



# FOUNTAIN INN

## CITIZEN'S GUIDE

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BOARD OF ZONING APPEALS BASICS

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## BOARD OF ZONING APPEALS BASICS

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### ABOUT THE ZONING ORDINANCE

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The concept of zoning is relatively simple: Land in a jurisdiction is divided into districts or zones in order to regulate what kinds of uses may be located within the zone. Each zone has a specific set of permissible uses and a set of design standards. These standards regulate the location of buildings by requiring a predetermined distance from the lot line to the building edge, which is called a “setback” because the building must be set back from the lot lines on the front, sides, and rear of the lot. Typical standards set maximum limits for building height and amount of lot coverage, and minimum requirements for the amount of landscaping and parking.

What happens when a lot is unusual and cannot be developed while meeting all of the standards? Zoning ordinances typically include a means of varying from the required standards, which is called a “variance.”

The uses that are identified in advance as permissible within a zoning district are often referred to as uses “by right,” which means that each use is identified as one that may be located within the district if it conforms to the design standards and other regulations that apply to the district. No specific permission is required for the use itself, only the conformance of the buildings and site features with the standards for development. Conversely, other uses may be permissible where additional standards are met to ensure that each use is compatible with the uses and character of the district. These other uses are often called “conditional uses” or “special exceptions.” Special exceptions require specific approval for the use as well as approval for the development of the site.

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### WHAT IS THE BOARD OF ZONING APPEALS

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In general, a board of zoning appeals is the body established to hear appeals of decisions rendered by administrators, applications for situations that depart from the zoning regulations, applications for some matters that require interpretation, and applications for matters that require the exercise of discretion.

South Carolina law specifically authorizes the zoning ordinance to provide for a board of zoning appeals as a part of the administrative mechanism designed to enforce the zoning ordinance. The board of zoning appeals has the authority to make final administrative decisions for the local government concerning the zoning ordinance, subject to appeal to circuit court.

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### POWERS OF THE BOARD OF ZONING APPEALS

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South Carolina law lists the powers of the board of appeals. The powers of the board are limited to three specific subject matter areas:

- Determining appeals from administrative decisions of the zoning administrator.
- Granting or denying of applications for variances.
- Granting or denying of applications for special exceptions.

## **APPEALS FROM ADMINISTRATIVE DECISIONS**

When city staff makes a land use decision rather than City Council or the planning commission, staff's decision is referred to as an "administrative decision"; a challenge to staff's decision is called an "administrative appeal."

The board has the exclusive power to hear and decide appeals where it is alleged the zoning administrator, in the enforcement of the zoning ordinance, erred in an order, requirement, decision or determination. An example of an appeal from an administrative decision would be if someone disagrees with how the planning staff interprets a provision of the zoning ordinance. In such cases, the board may reverse or affirm, wholly or in part, or may modify the order, requirements, decision or determination of the zoning administrator. The board has all the powers of the zoning administrator in such cases and may issue or direct the issuance of a permit.

In its decision on an administrative appeal from a decision of the zoning administrator, the board is not bound by the conclusion or reasoning of the zoning administrator and may consider and apply the appropriate provisions of the zoning ordinance as dictated by the facts before it. However, if staff's interpretation is reasonable, it should be upheld. Only when a party has demonstrated that staff's interpretation is unreasonable should the board overturn staff's interpretation.

## **VARIANCES**

Under South Carolina law, the board has the power to hear and decide appeals (requests) for variances when strict application of the zoning ordinance would result in "unnecessary hardship." A variance allows the board to modify an otherwise legitimate zoning restriction when, due to unusual conditions, the restriction may be more burdensome than was intended. The variance must not impair the public purpose.

To obtain a variance on the ground of "unnecessary hardship," there must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation. An owner is not entitled to relief from a self-created or self-inflicted hardship. A claim of unnecessary hardship cannot be based on conditions created by the owner, nor can one who purchases property after the enactment of a zoning regulation complain that the nonconforming use would work a hardship upon him.

Variances can sometimes significantly change the character of an area and should be carefully considered. Variances can potentially derail implementation of parts of the comprehensive plan.

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

Per Fountain Inn's zoning ordinance, the board may grant a variance in an individual case of unnecessary hardship if the board makes and explains **in writing all** of the following findings.

1. *There are special conditions and circumstances which are peculiar to the land, structure or building involved which are not applicable to other lands structures or buildings in the same district.* Typically, extraordinary conditions mean irregularity in the shape of the lot, exceptional topographical features, or other physical conditions. The idea is that the lot existed with specific physical conditions prior to the imposition of the zoning requirements. The provisions of the zoning ordinance may be appropriate for most lots within the district but limit the development of the affected lot to the point of hardship. These physical conditions are present in such a location or in such quantity that the property cannot be developed in compliance with district standards. Furthermore, the features themselves may have value to the community, and the variation in site design standards is a trade-off in achieving protection of the features.
2. *These conditions do not generally apply to other property in the vicinity, particularly those in the same zoning district.*
3. *Because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property in a manner consistent with others in the zoning district.* A property owner is not entitled to a variance simply because he cannot obtain the maximum economic return from his property. Rather, the board should only grant a variance when a physical feature of the property, coupled with the local government's regulations, precludes the property owner from obtaining reasonable use of his property.
4. *The need for the variance is not the result of the applicant's own actions.* The premise here is to avoid a deliberate bypassing of zoning regulations through a piecemeal approach to development. Because a variance grants permission to develop land without complying with all of the zoning regulations, it is important to ensure that the variance is justified by something other than the applicant's previous actions.
5. *The authorization of a variance does not substantially conflict with the Comprehensive Plan and the purposes of the Zoning Ordinance.* Variances can potentially allow for significant changes to the character of an area and may derail implementation of parts of the comprehensive plan and zoning ordinance.
6. *The authorization of a variance will not result in a substantial detriment to adjacent property or the public good, and the character of the district will not be harmed by the granting of the variance.* This provision is intended to protect the compatibility of the neighborhood. The use that receives a variance should fit the neighborhood in terms of scale, site features, intensity of development, and other design aspects. The principles of compatibility do not require sameness. The principles of compatibility do require harmony and transition from one use to another.
7. *The reason for the variance is more than simply for convenience or to allow the property to be utilized more profitably.*
8. *The variance requested is the minimum variance that will make possible the legal use of the land, building, or structure.* This rule helps ensure that the granting of a variance does not confer special privileges on the property owner that are not enjoyed by other similarly situated properties. This rule also eliminates the grant of a variance for social or personal hardships, which are not a proper basis for hardship in any case.

When reviewing a request for a variance, the board should also consider the following applicable policies:

- The fact that the property may be used more profitably, if a variance is granted, may not be considered as grounds for a variance.
- Often, a property owner wishes to achieve a particular design and is unable to do so because of some physical conditions of the property. Alternate designs are possible but do not meet the property owner’s preferences or may not yield the best economic return. It is inappropriate to grant such variances.
- In granting a variance, the board may attach conditions to it. These conditions should be the requirements that ensure compatibility, that the property owner does not receive special privileges, and that the variance is the minimum modification necessary to achieve the purpose. The conditions should be consistent with the spirit and intent of the zoning regulations, and should be designed to minimize any adverse impact that may arise from the grant of a variance.
- The board may not grant a variance that would allow the establishment of a use not otherwise permitted in a zoning district, physically extend a nonconforming use of land or change the zoning district boundaries shown on the official zoning map.
- The board should take care to review each application on its own merit. Previous decisions—especially those that were not made in accordance with the rules governing variances—do not set a precedent. Poorly supported decisions in the past should not lead to poor decisions now or in the future.

#### SPECIAL EXCEPTIONS

Additional standards may be needed for some specific uses to ensure that they are compatible with the character of the neighborhood or district. These “other” uses are typically called “special exceptions.” The board of appeals has the exclusive power to permit uses by special exception subject to standards and conditions in the zoning ordinance. The board may assign conditions to the approval of special exceptions in order to ensure compatibility.

As with considerations of variance requests, the board, in granting or denying a request for a special exception, must apply the standards and conditions imposed by the zoning ordinance. According to Fountain Inn’s zoning ordinance, the board may permit a use by special exception if the board makes and explains **in writing all** of the following findings.

1. *The use is allowed as a Special Exception in the zoning district.* Article 3 of the zoning ordinance indicates what uses require a special exception within the various zoning districts.
2. *The proposed Special Exception use is consistent with the spirit, purpose and intent of the City of Fountain Inn’s Comprehensive Plan.* A special exception can potentially allow for significant changes to the character of an area and may derail implementation of parts of the comprehensive plan.
3. *The proposed Special Exception use is consistent with the “purpose and intent” statement of the applicable zoning district.* Each zoning district has a statement explaining the purpose of that specific district. It is important that a special exception continue to maintain that purpose.
4. *The proposed Special Exception use will be constructed, operated and maintained so as to be compatible with the existing or intended character of the applicable district and so as not to change the essential character of the area in which it is proposed.* This provision is intended to protect the compatibility of the neighborhood. A use that receives a special exception should fit the neighborhood in terms of scale, site features, intensity of development, and other design aspects. Sameness is not required but the special exception use should maintain compatibility, harmony, and transition from one use to another.

5. *The proposed Special Exception use is compatible with the existing uses adjacent to and near the property. This provision helps to preserve and maintain the existing character of the neighborhood.*
6. *The proposed Special Exception use does not have an adverse effect on any site or feature of historical, cultural, natural, or scenic importance. It is important to preserve features of significance within the City; a special exception should not be detrimental to those features.*
7. *The proposed Special Exception use is consistent with existing and planned pedestrian and vehicular circulation adjacent to and near the property.*
8. *The adjacent streets and highways are or will be adequate to carry any additional traffic generated by the proposed Special Exception use.*
9. *The proposed Special Exception use will be adequately served by public facilities and services, such as traffic operations along streets, police and fire protection, drainage structures, water and sewage facilities and primary and secondary schools.*
10. *The proposed Special Exception use will not involve uses, activities, processes, materials and equipment or conditions of operations that, in comparison to by-right permitted uses in the district, will be hazardous, detrimental or disturbing to the natural environment, or the public health, safety and welfare by reason of excessive production of traffic, noise, smoke, odors or other such nuisances.*
11. *The proposed Special Exception use will conform to any specific criteria or conditions specified for that use in the applicable zoning district. Article 3 of the zoning ordinance lists criteria specific to the use that must be met in order to qualify for a special exception.*
12. *The application must be in compliance with other applicable provisions provided in the zoning ordinance.*

#### **APPEALS TO THE BOARD**

Appeals to the board and appeals from decisions of the board must follow the prescribed procedures. Appeals from administrative actions and decisions of the zoning administrator are taken to the board of zoning appeals, then to circuit court and finally to the state appellate courts. An appeal from an administrative decision of the zoning administrator is never taken to the governing body. Appeals from decisions of the board on variances or special exceptions are also taken to circuit court and finally to the state appellate courts.

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#### **ORGANIZATION AND OPERATION**

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Fountain Inn City Council has created a board of zoning appeals of seven members. The City Council appoints members of the board of zoning appeals for staggered three-year terms. The City Council may remove for cause any member of the board of zoning appeals prior to the expiration of that member's term.

It is important for the board of zoning appeals to organize itself and operate in accordance with South Carolina law and the local zoning ordinance. The essential elements of the organizational structure of the board include the following:

- **Chairperson.** The board must elect one of its members as chairperson. The chairperson serves for one year or until a successor is elected and qualified. The chairperson may be reelected.
- **Secretary.** The board must appoint a secretary. The secretary may be an officer of the governing authority or of the zoning board. It is customary for the zoning administrator to be appointed as secretary.
- **Rules of Procedure.** The board must adopt rules of procedure complying with South Carolina law and the local zoning ordinance. The for these written procedures is to ensure that board members, the public, staff, and elected and appointed officials of the

local government know how various operating matters will be handled. The rules of procedure should address the following elements as a minimum.

- Election of a chairperson and duties
- Procedure for electing acting chairperson
- Appointment of a secretary and duties
- Procedures for calling meetings
- Time and place for meetings
- Public notice of meetings to comply with the Freedom of Information Act and with South Carolina law
- Setting agenda
- Quorum and attendance requirements
- Rules of procedure for conducting meetings
- Time for appeal from decision of zoning official
- Time and procedure for hearing appeals, variances and special exceptions
- Time and procedure for rendering and serving decisions
- Procedure for making and keeping records of actions (including minutes of all meetings)
- Procedure for ordering remands to the zoning administrator and otherwise granting re-hearings by the board
- The oath administered to witnesses

It is typically the responsibility of city staff to take in applications, and provide an analysis and a report on whether the requested action is consistent with the plan and complies with the regulations. A staff member attends meetings of the board of zoning appeals to present the report, make a recommendation, and answer questions.

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#### **MAKING THE MOST OF MEETINGS**

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All actions of the board require public hearing. A public hearing is a formal proceeding to receive public comment on a particular matter, such as a variance. Any party may appear at the hearing in person, by agent or by attorney. The planning staff and any other persons may appear before the board at the hearing and present evidence in support of or in opposition to the request.

The agenda should be followed, and discussion should not be focused on extraneous issues. Comments on each agenda item should be limited to relevant issues. If the board has no authority over the covenants of a community, the chair should not entertain questions from board members or the public about the community's covenants, and any comments about the covenants should be ruled out of order. Members of the audience frequently want to discuss issues that are not applicable to the board's role. If the chair allows this discussion, the audience is misled into believing the board does have authority in those matters.

#### **ROLE OF THE CHAIRPERSON**

It is essential that the chairperson, who chairs the meeting, understands how to make meetings run smoothly. The chair needs to fully understand the board's rules and needs to follow them carefully. The chair should have a gavel and should not be afraid to use it, not only to open and close meetings, but to keep order. At the start of the hearing, the chairperson should welcome everyone to the meeting and indicate what is on the agenda. The chairperson should also explain the procedure to be followed throughout the meeting.

## **ROLE OF THE BOARD MEMBERS**

Board members have a responsibility for the smooth running of an effective meeting. Each member is responsible in the following ways:

- Be prepared and on time. Read the material included with the agenda. Visit the site that is the subject of an application.
- Listen to the explanations by staff and ask questions if something is not clear.
- Listen to the applicant and citizens as evidence is presented. Ask questions for clarification but do not argue or voice opinions.
- Be polite and patient with others who are not familiar with public hearing procedures, rules, planning jargon, and legal documents that board members may understand from practice and training.
- Be patient with those who have a different opinion. Citizens have left the comfort of home to participate and deserve patience and respect for their opinion.
- Leave personalities behind.
- Be open minded and fair.
- Address everyone with titles of respect (Mr., Ms., etc.).
- Treat all speakers and participants in a similar fashion.
- Have a public discussion—don't pass notes or whisper.
- Explain yourself—state your findings of fact so the public and the staff understand you correctly.
- Do not dominate the discussion. Make the points that need to be made and allow the discussion to continue.
- Be careful about the tone of voice. Meetings and hearings are not the place for sarcasm and anger. Board members should model the behavior that is expected from the public.
- Be willing to make or second a motion.

Above all, remember that this is not a debate. The board is there to hear testimony and make decisions based on evidence, not engage in a debate. The thoughtful and reasoned participation of each member is an important contribution to a well-run and effective meeting.

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## **BOARD DECISIONS**

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After a public hearing is concluded, the board must arrive at a decision. The issues often are complicated, and decision-making is likewise difficult. These decisions will be much easier if the board closely follows the recommended findings contained in the zoning ordinance. It is the board's job to sort through evidence and testimony and make reasoned decisions based on findings of fact. All members, including the chairperson, should vote on each issue.

Members of the public frequently circulate petitions throughout the neighborhood and bring them to the commission, overflowing with signatures of people supporting their position. These petitions usually are not useful evidence. The commission has no control over the manner in which the petition is circulated, no way to know what the signature seeker told those who signed it, and no way to verify the signatures. In addition, many people will sign anything their neighbors ask them to sign in an effort to promote neighborhood harmony. The commission should accept such petitions when they are offered, but the members should not give them a lot of weight.

South Carolina law provides that the board must decide the appeal or matter "within a reasonable time." The board has the same powers as the zoning official and may affirm or reverse

(wholly or in part) or modify his actions and may issue or direct issuance of a permit. Absentee ballots are not authorized; a member must be present to vote.

All final decisions of the board must be in writing, delivered to parties in interest by certified mail and permanently filed in the office of the board as public records. **All findings of fact and conclusions of law must be separately stated in final decisions or orders of the board.** This is a critical requirement because the board's findings of fact are binding on the circuit court on appeal.

One of the best ways for the board to make findings is to adopt findings as part of the motion on the case (either prepared by staff in advance to support the staff recommendation or proposed by a board member with the motion, using a prepared worksheet or petitioner's written application to cite the findings).

The board must have a quorum, which is a majority of its membership (not a majority of those in attendance), in order to authorize any action as official. In the case where a board member has a direct or indirect financial interest, that member may not participate in the hearing or decision of the board.

Board members usually are active in the community. They interact with developers, business people, and neighborhood residents regularly. These interactions occasionally result in efforts to influence the board member's opinion or vote on a specific proposal. It is good practice for board members to refrain from such discussions. They interfere with due process and they are inconsistent with the goals of the open meeting law. In many communities, these communications are difficult or impossible to avoid. The best way to deal with these situations is for the board member to explain that any information given will be shared with the entire board at the public hearing. The board member must then share the information as promised. If board members fail to report these conversations, various board members cast their votes based upon different information. Perhaps the outcome of a vote would be different, if every member had the same information.

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#### SOME OTHER DO'S AND DON'TS

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**Avoid conflicts of interest or their perception.** Board members should not accept gifts, food, or travel costs from applicants, interested parties or their representatives. Even if it is innocent, it looks bad to others. The board can use their rules of procedures to restrict these things. In any case, laws prohibit direct financial gain.

**Make decisions promptly.** If information is missing or in conflict, it is appropriate to continue the case until a specified future meeting, so that the board can be adequately informed when making a decision. The board's rules of procedure should limit how often and/or how long a continuance may be granted.

**Prepare findings.** Decisions themselves are central to the practice of due process. Specific factual findings in support of a final decision made by the board of zoning appeals are essential. Findings should always be done for these cases, and are particularly important if the case is controversial, because it is more likely to end up in court. It is fine to direct staff to prepare the findings, but don't make them guess what the board members were thinking. State for the public record at the hearing the reasoning regarding the applicable criteria.

**Be fair to everyone involved in the process.** Especially if you don't like an applicant, it is important to provide the opportunity for a fair hearing. It is totally inappropriate for a board to demonstrate its prejudice against even the sleaziest citizen. It is okay to apply strong conditions and

use extreme diligence in enforcing them, but don't call a sleazy citizen "out" before he ever gets to the plate. Due process is all about being fair to everyone involved in the process—developer, citizen, etc.

**Be consistent.** If you have consistently made the same decision on the same type of request, don't suddenly change that decision unless you have an excellent reason for doing so, and point out what is so markedly different about this request. Rely on the applicable criteria and you will make the appropriate decision. Don't get lazy though—review the criteria anew for each case.

**Base your decision on legal considerations.** Your decision must be based on applicable criteria from state law and local ordinances. There is no room for sentiment when it comes to board decisions.

**Make a good, clear motion.** Your motion should reference applicable criteria. The chairperson should take a strong leadership role in bringing the group to a vote. Upon termination of the public hearing and any discussion between board members, the chairperson should call for a motion on the matter.

**Avoid emotions.** The types of topics brought before the board can be highly charged in many communities. Emotions can run high from the perspective of the petitioner, remonstrators, and decision-makers. Typically, the investment an individual, family or business makes in real estate represents the largest single investment they will ever make. This is especially true of individual homeowners and their families. Once things become emotionally charged for either or both sides of a board issue, involved parties, including the board, can get caught up in the emotion of the situation. These represent some of the most dangerous times for board members in which they may be swayed by the emotions of the issue rather than the facts presented. Decisions made on the basis of emotional reactions are most likely to be flawed decisions, which may be challenged in court.

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### CONFLICT OF INTEREST

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Board members may not participate in an appeal matter in which they have a direct or indirect financial interest. Furthermore, board members may not participate in an appeal matter in which they are a relative of either the applicant or an opponent. Board of zoning appeals rules should include a definition of a conflict of interest and a means for determining conflict in cases of uncertainty. Each board member needs to be responsible for declaring any potential conflicts. It is recommended that in cases of uncertainty, the board should make the determination. The potential conflict is publicly announced, and the board members deliberate among themselves. The public should not be permitted to participate in this determination.

The rules should also specify the conduct expected from a member with a declared conflict of interest. Typically, the member with a conflict cannot take part in the discussion or vote on the item. The member may also consider leaving the commission table and joining the audience or leaving the hearing room altogether until the matter is concluded.

Board members also may not represent another person in a hearing on an appeal matter before the board. Board members may represent themselves, but they cannot appear on behalf of another applicant.

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## **EDUCATIONAL REQUIREMENTS FOR BOARD MEMBERS**

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South Carolina law requires members of the board of zoning appeals to complete a mandatory orientation and continuing education. Specifically, these educational requirements consist of a six-hour orientation to be completed six months to one year after the initial date of appointment and a three-hour annual training every year after the first year of service. Failure of a commission member to complete the requisite education requirements may result in removal from office for cause.

The training program must be approved by the State Advisory Committee on Educational Requirements for Local Government Planning or Zoning Officials and Employees. The Appalachian Council of Governments located at 30 Century Circle in Greenville is one of the closest approved instructors for the required orientation and annual training.