisions. Three states—Indiana, New Jersey, and New Hampshire—have statutes that prohibit members of a planning commission or zoning board of adjustment from participating in hearings in which they have a direct or indirect substantial interest. These statutory prohibitions are limited to partiality by zoning bodies that function in an adjudicative capacity.

A few other states, such as Virginia, New York, and Connecticut, have broader regulations that require impartiality by zoning decision makers who act in either a legislative or adjudicative capacity. Connecticut’s statute has the most comprehensive scheme. For example, it prohibits zoning officials from participating in any hearing or decision in which they have either a direct or indirect personal or financial interest.

Several other states have general governmental ethics and conflict-of-interest statutes that provide a basis for regulating various types of bias and conflicts by public officials. At least 19 have statutes that prohibit participation by local officials in decisions in which they or a particular associate have a financial interest. Relatively few cases have been decided under these statutes, however, so the precise scope of their application in the context of zoning bias is uncertain.

In the Public Interest
Zoning officers should make every conceivable effort to protect the integrity of the zoning and land-use planning process through impartial decision making. Biased decisions not only undermine public confidence in the local zoning body but are more susceptible to unwanted and costly court challenges.

Zoning Reports
Montgomery County
Open Space Preservation: Program Recommendations

Late last year, Montgomery County in suburban Philadelphia approved a 10-year, $100 million program for open space acquisition. This document details the rationale behind the program as developed by the task force assigned by the county board to study the issue.

Modeling Future Development on the Design Characteristics of Maryland’s Traditional Settlements
Maryland Office of Planning (in cooperation with the School of Architecture, University of Maryland), 301 W. Preston St., Room 1101, Baltimore, MD 21201. August 1994. 112 pp. $2.

Neotraditional and cluster designs for rural and suburban communities have been attracting increased attention in recent years as planners seek new solutions to the problem of urban sprawl. This effort, the result of a university research seminar on small town paradigms, examines a series of traditional Maryland communities and concludes with alternative models for zoning ordinance language to facilitate traditional design. The appendices include sample provisions of local comprehensive plans and zoning ordinances from existing communities.

Big Box Retail in the Big Apple?
The New York City planning department wants to give big retailers the key to the city—and much of the small business community is preparing to change the lock if it does. Seeking to reverse the city’s significant decline in retail sales and employment, the department is proposing to change the zoning of manufacturing and industrial districts to encourage specialized discount retailers and warehouse stores. The 20,000 acres targeted include abandoned and underused industrial land in every borough but Manhattan.

Current zoning allows only 10,000 square feet for food, department, and clothing stores and an array of other retail uses within areas zoned for light and heavy manufacturing. Large retail stores seeking to locate in these districts must apply for a special permit, which can take years. The proposal would allow any retail development up to 100,000 square feet to be permitted as-of-right on wide streets. Others would need a special permit from the planning commission. The planning department argues that making it easier for discount stores to locate in abandoned industrial areas will promote investment, new retail developments, generate employment opportunities, and increase sales and property tax revenues.

But many small storekeepers oppose the plan, claiming it creates an unfair playing field. Should Mayor Rudolph Giuliani support it, the city planning commission would then review it. A state-mandated environmental impact study and approval by both the borough presidents and community boards would follow before it could go to the city council.  

Kevin J. Krizek
City of Aurora

Guidance to Planning Commissioners

PUBLIC HEARINGS

The purpose of a public hearing is to receive evidence to which the Planning Commission, or City Council, applies the criteria for review. It is the task of the Commission to determine whether the evidence presented is relevant and whether it is competent or credible. After sifting through the evidence, the Commission or Council makes certain findings of fact, and then makes its decision of approval or denial of the application. The member of Council or Commission should take the opportunity to question staff, applicant, and members of the public in order to develop evidence on the record. A member’s personal experiences can be verified by effective questioning. If it is not in the record, a judge will not sustain your decision.

ABUSE OF DISCRETION

It is an abuse of discretion when the findings do not support the decision of the Commission; for example, when the findings show that a particular application is compatible, but the decision is denial. It is also an abuse of discretion when the evidence does not support the findings. If, for example, evidence is presented that there are significant traffic impacts for a development proposal, the Council could not make a finding that there are no traffic impacts. When the record of the evidence supports the findings and the findings are consistent with the conclusion, a court must uphold the decision of Planning Commission or City Council.

Remember:

Decision = Evidence Developed on the Record
Criteria Established by City Code

IMPARTIAL DECISION

It is important for Commission and Council to be impartial in its decision making. Every decision that involves
quasi-judicial review must be made impartially. The Commissioner or Council Member cannot make a decision on a proposal until after all the evidence has been received. A decision cannot be based on matters outside of the record. If, for example, a Commissioner has visited the site of a proposed development, and has noticed certain physical characteristics that may influence that Commissioner’s decision, it is important for the Commissioner to bring this information up in the public hearing. This provides an opportunity for staff, the applicant, and neighborhood groups to comment on the information. Planning Commission has the authority to defer the decision in order to obtain more information.

EX PARTE CONTACTS

It may happen that applicants or neighborhood groups may try to influence a decision by calling the Council Member or Commissioner on the phone, and explaining a project or explaining their opposition to a project, or by asking the Commissioner to come down to review project plans and architectural elevations and the like. Because the decision is based upon the evidence presented at the public hearing, the best thing to do is to suggest to the person or group that they should attend the public hearing and present their evidence to the whole Commission or Council because only evidence developed at the hearing can be considered in the decision making. If, however, a Commissioner has a neighborhood meeting or a meeting with an applicant, and certain information arises from that meeting that may have some influence on the Member’s decision, the Commissioner or Council Member should divulge that information at the public hearing so that the applicant, staff, or neighborhood groups can respond.
A member of the commission shall not participate in any decision-making process if a conflict of interest is present.

**Conflict of Interest**

**Table 1**

<table>
<thead>
<tr>
<th>Relationship That Do Not Constitute a Conflict of Interest</th>
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<tbody>
<tr>
<td>• Election to other public office</td>
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<tr>
<td>• Holding appointment to other public commissions</td>
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<tr>
<td>• Membership in our country's financial institutions</td>
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<tr>
<td>• Holding personal accounts, commercial accounts, or lines of credit</td>
</tr>
<tr>
<td>• Serving as an officer or board member of a nonprofit corporation</td>
</tr>
<tr>
<td>• Serving as an officer of a chartered organization or community association</td>
</tr>
</tbody>
</table>

In all cases, a member must be able to respond objectively to interests in matters placed before the commission (see Table 2).
Participation. Since the nature of the committee could
decide in a conflict or conflict exist, and with it, from
participants in the decision process. This is due to the
case is an inherent conflict of interest and conflict,
A number of issues involving a conflict of interests
must be considered. If the interests of the
professional, businesses, and social relationships, it is
necessary to seek legal advice before
decision-making. In this context, many governments
have introduced a legal framework to regulate the
case. A member in doubt as to the existence of a conflict of
interest should consult the legal counsel of the council
or other governmental body.

2. A member in doubt as to the existence of a conflict of
interest should consult the legal counsel of the council.

The commission

involved in substantiating the existence of cases pending before
the commission. This consultation, however, should
not be regarded as a conflict of interest. This consultation, however,
should not be regarded as a conflict of interest. This consultation, however,
should not be regarded as a conflict of interest.

A member in doubt as to the existence of a conflict of
interest should consult the legal counsel of the council.

Although all members should seek the assistance of the
chair or other persons in their interest,
the chair should indicate this.

A member in doubt as to the existence of a conflict of
interest should consult the legal counsel of the council.

Potential conflicts of interest

should come to know that any member

Commission Member V & I wish to comment that if the

Conflicts of Interest

Table 2

A CONFLICT OF INTEREST

RELATIONSHIPS CONFLICTING
6. Use and Abuse of the Commission (page 146)
5. Use and Abuses of the Charter (page 143)
4. Conflict of Office (page 77)
3. Character and Intentions of Applicants (page 2)
2. Reasonable, Nongrillatory, and Nonexpiatutory Decisions
1. Character and Intentions of Applicants

The reader may wish to review the related topics:

Related Topics

Testimony of other parties may influence deliberations of the
participating — may influence deliberations of the
presence of a member — even though no longer
commission members have reached a decision. The
withdrawing from the chamber until the remaining
exhibits finds that it is critically sensitive, he or she should
shall with respect to the issue,

having decided a conflict of interest, the member should be
collaboration does not change commission decisions. Once
participated in deliberations prior to the decision of the
participant on the issue; the issues that the participant

if a conflict of interest exists, and withdraws from all
should request special privileges of the charter, and now

A member who becomes aware of a conflict of interest
not to expedite the responsibilities of office.

Formal Appeal of Decision-Makers

However, the members specify a conflict of interest as,

some state statutes and commission by-laws do require,

Prejudice the decision of others, it should not be shared,

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