BOARD OF ADJUSTMENT STAFF REPORT

DATE OF MEETING:	February 19, 2024
NAME OF PROJECT:	Kohler front porch setback variance request
NAME OF APPLICANTS:	Luke & Tiffany Kohler
AGENDA ITEM:	Setback Variance
LOCATION OF ITEM:	157 West 100 South, Midway, Utah
ZONING DESIGNATION:	R-1-9

ITEM: 1

Midway City has received a request from Luke and Tiffany Kohler for a variance from the terms of **Midway City Code Section 16.8.6 (A.1), Location Requirements**, which requires that all dwellings in the R-1-9 zone shall be setback from front property lines a minimum distance of thirty feet (30'). The proposed 18' variance would allow the existing non-conforming covered porch to remain within the 30' setback. The home is located at 157 West 100 South and is in the R-1-9 zone.

BACKGROUND:

The Midway Code Section 16.08.060 (A)(1) provides the following for the R-1-9 zone:

A. *Front Setback: 1. Dwellings – All dwellings shall be setback from front property lines a minimum distance of thirty feet (30').*

The Applicants, Luke and Tiffany Kohler, reside at 157 West 100 South in Midway. In July of 2023, the Applicants applied for a building permit from the City of Midway to replace a garage on the premises. In the course of permit reviews and inspections in connection with the garage, the Midway Building Official discovered that a front porch had been added to the premises without obtaining a building permit and that the setback of the porch did not comply with the 30' front setback under applicable code. The Building Official red tagged the garage addition based upon the porch violation.

Because the porch addition did not go through the legal permitting process at the time constructed, it is illegal and noncompliant. Going through the permitting process now would not cure the illegality as the addition does not comply with current setbacks, nor did it comply with Midway City Code at the time it appears to have been constructed (approximately July of 2022) therefore, Planning Staff could not have approved any such application.

On August 15, 2023, Luke Kohler delivered to the Midway Planning Department his letter dated August 15, 2023, copy attached, requesting the City allow him to complete his garage "under the understanding that [he] will address the current porch situation at a later date… Such date not to exceed 1/1/2025".

On August 16, 2023, Michael Henke, Midway City Planning Director, and Tex Couch, Building Official, forwarded the City's response to Mr. Kohler, see copy attached. As relevant to the noncompliant porch, the City's August 16, 2023, letter provided as follows:

Per your request and our discussions, please be advised that the City is willing to issue the building permit for the garage (Application Number: PLAN23-0149) subject to your agreement to the following conditions:

1. *You remedy the setback violation and bring the front porch on the property into compliance with the Midway City Code within one (1) year of the date of issuance of the building permit for the garage at the referenced property. Section 16.8.6 of the Midway Municipal Code provides that front setbacks for dwellings in the R-1-9 zone, such as yours, 'shall be setback from the front property lines a* ***minimum distance of thirty feet (30')*** *' (bold added for emphasis).*

2. *You will need to obtain a separate building permit for the work to the front porch to bring it into compliance and comply with all conditions of such permit.*

3. *The time limits set forth in paragraph 1 are not contingent upon other factors, such as finances and weather, set forth in your letter, and failure to comply with the time limits subject you to fines and penalties as outlined and authorized under the Midway City Code.*

If the above is acceptable to you, please sign this notice and return it to the City of Midway Building or Planning Departments.

The August 16, 2023, notice was signed by Michael Henke and Tex Couch on behalf of the City of Midway, and "Reviewed, accepted and approved" by Luke Kohler on August 17, 2023. See attached.

Based upon Mr. Kohler's consent to the August 16, 2023, agreement, Midway City issued a building permit for the garage on August 17, 2023, on the understanding and condition, per the August 17, 2023 agreement, that Mr. Kohler would bring the porch into compliance within 1 year of the date of issuance of the garage building permit.

On July 9, 2024, the Midway Planning Department sent Mr. Kohler a letter reminding him of the approaching deadline (August 17, 2024) to bring the porch into compliance, including a copy of the August 16, 2023, agreement.

Mr. Kohler delivered his written response to the Midway Planning Department dated July 15, 2024, see copy attached. Mr. Kohler's letter provides, in relevant part:

I received your letter dated July 9th 2024, reminding me of the agreement I signed stating I would bring the front porch into compliance if the permit was issued to build my garage. I appreciate your willingness to work together in issuing me that permit. Now that my garage is complete I have time to think about whet to do with the porch. Life is hectic and busy raising 4 young kids and the summer has slipped away from me. I am asking for an extension of the deadline to bring the porch into compliance as I do not have sufficient time to do so. I am currently working with engineering to figure things out pertaining to loads and different options that we might have to possibly remedy the porch to conform to current set-backs. The letter that I previously signed was dated August 17th. I am asking that I get a 3 month extension, that date being November 15th 2024 to be able to accomplish this matter. I would appreciate if you would consider this".

Midway City Planning responded the next day, by letter dated July 16, 2024. The City granted the extension requested by Mr. Kohler through November 15, 2024, but advised that no further extensions would be granted.

The Applicants did not remedy the porch setback violation by November 15, 2024.

On October 31, 2024, approximately two weeks before the extended deadline to bring the porch into compliance, the Applicants filed an "Application to Appear Before the Board of Adjustment" and paid the corresponding application fee. A copy of the application is attached along with the receipt for payment of the application fee dated October 31, 2024. Mr. Kohler has acknowledged that the porch is noncompliant with applicable setbacks and acknowledged that he signed an agreement to bring the porch into compliance, but requests a variance on the basis that the porch was existing on the home when purchased (Mr. Kohler has advised that he purchased the home from his father and that his father added the porch roof), that removing the porch covering would be a substantial financial

hardship on his family, that there are other structures on the street closer to the road, and that the porch posts do not impede traffic of create a safety hazard.

Review of Application by Board of Adjustment

Section 2.05.020 of the Midway City Code, Powers and Duties, provides:

The Board of Adjustment shall have the power to authorize such variance from the terms of Title 16 as provided and governed by the municipal Land Use Development and Management Act.

Section 2.05.030 of the Midway Code, Authority Limited, provides:

The powers and duties of the Board of Adjustment are limited to granting or denying variances as set forth in the Utah Municipal Land Use Development and Management Act. The Board of Adjustment shall not have authority to amend Title 16 nor to correct what it may consider to be an unwise requirement.

Section 2.05.040, Vote, provides:

The concurring vote of at least three members of the Board shall be necessary to decide upon any matter upon which it is required to pass.

Section 2.05.050, Application to Appear Before the Board, provides:

Any person may appeal to the Board of Adjustment by filing for a variance request in writing with the Zoning Administrator, and by paying a fee set by the City Council, ***provided such appeal is made within 45 days of the decision being appealed****. The request to appear before the Board of Adjustment shall be made on forms furnished by the Zoning Administrator at least 15 days prior to the date of the hearing on the appeal*. (emphasis added)

Section 16.24.010, Building Permits Required, provides, in relevant part:

No person, firm, or corporation shall commence to construct, alter or move a building or structure, or to make a change in use of any land within the territory shown on the zone map which has been adopted as a part of this Title without first submitting an application and obtaining a permit therefore from the Zoning Administrator or other authorized officer…

CONSENT AND RELIANCE:

By their own numbers, the Applicants seek an 18 foot variance, or 60% of the front setback (30') in the R-1-9 zone. Applicants seek this 60% variance despite the following:

1) the fact that Mr. Kohler volunteered to bring the porch into compliance if the City allowed him to proceed with building his garage;

2) Mr. Kohler voluntarily entered into a written agreement with the City in which he agreed to bring the porch into compliance with Code within one year of the issuance of a building permit for the garage (e.g., by August 17, 2024);

3) Mr. Kohler reiterated his promise to remedy the porch violation in his request for an extension through November 15, 2024, which the City granted;

4) Mr. Kohler received his garage building permit and completed his garage; and

5) after obtaining what he wanted (i.e., a building permit for the garage), after allowing more than a year and a half to pass from his written promise to remedy the porch violation, and after repeatedly reiterating his commitment to remedying the violation, Mr. Kohler seeks to void his contractual obligation to remedy the porch violation by applying for a variance.

The City met its obligations under the August 2023 written agreement, but Mr. Kohler is seeking to avoid his obligations under the same agreement under which he benefited. The City reasonably relied to its detriment on Mr. Kohler's written agreement to remedy the porch violation in granting the request and allowing the Applicant to complete the garage.

BURDEN OF PROOF RESTS ON THE APPLICANT:

UCA Section 10-9a-705 places the burden of proof on an appeal/variance on the Applicant.

UCA Section 10-9a-702, Variances, states:

(1) Any person or entity desiring a waiver or modification of the requirements of a land use ordinance as applied to a parcel of property that he owns, leases, or in which he holds some other beneficial interest may apply to the applicable appeal authority for a variance from the terms of the ordinance.

(2) (a) The appeal authority may grant a variance only if:

(i) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances;

(ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;

(iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;

(iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and

(v) the spirit of the land use ordinance is observed and substantial justice done.

(b) (i) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship unless the alleged hardship:

(A) is located on or associated with the property for which the variance is sought; and

(B) comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.

(ii) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship if the hardship is self-imposed or economic.

I In determining whether or not there are special circumstances attached to the property under Subsection (2)(a), the appeal authority may find that special circumstances exist only if the special circumstances:

(i) relate to the hardship complained of; and

(ii) deprive the property of privileges granted to other properties in the same zone.

(3) The applicant shall bear the burden of proving that all of the conditions justifying a variance have been met.

(4) Variances run with the land.

(5) The appeal authority may not grant a use variance.

(6) In granting a variance, the appeal authority may impose additional requirements on the applicant that will:

(a) mitigate any harmful affects of the variance; or

(b) serve the purpose of the standard or requirement that is waived or modified.

Thus, as set forth in UCA 10-9a-702, and as outlined in the 2021 Variance Handbook for Appeal Authorities published by the Utah League of Cities and Towns, pp. 15-16, copy attached and previously provided to the Applicant, to comply with the standards for a variance, the Applicants must show that the alleged hardship:

- *Must be associated with the property. (It cannot be that the people who will live on the property cannot do the work themselves, or afford to comply with the standards);*

- *Must be peculiar to this piece of property and one that is not general to the neighborhood;*
- *Cannot be purely economic or self-imposed. (The hardship cannot exist because of something for which the owner of the property is responsible);*
- *Cannot be a "use" variance (No variance can change the general purpose of the property. A variance cannot be used to allow a commercial use in a residential zone, nor a duplex in a single home residential zone)*

T*o justify a variance, a hardship must not be self-imposed or financial, and it must relate to a unique condition of the property. Importantly, it must not be personal in nature.* (emphasis added)

ANALYSIS & CONSIDERATONS:

Findings of Fact:

- Midway Code Section 16.24.010, Building Permit Required, requires a valid permit for the porch roof as constructed.

- The porch roof was constructed without a permit in violation of Section 16.24.010 of the Code.

- A permit could not have been granted for the porch roof without a variance, given setback requirements, which was not applied for nor granted prior to construction.

- Construction of the porch roof increased and expanded the non-conforming uses on the property in violation of Section 16.26.080 of the Code.

- The Applicant, Luke Kohler, agreed in writing on August 17, 2023, to "remedy the setback violation and bring the front porch on the property into compliance with the Midway City Code within one (1) year of the date of issuance of the building permit for the garage" as a condition of obtaining a building permit to construct the garage at the premises.

- The Applicant, Luke Kohler, re-acknowledged the aforesaid agreement he "signed stating that [I] would bring the front porch into compliance if the permit was issued to build the garage" in his July 15, 2024 letter requesting a three month extension through November 15, 2024.

- Mr. Kohler's letter of July 15, 2024 requesting an extension said: "*I am currently working with engineering to figure things out pertaining to loads and different options that we might have to possibly remedy the porch to conform to current set-backs. The letter that I previously signed was dated August 17th. I am asking that I get a 3 month extension, that date being November 15th 2024 to be able to accomplish this matter. I would appreciate if you would consider this".*

- To date the porch has not been brought into compliance with Midway City Code.

- The Applicants bear the burden of proof on showing the requirements that enable the Board of Adjustment to grant a variance are met.

The following are issues the Applicants must prove for a variance to be granted. The italicized statements are Staff's opinion as to whether the item has been met.

1. Literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance;

   Literal enforcement of the code would not create an unreasonable hardship for the applicant because the setback is measured to the posts for the covered porch and if the posts were removed the violation would be brought into compliance. Thus, the applicant still has the ability to have the front entrance to the house without the roof covering or the ability to cantilever the roof rather than support with posts in the setback area. The setbacks apply to all residents in the R-1-9 zone. Allowing a variance would in essence reward residents for ignoring applicable ordinances and permitting requirements. In addition, the Applicant, Luke Kohler, agreed to bring the porch into compliance as a condition of being allowed to rebuild his garage, which has since been completed.

2. There are special circumstances attached to the property that do not generally apply to other properties in the same district;

   There do not appear to be any special circumstances applicable to this property that do not apply to the surrounding homes. The only special circumstance may be that the builder of the porch disregarded code and the permitting process and the current applicant, Luke Kohler, agreed to bring the porch into compliance as a condition of being allowed to rebuild his garage, which has since been completed. However, these circumstances argue against, rather than in favor of, the requested variance.

3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district;

   The applicant still has the ability to have the front entrance to the house without the roof covering or the ability to cantilever the roof rather than support with posts in the setback area. The setbacks apply to all residents in the R-1-9 zone.

4. The variance will not substantially affect the General Plan and will not be contrary to the public interest;

   The General Plan was established to promote the general health, safety, and welfare of residents and future residents. It also established community preferences regarding the "feel" of Midway. The preference that was discussed in detail through several public meetings before the Planning Commission and City Council was to keep local streets with an open feel and to avoid having houses and appurtenances encroach upon the street and road right-of way and view corridors.

   If we accept the Applicant's measurements, as shown on the Applicant's survey through Element surveying, the setback of the house is approximately 24' rather than the 30' required in the zone, but the house is legally nonconforming. The addition of the porch covering in approximately 2022 increased and expanded the nonconformance threefold. Thus, the addition of the porch roof increased the existing house nonconformity of 20% (24' setback where 30' setback required yields 6', or 20%, nonconformity) to 60% (12' setback (per the Element survey) where 30' setback required yields 18', or 60%, nonconformity).

5. The spirit of the zoning ordinance is observed and substantial justice done.

   The spirit of the zoning ordinance in regards to setbacks is to have an open and inviting feel to residential neighborhoods while preserving the rural "feel" of Midway, the openness of local neighborhoods, and protection of rights-of-way and view corridors. Encroachments into the setback, especially one as significant as 60%, not only detracts from this atmosphere but potentially creates safety issues due to its proximity to the road and right-of-way, especially near driveway entrances and intersections because of the lack of visibility.

The burden of proof rests with the applicant to prove to the Board that all requirements can be satisfied. As set forth in the Applicant's application for board of adjustment review, the reasons cited by the Applicants are limited to the following: "financial hardship", other properties on the street predate setbacks, the porch posts are not impeding traffic, and the porch posts are not a safety hazard or violation. Even if the Applicants could prove these assertions, it would not meet the burden of proof required for a variance under state and local laws.

ALTERNATIVE ACTIONS:

1. Approval. This action can be taken if the Board of Adjustment feels that the proposed variance complies with the five aforementioned criteria and the proposal is ready for approval.

a. Accept staff report
b. List accepted findings
c. Place condition(s)

2. Continuance. This action can be taken if the Board of Adjustment feels that there are unresolved issues.

    a. Accept staff report
    b. List accepted findings
    c. Reasons for continuance
        i. Unresolved issues that must be addressed
    d. Date when the item will be heard again

3. Denial. This action can be taken if the Board of Adjustment feels that the proposed variance does not comply with one or more of the five aforementioned criteria and the proposed variance is not justifiable.

    a. Accept staff report
    b. List accepted findings
    c. Reasons for denial


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Exhibits

To whom it may concern,

I have been notified by the city of Midway that my front porch at 157 W. 100 S. does not comply with current set-backs within my neighborhood. As a result, they are holding my permit for my garage until the issue is addressed. This letter is to request due to current financial situations, as well as, unexpected project expenses, and the winter months coming upon us that I receive my building permit for my garage, under the understanding that I will address the current porch situation at a later date. Such date to be determined by weather conditions, as well as, having sufficient financial funds pertaining to the porch. Such date not to exceed 1/1/2025. I would appreciate if you would consider this. Thank you.

Sincerely,.

Luke Kohler

Midway City Corporation

75 North 100 West
P.O. Box 277
Midway, Utah 84049

Phone: 435-654-3223
Fax: 435-654-4120

midwaycityut.org

August 16, 2023

Luke Kohler
157 W. 100 S.
Midway, Utah 84049

Re: 157 West 100 South, Midway, Utah

Dear Mr Kohler:

We received your letter dated August 15, 2023, requesting issuance of a building permit to rebuild the garage at the above property and an extension of time to bring the nonconforming porch on the property into compliance.

Per your request and our discussions, please be advised that the City is willing to issue the building permit for the garage (Application Number: PLAN23-0149) subject to your agreement to the following conditions:

1. You remedy the setback violation and bring the front porch on the property into compliance with the Midway City Code within one (1) year of the date of issuance of the building permit for the garage at the referenced property. Section 16.8.6 of the Midway Municipal Code provides that front setbacks for dwellings in the R-1-9 zone, such as yours, "shall be setback from front property lines a ***minimum distance of thirty feet (30')***" (bold added for emphasis).

2. You will need to obtain a separate building permit for the work to the front porch to bring it into compliance and comply with all conditions of such permit.

3. The time limits set forth in paragraph 1 are not contingent upon other factors, such as finances and weather, set forth in your letter, and failure to comply with the time limits subject you to fines and penalties as outlined and authorized under the Midway City Code.

If the above is acceptable to you, please sign this notice and return it to the City of Midway Building or Planning Departments. If you have any questions or concerns, please contact us at 435-654-3223 or at the Midway City offices at 75 North 100 West.

Thank you for your cooperation and attention to these matters.

Sincerely,

Michael Henke
Midway City Planner
435-654-3223 ext 105
mhencke@midwaycityut.org

Tex Couch
Midway Building Official
435-654-3223 ext 107
tcouch@midwaycityut.org

Reviewed, accepted and approved this 17th day of August, 2023

Luke Kohler
157 W. 100 S., Midway, Utah 84049

Midway City Corporation

Midway

75 North 100 West
P.O. Box 277
Midway, Utah 84049
Phone: 435-654-3223
midwaycityut.org

July 9, 2024

Luke Kohler
157 W 100 S
Midway City, Utah 84049

RE: 157 W 100 S, Midway, UT 84049

Dear Mr. Kohler:

This is a reminder letter that your signed agreement with Midway City is nearing its deadline. The letter was requesting issuance of a building permit to rebuild your garage and extend the time to bringing the nonconforming porch on the property into compliance. I have included the agreement with this letter. Your deadline to bring the porch into compliance is August 17, 2024.

Please contact Midway City if you have any Questions.
Sincerely,

Melannie Egan

Melannie Egan
Midway City Planning Tech
megan@midwaycityut.org
435-654-3223, Ext. 106

To whom it may concern,

I received your letter dated July 9th 2024, reminding me of the agreement I signed stating I would bring the front porch into compliance if the permit was issued to build my garage. I appreciate your willingness to work together in issuing me that permit. Now that my garage is complete I have time to think about what to do with the porch. Life is hectic and busy raising 4 young kids and the summer has slipped away from me. I am asking for an extension of the deadline to bring the porch into compliance as I do not have sufficient time to do so. I am currently working with engineering to figure things out pertaining to loads and different options that we might have to possibly remedy the porch to conform to current set-backs. The letter that I previously signed was dated August 17th. I am asking that I get a 3 month extension, that date being November 15th 2024 to be able to accomplish this matter. I would appreciate if you would consider this.

Thank you,

7/15/24

Luke Kohler

Midway City Corporation

Midway

75 North 100 West
P.O. Box 277
Midway, Utah 84049
Phone: 435-654-3223
midwaycityut.org

July 16, 2024

Luke Kohler
157 W 100 S
Midway City, Utah 84049

RE: 157 W 100 S, Midway, UT 84049

Dear Mr. Kohler:

We have reviewed your request for an extension to come into compliance on your porch. We will grant you this extension to November 15, 2024. We appreciate you for wanting to fix the porch and come into compliance. Please note that there will be no other extensions given.

Please contact Midway City if you have any Questions.

Sincerely,

Melannie Egan

Melannie Egan
Midway City Planning Tech
megan@midwaycityut.org
435-654-3223, Ext. 106

MIDWAY CITY
Planning Office

SCANNED
Planning / Board of Adjustments
2025 BoA

75 North 100 West
Midway, Utah 84049

Phone: 435-654-3223 x 105
Fax: 435-654-2830
mhenke@midwaycityut.org

Application to Appear Before the Board of Adjustment

Application Fee: $200 + .50 per envelope + Costs
(Costs include $.50 per letter, any Engineering Review expenses and legal noticing)

Owner(s) of Record:

Name: LUKE KOHLER Phone: _

Mailing Address. _____ City: MIDWAY State: UT Zip: 84049

E-mail Address: _

Applicant or Authorized representative:

Name: LUKE KOHLER Phone: _____

Mailing Address. _____ City: MIDWAY State: UT Zip: 84049

E-mail Address: _____

Explanation of Request: TO ADDRESS my FRONT PORCH.

Property Location:

Tax Identification #: OMI-0360-0-034-034 PARCEL# 00-0006-4035

Street Address: 157 W. 100 S.

Prior Board of Adjustment action(s) on said property:

FOR OFFICE USE ONLY

STAFF:
Date Received: 10.31.24
Received By: _____
Fee Paid: _____

Application Number: _____
Zone: _____
Tax ID Number: _____

PLANNER:
Complete / Incomplete
Date: _____ Reviewed by: _____

Please read and sign before application submittal

I declare under penalty of perjury that I am the owner or authorized agent of the property subject to this request and the foregoing statements, answers and attached documents are true and correct. As the applicant for this proposal, I understand that my application is not deemed complete until the Planning Office has reviewed the application. I further understand I will be notified when my application has been deemed complete. At that time I expect that my application will be processed within a reasonable time, considering the work load of the Planning Office.

I fully understand that I am responsible for the payment of any back taxes and declare that I am responsible for all fees incurred.

Signature of Owner or Agent: _____ **Date:** 8/26/24

IMPORTANT: Your application cannot be processed until determined complete by the Planning Staff. An application shall be considered complete when all applicable fees (such as Midway Water Board, Midway Sanitation District, out-of-pocket expenses, etc.) are paid and all items listed herewith are provided or considered not applicable by the Planning Office. All application fees are non-refundable.

Section 16.26.6 Appeal Authority
A. The Board of Adjustment shall be the appeal authority to hear and decide requests for variances from the terms of the Land Use Title. An adverse decision by the Board of Adjustment in variance matters may be appealed to district court pursuant to Utah law.

The following checklist must be included with your submittal.

CHECKLIST:

☐ Submit a written statement outlining the intent and request to the Board of Adjustment Members.
☐ Two copies of any documentation to support your request including:

- ✓ Plat map
- ✓ Current use of structure (i.e. home, shed, office, etc.)
- ✓ Proposed use of structure
- ✓ Existing distances between structures and property lines
- ✓ Elevation drawings of existing and proposed construction
- ✓ Dimensions of the property and location of property lines
- ✓ Location of all proposed structures, outlined by dashed lines
- ✓ Location of all existing structures, outlined by solid lines
- ✓ Location of topographic features (i.e. streams, canals, hillsides, etc.) which are located on your property
- ✓ Location of existing and/or any proposed parking spaces
- ✓ Location and width of existing and/or proposed driveways
- ✓ Location of main current landscaping which may be altered/moved over by your proposal
- ✓ Location of sewer and water lines and name of company which provides the services
- ✓ Any other features which may be helpful for the Board of Adjustment to understand your request

Other: _____

_____

☐ Copy of letter of intent to each of the neighbors within 600 feet of the parcel in question. Submit the letters with a non-sealed, stamped and addressed envelope, and pay a $.50 per letter charge. The Planning Office will then mail the letters for you.
☐ Copy of letter explaining how each of the following items has been satisfied:

- ✓ Literal enforcement of the Land Use ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general propose of the Land Use ordinance;
- ✓ There are special circumstances attached to the property that do not generally apply to other properties in the same district;
- ✓ Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district;
- ✓ The variance will not substantially affect the General Plan and will not be contrary to the public interest;
- ✓ The spirit of the Land Use ordinance is observed and substantial justice is done.

☐ Application fee of $200.00 + costs have been paid.

You may wish to consult with a Planner. State the facts fully. Use additional sheets if necessary and attach to your application.

To whom this may concern

In July of 2023 we started a backyard project that didn't require a permit. During the process we found the garage was not built on a foundation and was tearing away from the house. We were in an emergency situation and had to demo the garage. We applied for a new building permit and it was withheld, due to our existing porch covering not being in compliance with current set back code, until we would sign a document stating we would bring the porch into compliance. The porch was existing on the home when we purchased the house.

Having to remove the porch covering would be a substantial financial hardship on our family. Majority of the properties on our street were built before the current set back codes were in place, and there are many structures on our street that are far closer to the road and the public easement than our porch posts are. The porch posts are not in anyway impeding traffic, nor are they a safety hazard or violation.

Updating older homes and making them more esthetically pleasing brings the value of each home and the surrounding properties up in value, which in turn makes the community have better value.

We are asking that a variance be granted in our favor to keep our porch the way it exists now.

Signed,

Luke and Tiffany Kohler

Midway City
75 N 100 W | PO Box 277
Midway, UT 84049
(435) 654-3223

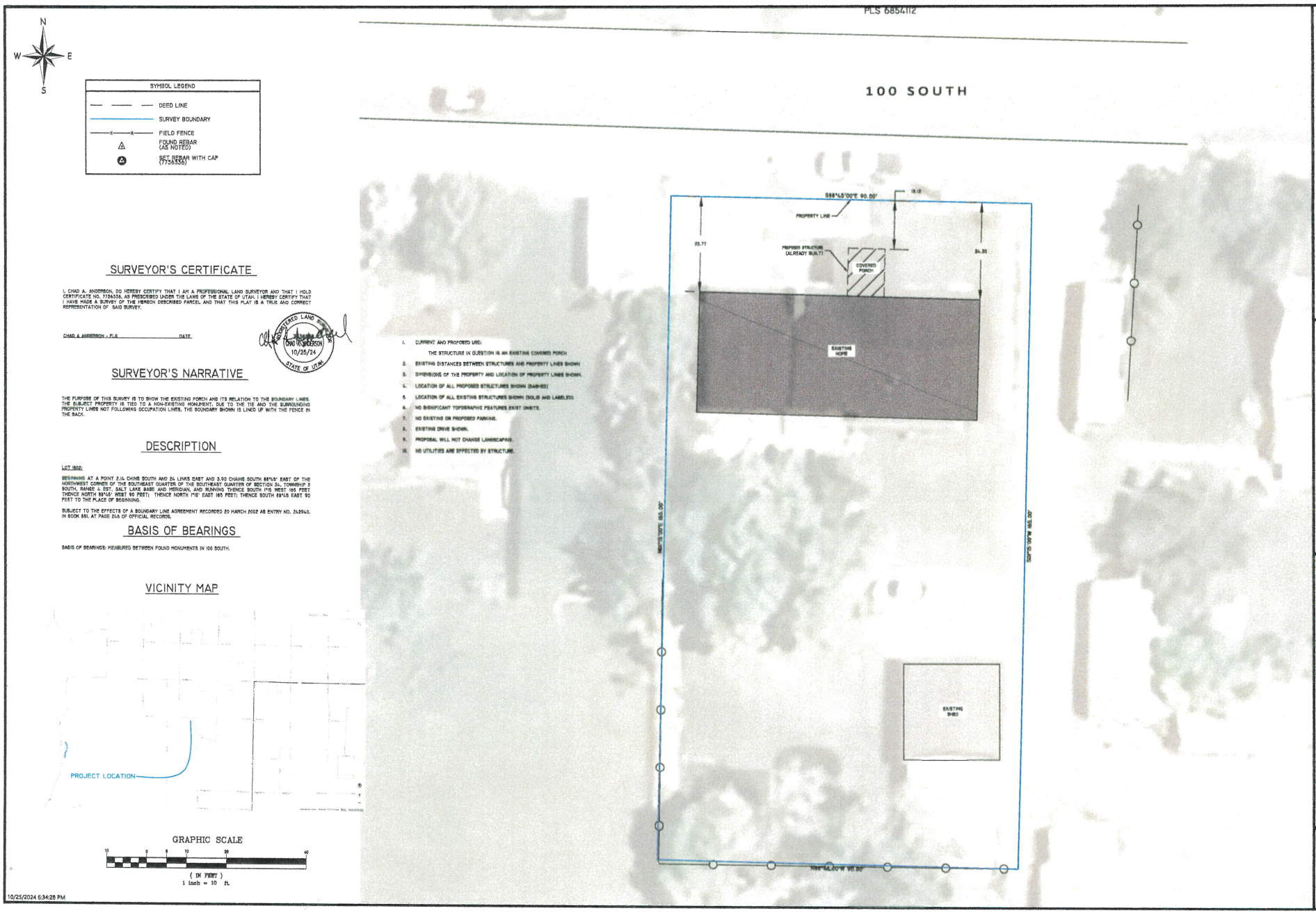
XBP Confirmation Number: 213908051

Transaction detail for payment to Midway City.			**Date: 10/31/2024 - 4:04:08 PM MT**
Transaction Number: 229459832 **Visa — XXXX-XXXX-XXXX-3564** **Status: Successful**			
Account #	**Item**	**Quantity**	**Item Amount**
	Miscellaneous	1	$219.00
Notes: Luke Kohler - board of adjustment			

TOTAL: *$219.00*

Billing Information
Luke Kohler
84049

Transaction taken by: Admin jsweat



SURVEYOR'S CERTIFICATE

I, CHAD A. ANDERSON, DO HEREBY CERTIFY THAT I AM A PROFESSIONAL LAND SURVEYOR AND THAT I HOLD CERTIFICATE NO. 7736336, AS PRESCRIBED UNDER THE LAWS OF THE STATE OF UTAH. I HEREBY CERTIFY THAT I HAVE MADE A SURVEY OF THE HEREON DESCRIBED PARCEL AND THAT THIS PLAT IS A TRUE AND CORRECT REPRESENTATION OF SAID SURVEY.

CHAD A ANDERSON - PLS DATE

REGISTERED LAND SURVEYOR CHAD K ANDERSON 10/25/24 STATE OF UTAH

SURVEYOR'S NARRATIVE

THE PURPOSE OF THIS SURVEY IS TO SHOW THE EXISTING PORCH AND ITS RELATION TO THE BOUNDARY LINES. THE SUBJECT PROPERTY IS TIED TO A NON-EXISTING MONUMENT, DUE TO THE TIE AND THE SURROUNDING PROPERTY LINES NOT FOLLOWING OCCUPATION LINES, THE BOUNDARY SHOWN IS LINED UP WITH THE FENCE IN THE BACK.

DESCRIPTION

LOT 1802:

BEGINNING AT A POINT 2.14 CHAINS SOUTH AND 24 LINKS EAST AND 3.90 CHAINS SOUTH 88°45' EAST OF THE NORTHWEST CORNER OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 34, TOWNSHIP 3 SOUTH, RANGE 4 EST, SALT LAKE BASE AND MERIDIAN, AND RUNNING THENCE SOUTH 1°15 WEST 165 FEET THENCE NORTH 88°45' WEST 90 FEET; THENCE NORTH 1°15' EAST 165 FEET; THENCE SOUTH 88°45 EAST 90 FEET TO THE PLACE OF BEGINNING.

SUBJECT TO THE EFFECTS OF A BOUNDARY LINE AGREEMENT RECORDED 20 MARCH 2002 AS ENTRY NO. 262940, IN BOOK 881, AT PAGE 216 OF OFFICIAL RECORDS.

BASIS OF BEARINGS

BASIS OF BEARINGS: MEASURED BETWEEN FOUND MONUMENTS IN 100 SOUTH.

VICINITY MAP

1. CURRENT AND PROPOSED USE:
   THE STRUCTURE IN QUESTION IS AN EXISTING COVERED PORCH
2. EXISTING DISTANCES BETWEEN STRUCTURES AND PROPERTY LINES SHOWN
3. DIMENSIONS OF THE PROPERTY AND LOCATION OF PROPERTY LINES SHOWN.
4. LOCATION OF ALL PROPOSED STRUCTURES SHOWN (DASHED)
5. LOCATION OF ALL EXISTING STRUCTURES SHOWN (SOLID AND LABELED).
6. NO SIGNIFICANT TOPOGRAPHIC FEATURES EXIST ONSITE.
7. NO EXISTING OR PROPOSED PARKING.
8. EXISTING DRIVE SHOWN.
9. PROPOSAL WILL NOT CHANGE LANDSCAPING.
10. NO UTILITIES ARE EFFECTED BY STRUCTURE.

ELEMENT LAND SURVEYING
WWW.ELEMENTSURVEYING.COM|2296 SOUTH 270 EAST, HEBER CITY, UT 84032
801-562-3873 & 801-457-5748

IMPROVEMENT EXHIBIT

WASATCH COUNTY

IN THE SE 1/4 OF SEC 34, T3S, R4E, SLB&M

PREPARED FOR: KOHLER FAMILY

PROJECT: MIDWAY 100 SOUTH KOHLER

PROJECT NO. 24-10-428

SHEET 1 OF 1

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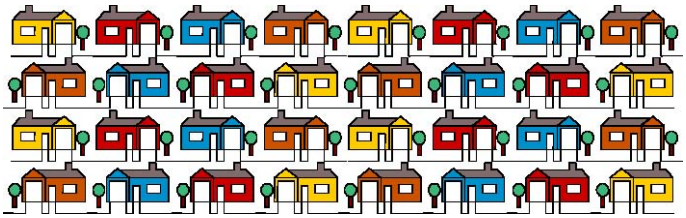
LAND USE APPEALS AND VARIANCES



Origin of land use appeals

It was during the drafting of the first comprehensive zoning ordinance in the United States (New York City in 1916) that the concept of a board of zoning appeals was originated. It had become evident to the drafters that no ordinance attempting to regulate land use could be written in a way that anticipates all of the unusual circumstances or conditions that may exist. A process for granting relief from any injustices that may arise in the strict application of standards was needed. The concept of a board of appeals was that it will be a quasi-judicial function to review practical difficulties or unnecessary hardships created by the strict application of land use regulations.

The model state enabling code that was developed in the 1920s by the U.S. Department of Commerce for use throughout the country, suggested the term "board of adjustment "or “board of zoning appeals.” The code recommended that an appeal board be required whenever a community adopts a zoning ordinance. Provisions for the establishment of boards of adjustment were incorporated into Utah State enabling statutes for zoning for cities and towns in 1925, and for counties in 1941.

Utah enabling acts

In 2005, the Utah Legislature adopted a revised *Land Use Development and Management Act*. The Act modified the previous planning and zoning enabling statute that was introduced in 1991. The purpose of the 1991 modifications was to up-date the earlier enabling statutes to bring the language closer to current practice and to draw the enabling language for cities and counties to resemble each other more closely. These objectives were accomplished. The 2005

revisions offer greater flexibility in the treatment of appeals and variances.

Land appeal authority based upon planning commission recommendation

Utah Code Sections 10-9a-302/17-27a-302, provide that the planning commission (city, countywide or township) shall make a recommendation to the legislative body for:

an appropriate delegation of power to at least one appeal authority to hear and act on an appeal from a decision of the land use authority.

The primary purpose of the land use appeals board is to allow a variance from regulations to a property owner who may suffer because a physical limitation or abnormality of a particular parcel of property unfairly precludes a use that is enjoyed by all other properties in the same zoning district. These are properties so uniquely circumstanced by physical limitations that there exist practical or real difficulties in conforming to the applicable zoning regulations. The boards are also empowered to hear appeals from disputed decisions based upon land use regulations.

Function and purpose

An appeals board is not granted legislative authority to substitute its judgment for that of the legislative body, nor is it charged with the routine administration of the zoning ordinance. The board must uphold the meaning and the spirit of the zoning ordinance as enacted by the legislative body, even if its members may disagree with the governing body's judgment as to the proper content of the ordinance. Where particular provisions of the ordinance seem to lead to uncertainty or injustice, the board should recommend to the planning commission and governing body that the ordinance be amended.

Unfortunately, it has been quite common for local governments to ignore or misinterpret the state legislative requirements regarding appeal board authority. This generated a spate of decisions from Utah courts, including the Utah Supreme Court, during the 1980s that have redirected attention to the purpose and authority of the board.

LAND USE DEVELOPMENT AND MANAGEMENT ACT

Title 10- Chapter 9a - CITIES, and Title 17- Chapter 27a - COUNTIES PART 7
Appeal Authority and Variances

(Part 7 for both titles is reprinted in full in the Appendix to this handbook)

THE LAW DESCRIBING THE LAND USE APPEAL AUTHORITY MUST BE STUDIED VERY CAREFULLY -THE APPEAL AUTHORITY CAN BE MISUNDERSTOOD AND MISUSED.

An appeal authority is required for all local governments that have adopted a land use ordinance (zoning, subdivision, etc.)

10-9a-103/17-27a-103, Definitions
(2) "Appeal authority" means the person, board, commission, agency, or other body designated by ordinance to decide an appeal of a decision of a land use application or a variance.

10-9a-701/17-27a-701 - Appeal Authority required
(1) Each municipality [county] adopting a land use ordinance shall by ordinance establish one or more appeal authorities to hear and decide:
(a) requests for variances from the terms of the land use ordinances; and
(b) appeals from decisions applying the land use ordinances.

The appeal authority and its procedures must be created by local ordinance
(2) As a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance.

The conduct of an appeal authority

(3) An appeal authority:
(a) shall:
(I) act in a quasi-judicial manner; and (Ii) serve as the final arbiter of issues involving the interpretation or application of land use ordinances; and.
(b) may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority.

Quasi-judicial manner

An appeal authority is not a court of law; however, its hearings and discussions must follow many of the procedures practiced by a judicial court. The boards hold public meetings on matters for which they are authorized, avoid ex parte contacts, and provide opportunity for cross examination. Its records are frequently used in subsequent judicial proceedings, therefore, it is important that the hearings of the board be conducted with dignity and with an established procedure. The board must review and draw conclusions from facts presented by the complainant regarding a specific parcel of property following procedures that resembles those that are followed by a court of law. The proceedings of the meetings must be recorded completely and accurately and a permanent public record, in writing, maintained. Because of the nature of its function it is important that each member of the board, or an alternate, be present at all hearings.

Final Arbiter

A decision by the authorized local appeal authority shall be the final step of the local appeal process.

Separation of powers

There may be a temptation to appoint a member of the planning commission or the city or county legislative body to a duel membership on the appeal board. Subsection (b), above, clarifies the importance of assuring that an individual appeal authority, or member of an appeal board, is not passing judgment on a decision in which that person participated as a decision-maker. A member of the planning commission or city or county council may have a conflict of interest with the many issues that come before an appeal board that are an appeal from a decision of the planning commission.

It is sometimes recognized as useful to have a member of the planning commission in attendance at the board meetings. A planning commission member may be able to explain or interpret planning commission actions or objectives A possible resolution would be to appoint a member of the planning commission or council as a non-voting member of the appeal board.

With respect to the involvement of members of the legislative body in the deliberations of an appeal board, it must be remembered that there is a *separation of powers* in local government. The board is an administrative agency that also performs quasijudicial functions. The legislative body must not interfere with board decision-making. It is not advisable for a member of the legislative body to serve also as a member of the board of adjustment.

More than one appeal body is possible

(4) By ordinance, a municipality [county] may:
(a) designate a separate appeal authority to hear requests for variances from the appeal authority it designates to hear appeals;
(b) designate one or more separate appeal authorities to hear distinct types of appeals of land use authority decisions ...

Subsection (1), above, provides that the appeal authority is created to hear and act upon requests for variances and appeals of decisions applying land use regulations. The planning commission may recommend an authority with the responsibility to confront both variances and appeals - much as the former board of adjustment. By Subsection (4)(a) the planning commission is granted the option to recommend two authorities, one that will focus upon variances and the other to decide appeals. This subsection also implies the option of delegating the appeal authority to a knowledgeable individual who would function similarly to an administrative judge.

Variances

The term “variance” has been interpreted as a variation from the land use ordinance that can be issued at will by an appeal board. It should be noted at the outset that a variance has a special legal meaning and can only be issued under certain circumstances. Sections 10-9a-702 and 17-27a-702 are identical. This section should be reviewed very carefully.

Essentially, a land use variance is a modification of regulations contained in the land use ordinance allowed in order to provide relief to a property owner in cases where the ordinance imposes *undue hardship* or *practical difficulties* to the property owner in the use of land. The hardships must not have been created by the actions or omissions of the landowner, or a previous landowner.

Generally, in the law, there are two kinds of variances: variances for minor departure from the ordinance, and use variances which involve changes in land use rather than just modifications of land use regulations. The Utah Supreme Court, in the case of *Walton v. Tracy Loan & Trust Co.,* 92 P2d 724 (1939), confirmed that the board of adjustment (appeal board) in Utah has jurisdiction only in cases of variances for minor departures from the regulation. The court strictly prohibited the board from granting variances of land use, i.e., use variances. This rule is often overlooked or abused by boards.

Approving a “variance” to allow a rental apartment in a single family house in a single family district, for example, would constitute a “use” variance - and thus an abuse of the authority of an appeal board.

 **The statutory language provides that each of the following five basic criteria for a variance must be satisfied before a variance can be approved**:

10-9a-702/17-27a-702 Variances.
(2) (a) The appeal authority may grant a variance only if:
(i) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinance;
(ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;
(iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;
(iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and
(v) the spirit of the land use ordinance is observed and substantial justice done.

Some of the definition problems for the courts have been with the term "unreasonable hardship." Courts have interpreted this phrase to mean that if the property owner complies with the provisions of the ordinance, he or she must be able to demonstrate an inability to make reasonable use of the property. The definition of hardship that is recognized by the law does not allow for special privileges. The board is without authority to grant a request for a variance that is based upon a personal hardship. The hardship must relate to the property, not to the owner or user. The following are factors which have been used by courts to determine if a land user has incurred undue hardship that qualifies for consideration of a variance:

T*he difficulties encountered must be caused by conditions unique to the property in question. If the hardship is common to several properties, the variance cannot be granted. The proper remedy under such circumstances is a land use amendment.*

The property owner cannot create the hardship. An example would be a home built too close to the property line when the site plan showed a proper setback. This applies although the illegal structure may have been constructed by a previous landowner; it applies also if the structure was constructed without a building permit.

The hardship must result from the application of a land use ordinance, not from the operation of a deed restriction or some other disability of the property.

A potential for economic loss, or something less than the maximum potential economic return to the property user, are not considered hardships by this definition.

The proposed modification must not alter the essential character of the area and must not be in conflict with the general plan.

Thus, "hardship" means more than just personal inconvenience. The courts have interpreted hardship very narrowly. Since use variances are not allowed, variances can only be applicable in those cases where the owner, because of odd-shaped lots or lot remnants, is unable to meet the dimensional standards of the land use ordinance. It should also be noted that special restrictions can be imposed in those cases where a variance is granted. The main purpose for the variance is to serve as a safety valve in those areas where a landowner incurs a hardship as a result of the application of the land use regulations. If the issuance of a variance for relief from the strict application of regulations were not allowed in the face of legitimate hardship, many land use ordinances would probably be held by the courts to be unconstitutional.

Case Study – In the case of *Xanthos v. Board of Adjustment of Salt Lake City,* 685 P2d 1032 (1984), the Utah Supreme Court dealt with standards of judicial review of a decision of a board of adjustment, but also expressed its interpretation of "hardship":

> *Therefore, in order to justify a variance, the statute requires that the applicant show at a minimum that the variance would not substantially affect the comprehensive zoning plan; that there are special conditions with regard to the property; that unnecessary hardship would result if the variance were not granted; and that substantial property rights enjoyed by other property in the area would be denied.*
>
> *It is not enough to show that the property for which the variance is requested is different in some way from the property surrounding it. Each piece of property is unique. What must be shown is that the property itself contains some special circumstance that relates to the hardship complained of and that granting a variance to take this into account would not affect the zoning plan.*
>
> *The evidence adduced does not support respondent's claim of special circumstance. The property is neither unusual topographically nor by shape, nor is there anything extraordinary about the piece of property itself.*

Variances that are granted should be recorded with the deed in order that the nature of the variance, and any conditions imposed with the variance, will run with the land and will be a continuing obligation of all subsequent landowners.

The City of West Valley City offers a checklist to potential applicants for a variance. Applicants are asked to determine if their request is justifiable or not by considering the following examples:

VARIANCE REQUESTS THAT MAY BE JUSTIFIABLE

An extra wide utility easement which interferes with the buildable area of a lot may justify encroachment into a required yard area.

Unusual size, shape or topography of a lot may justify some variance from what would normally be required under the ordinance.

VARIANCE REQUESTS THAT ARE NOT CONSIDERED JUSTIFIABLE

A hardship is not a problem that the property owner creates. For instance, if the house is built in such a manner that you cannot expand the living room without encroaching into a required yard, you will be creating the situation/problem and the ordinance does not recognize that as a legitimate hardship. Likewise, the fact that it might cost you less money to add an extension in a required front yard rather than adding to the house where the addition would be permitted out right, is not a hardship.

The important point is whether the owner is deprived of property rights, not desires. Financial hardship is not considered a legitimate reason for seeking a variance, nor are personal health situations.

Often you will not be aware of the fact that your proposed addition or other desired improvements do not comply with city ordinances until you apply for a building permit. The staff of the Planning and Zoning Department will work with you if it is determined that you have a justifiable hardship situation. You will be assisted in making application to the appeal authority.

In the granting of the variance, the board must take care to assure that the public safety and welfare are preserved and that substantial justice has been done. The board of appeals has an especially high calling to serve as an advocate of the public interest. The board should place great importance upon this consideration, rather than looking upon its duties as that of simple arbitration of disputes among private parties.

The board should consider and anticipate the potential impact of any proposed variance upon neighboring properties. Experience has shown that in many cases, variances are in reality requests for special favors that, if granted, could negate the intent of the ordinance. In such cases, the board should suggest that the applicant approach the planning commission and request an amendment to the ordinance.

Important points relative to variances (from 10-9a-702/17-27a-702):

- The applicant shall bear the burden of proving that all of the conditions

justifying a variance have been met;
- Variances run with the land;
- The appeal authority may not grant a use variance;
- In granting a variance, the appeal authority may impose additional requirements on the applicant that will:
  (a) mitigate any harmful affects of the variance; or
  (b) serve the purpose of the standard or requirement that is waived or modified.

Appeals

County and municipal boards are authorized to hear appeals to decisions or orders of a land use authority when a person or entity is adversely affected by a decision administering or interpreting a land use ordinance. When a person is aggrieved by a decision of an official charged with the enforcement of the land use ordinance, the person so aggrieved should file a petition directly to the appeal authority for hearing. Recourse beyond the appeal authority is to the court of competent jurisdiction.

When considering cases of interpretation, the board should first determine the facts and then apply what it thinks is the proper interpretation of the ordinance. For instance, where there may be some question as to the exact interpretation of the language in the ordinance on the basis of which the enforcement officer is denying a particular use, the board should make every effort to determine the legislative intent of the text of the ordinance prior to making its decision. In all cases the board must be guided by the *intent* of the ordinance, and must reach a judgment doing its best to uphold fairness and equity within the general purpose of the land use ordinance.

There are often problems that are brought to the city or county offices for board of appeals consideration that are relatively routine and can be resolved by administrative staff. Guidelines for making such determinations must be clearly outlined and adopted. The decisions of the administrator as provided here can be appealed to the board of appeals.

ETHICS OF THE MEMBERS OF THE BOARD OF APPEALS

The expectation of ethical behavior by a member of a planning commission, or governing body, applies equally to a member of a board of appeals. A section of the handbook entitled *Planning Commission* provides a description of the basic subjects of "Conflict of Interest," "Gifts and Favors" and "Political Activity." The main points are repeated here.

Conflicts of Interest

A board member to whom some private benefit may be derived as the result of a board action should not be a participant in the action.

- The private benefit may be direct or indirect, create a material personal gain or provide an advantage to relatives, friends or groups and associations which hold some share of a person's loyalty. Mere membership itself in a group or organization, however, shall not be considered a conflict of interest as to board action concerning such group or association unless a reasonable person would conclude that such membership in itself would prevent an objective consideration of the matter.

- Board members experiencing a conflict of interest, should declare their interests publicly, abstain from voting on the action and excuse themselves from the room during consideration of the action. The vote of board members with a conflict of interest who fail to disqualify themselves shall be disallowed.

- A conflict of interest may exist under these rules although a board member may not believe he or she has an actual conflict; therefore, a member who has any question about a conflict of interest under these rules should raise the matter with the other board members and the county or city attorney's office in order that a determination may be made as to whether a conflict of interest exists.

- No board member should engage in any transaction in which that member has a financial interest, direct or indirect, unless the transaction is disclosed publicly and determined to be lawful.

- Board members should not become personally involved in cases presented before the board. If an applicant should attempt to discuss a pending matter with any board member outside of an official meeting, the board member should advise the applicant that if the applicant persists it will be necessary for the board member to abstain from voting. Ex parte communications (relevant infromation sent directly to a member) or information received by a board members should be made public by the board member who was contacted.

- Public officials making appointments to the board of appeals should not attempt to exclude whole categories or associations of business, professional, or other persons in anticipation of conflict of interest problems. The service of competent people of

good character need not be sacrificed. Their withdrawal from participation in board matters is necessary only in those specific cases in which a conflict of interest might arise.

Gifts and Favors

Gifts, favors or advantages must not be accepted if they are offered because the receiver holds a position of public responsibility. Even small gifts that come in the form of business lunches, calendars or office brick-a-brac may arouse suspicion. The best rule to follow regarding gifts and favors is this: In cases of doubt, *refuse*. In cases of even marginal doubt, *refuse*.

Treatment of Information

It is important to distinguish between information that belongs to the public and information that does not.

- Reports and official records of a board of adjustment must be open on an equal basis to all inquiries. Information should not be furnished to some unless it is available to all.

- Information or private affairs learned in the course of performing board duties must be treated in confidence. Private affairs become public affairs when an official action, such as a variance or an appeal is requested. Only then is a disclosure of relevant information proper.

- Prearranged private meetings between a member of a board of adjustment and applicants, their agents, or other interested parties are prohibited. Partisan information on any application received by a member whether by mail, telephone, or other communication should be made part of the public record.

Political Activity

Membership in a political party and contributions to its finances or activities are matters of individual decision and should neither be required of, nor prohibited to, members of the board of adjustment. The extent of participation in political activities should be governed by professional judgment as well as limited by an applicable civil service law or regulations.

These rules for ethical conduct should serve as a guideline for all board members. Because each situation is unique, a board member should use his/her best judgment. All decisions made by the board of adjustment *must* be conducted with total fairness.

THE IMPORTANCE OF MAKING AND KEEPING GOOD RECORDS

The records of the proceedings of the board will form the basis for the district or higher court's review of its actions. Care should be taken, therefore, to ensure that all pertinent information is included in the record. This information should include evidence of proper notice for the case, as well as all evidence upon which the board based its decision. As an example, the board may have been required to show that its decision would not have adverse impacts on neighboring property. Their consideration should go beyond a statement in the proceedings that the decision did not appear to have adversely affected a neighbor's property.
Where the record is not sufficient, the court may refer it back to the board for clarification, or the court may be forced to rehear the case. Either way, delays and embarrassment will occur if records of the board's proceedings and findings are inadequate.

NOTE - The Open and Public Meetings Act provides that "only written minutes shall be evidence of the official action taken..."

Case Study – The need for the board to follow its decisions with a clear and concise explanation was abundantly illustrated by the decision by the Utah Court of Appeals in the 1997case of *Pamela Wells, et. al. vs. Board of Adjustment of Salt Lake City Corp., Case No. 960347-CA, 1997.* A restaurant owner acquired an old fire station building in Salt Lake City and converted it to a restaurant. The half of the block on which the building is located is zoned for commercial; the other half of the block, separated by an alley, is zoned residential. The zoning ordinance required a rear set back of ten feet for commercial uses, and where the commercial lot abuts residential, the ordinance requires that the rear yard become an unobstructed, landscaped buffer.

The owner applied to the Board of Adjustment for a variance to allow them to construct an enclosure for the dumpsters in the setback area. The Board held a hearing on the application. The applicants testified that the restaurant needed two dumpters, and that they had been in that location without the enclosure for a period of time. Residents of the area protested the application. The residents testified that they believed that any hardship suffered by the restaurant was the result of its own success rather than any difficulty with the lot. The residents alleged that the owners had failed to make adequate provisions for the

dumpsters during remodeling. It was pointed out also that the restaurant's dilemma was not unique to this lot; other business in this zone district were faced with the same requirement. The Board granted the variance.

The Board found that "the neighborhood would be better served by addressing the garbage issue and that only available space should be used as a buffer after both dumpsters are enclosed." The Board made no other express findings.

Residents took the case to the District Court. The Court granted summary judgment in the Board's favor. The Courts decision was appealed to the Court of Appeals. The Court of Appeals reversed the District Court and provided the following conclusion:

We conclude the Board's decision to grant the variance was illegal because the Board failed to make the required statutory findings. In addition, even assuming it silently made these statutory findings, the Board's decision was also arbitrary and capricious because it was not supported by substantial evidence. We therefore reverse the trial court's order granting respondents' motion for summary judgment and vacate the Board's decision granting the restaurant's variance.

MISUSE OF THE APPEAL AUTHORITY

Board members must be willing to place commitment to the rule of law above personal relationships, or fear of criticism!

The discussion of appeal authority would not be complete without some discussion of the potential for misuse of the authority. Board members must be careful to keep focused on the broad public interest, avoiding favoritism or bias that may lead to financial gain or advantages for family or acquaintances. There are often instances, especially in smaller communities, in which a board member must confront a neighbor, friend or relative who has a request that is very difficult to turn down. A person should not accept an appointment to an important public decision-making body without the awareness that while functioning in that role, they are committed to carrying out the letter of the law and representing the public interest. If the personal relationship is stronger than that commitment, the board member should acknowledge that there is a conflict of interest and withdraw from deliberation.

There may be an inclination on the part of board members to attempt to cure an individual's problem, when often such efforts are not in the interest of the public in general. Some observers of the function of boards of appeal have observed that over the years if all variances issued by the boards were carefully scrutinized, a very high proportion of them would be found to be invalid.

An appeal body does not have legislative power. For that important reason, it may not amend a land use ordinance or disregard its provisions.

Boards have limited powers and must act within the limits of those powers granted to it by the enabling act and the local land use ordinances. It is true also, that the powers granted to an appeal authority by the enabling statutes cannot be arbitrarily transferred to another agency.

The board should not attempt to amend the land use ordinance through its decisions. To attempt to do so would be an unauthorized assumption of legislative authority. The cases in which the courts have challenged actions of an appeal board as an attempt to exercise forbidden legislative powers are primarily cases where the board has granted variances in which the evidence presented would not support the claim of the property owner stating his circumstance, or in which the spirit of the ordinance would not be observed, nor public safety and welfare secured or substantial justice done.

Where the evidence does not reveal that a hardship exists or that it is unique to the specific property but arises through conditions which are common to other properties in the area, an attempt by the board to grant a variance would be equivalent to relieving the situation by amending the land use ordinance and that is a function reserved to the legislative body.

Variances should be granted only on an individual lot basis.

Another example of misuse of the power to grant variances is where the subject property embraces a large area and a petition for a change in zoning was denied. It is assumed that a large enough area and its surrounding conditions were considered by the legislative body and that the correct and appropriate zoning was enacted in the zoning ordinance at that time. A variance granted with respect to such a large area may affect substantial change in the comprehensive plan adopted for the community by the legislative body and would be contrary to the spirit and intent of the ordinance.

A legislative body cannot assume the role of the board of adjustment

A strictly legislative body cannot displace the board of adjustment in issuing variances. In municipalities in which there is a strong mayor-council form of government, constituting a clear separation of powers, the city council cannot be empowered by the local ordinance to assume the responsibilities of the board of adjustment. The Utah Supreme Court in the case of *Chambers v. Smithfield City,* 714 P2d 1133 (1986), interpreted Utah Code as expressing a clear legislative intent to vest the authority to grant variances solely with the board of adjustment. The Smithfield ordinance that was the issue in that case required that variance requests be submitted to both the board of adjustment and the planning commission, with appeal to the city council. The court found that the

city's procedures conflicted with the enabling act by vesting the city council, rather than the board of adjustment, with the final authority over the determination whether or not to grant variances.

The point of law was emphasized again in the case of *Scherbel v. Salt Lake City Corp.*, 81 Utah Adv. Rep. 15 (1988), where the Utah Supreme Court stated, "We therefore hold that the board of adjustment is the proper body to hear zoning appeals from the planning commission under the council-mayor form of government."

It should be repeated here that the statute authorizes a municipal government to designate a body other than the board of adjustment to hear appeals from the planning commission regarding conditional uses (but the amendment did not include variances). Such body could be the city council.

The board of adjustment may not change specified uses and may not alter boundary lines of zoning districts. The board cannot alter the uses intended within a zone; it cannot grant a "use" variance. The board also may not change the boundary lines of the zoning districts on the zoning map.

The board of adjustment cannot pass judgment on the validity of the zoning ordinance or the reasonableness of a legislative determination with respect to the restrictions placed upon land within the community. In an application to the board of adjustment for a variance, the applicant is conceding for the purposes of the application that the ordinance is valid.

SUMMARY

The process of land use administration requires enlightened and sound judgment because of its importance to the conduct of local government. The intent of the legislative body and planning commission to guarantee orderly and meaningful growth can be inhibited if the authority of the land use appeal authority is either misunderstood, misused or under-estimated. In order to preserve and enhance the proper function of local government as it relates to the regulation and determination of land conversion, it is necessary for each office of local government to understand its own role, as well as its relationship to the other branches and agencies. When these relationships as described by state statute and local ordinances are violated by the parties involved, mistrust, confusion and poor government administration will result. This can only destroy the intent of government to serve its people, as it may become government by whim rather than government by law.

APPENDIX

Utah Code Land Use Development and Management Act

Title 10, Chapter 9a - Municipalities

10-9a-701. Appeal authority required -- Condition precedent to judicial review -- Appeal authority duties.

(1) Each municipality adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide:

(a) requests for variances from the terms of the land use ordinances; and

(b) appeals from decisions applying the land use ordinances.

(2) As a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance.

(3) An appeal authority:

(a) shall:

(i) act in a quasi-judicial manner; and

(ii) serve as the final arbiter of issues involving the interpretation or application of land use ordinances; and

(b) may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority.

(4) By ordinance, a municipality may:

(a) designate a separate appeal authority to hear requests for variances than the appeal authority it designates to hear appeals;

(b) designate one or more separate appeal authorities to hear distinct types of appeals of land use authority decisions;

(c) require an adversely affected party to present to an appeal authority every theory of relief that it can raise in district court;

(d) not require an adversely affected party to pursue duplicate or successive appeals before the same or separate appeal authorities as a condition of the adversely affected party's duty to exhaust administrative remedies; and

(e) provide that specified types of land use decisions may be appealed directly to the district court.

(5) If the municipality establishes or, prior to the effective date of this chapter, has established a multiperson board, body, or panel to act as an appeal authority, at a minimum the board, body, or panel shall:

(a) notify each of its members of any meeting or hearing of the board, body, or panel;

(b) provide each of its members with the same information and access to municipal resources as any other member;

(c) convene only if a quorum of its members is present; and

(d) act only upon the vote of a majority of its convened members.

10-9a-702. Variances.

(1) Any person or entity desiring a waiver or modification of the requirements of a land use ordinance as applied to a parcel of property that he owns, leases, or in which he holds some other beneficial interest may apply to the applicable appeal authority for a variance from the terms of the ordinance.

(2) (a) The appeal authority may grant a variance only if:

(i) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances;

(ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;

(iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;

(iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and

(v) the spirit of the land use ordinance is observed and substantial justice done.

(b) (i) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship unless the alleged hardship:
(A) is located on or associated with the property for which the variance is sought; and
(B) comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.
(ii) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship if the hardship is self-imposed or economic.
(c) In determining whether or not there are special circumstances attached to the property under Subsection (2)(a), the appeal authority may find that special circumstances exist only if the special circumstances:
(i) relate to the hardship complained of; and
(ii) deprive the property of privileges granted to other properties in the same zone.
(3) The applicant shall bear the burden of proving that all of the conditions justifying a variance have been met.
(4) Variances run with the land.
(5) The appeal authority may not grant a use variance.
(6) In granting a variance, the appeal authority may impose additional requirements on the applicant that will:
(a) mitigate any harmful affects of the variance; or
(b) serve the purpose of the standard or requirement that is waived or modified.

10-9a-703. Appealing a land use authority's decision.
The applicant, a board or officer of the municipality, or any person adversely affected by the land use authority's decision administering or interpreting a land use ordinance may, within the time period provided by ordinance, appeal that decision to the appeal authority by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance.

10-9a-704. Time to appeal.
(1) The municipality shall enact an ordinance establishing a reasonable time of not less than ten days to appeal to an appeal authority a written decision issued by a land use authority.
(2) In the absence of an ordinance establishing a reasonable time to appeal, an adversely affected party shall have ten calendar days to appeal to an appeal authority a written decision issued by a land use authority.

10-9a-705. Burden of proof.
The appellant has the burden of proving that the land use authority erred.

10-9a-706. Due process.
(1) Each appeal authority shall conduct each appeal and variance request as provided in local ordinance.
(2) Each appeal authority shall respect the due process rights of each of the participants.

10-9a-707. Standard of review for appeals.
(1) A municipality may, by ordinance, designate the standard of review for appeals of land use authority decisions.
(2) If the municipality fails to designate a standard of review of factual matters, the appeal authority shall review the matter de novo.
(3) The appeal authority shall determine the correctness of a decision of the land use authority in its interpretation and application of a land use ordinance.
(4) Only those decisions in which a land use authority has applied a land use ordinance to a particular application, person, or parcel may be appealed to an appeal authority.

10-9a-708. Final decision.
(1) A decision of an appeal authority takes effect on the date when the appeal authority issues a written decision, or as otherwise provided by ordinance.

(2) A written decision, or other event as provided by ordinance, constitutes a final decision under Subsection **10-9a-801**(2)(a) or a final action under Subsection **10-9a-801**(4).

Utah Code Land Use Development and Management Act Title 17, Chapter 27a - Counties

17-27a-701. Appeal authority required -- Condition precedent to judicial review -- Appeal authority duties.
(1) Each county adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide:
(a) requests for variances from the terms of the land use ordinances; and
(b) appeals from decisions applying the land use ordinances.
(2) As a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance.
(3) An appeal authority:
(a) shall:
(i) act in a quasi-judicial manner; and
(ii) serve as the final arbiter of issues involving the interpretation or application of land use ordinances; and
(b) may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority.
(4) By ordinance, a county may:
(a) designate a separate appeal authority to hear requests for variances than the appeal authority it designates to hear appeals;
(b) designate one or more separate appeal authorities to hear distinct types of appeals of land use authority decisions;
(c) require an adversely affected party to present to an appeal authority every theory of relief that it can raise in district court;
(d) not require an adversely affected party to pursue duplicate or successive appeals before the same or separate appeal authorities as a condition of the adversely affected party's duty to exhaust administrative remedies; and
(e) provide that specified types of land use decisions may be appealed directly to the district court.
(5) If the county establishes or, prior to the effective date of this chapter, has established a multiperson board, body, or panel to act as an appeal authority, at a minimum the board, body, or panel shall:
(a) notify each of its members of any meeting or hearing of the board, body, or panel;
(b) provide each of its members with the same information and access to municipal resources as any other member;
(c) convene only if a quorum of its members is present; and
(d) act only upon the vote of a majority of its convened members.

17-27a-702. Variances.
(1) Any person or entity desiring a waiver or modification of the requirements of a land use ordinance as applied to a parcel of property that he owns, leases, or in which he holds some other beneficial interest may apply to the applicable appeal authority for a variance from the terms of the ordinance.
(2) (a) The appeal authority may grant a variance only if:
(i) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances;
(ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;

(iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;
(iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and

(v) the spirit of the land use ordinance is observed and substantial justice done.
(b) (i) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship unless the alleged hardship:
(A) is located on or associated with the property for which the variance is sought; and
(B) comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.
(ii) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship if the hardship is self-imposed or economic.
(c) In determining whether or not there are special circumstances attached to the property under Subsection (2)(a), the appeal authority may find that special circumstances exist only if the special circumstances:
(i) relate to the hardship complained of; and
(ii) deprive the property of privileges granted to other properties in the same zone.
(3) The applicant shall bear the burden of proving that all of the conditions justifying a variance have been met.
(4) Variances run with the land.
(5) The appeal authority may not grant a use variance.
(6) In granting a variance, the appeal authority may impose additional requirements on the applicant that will:
(a) mitigate any harmful affects of the variance; or
(b) serve the purpose of the standard or requirement that is waived or modified.

17-27a-703. Appealing a land use authority's decision.
The applicant, a board or officer of the county, or any person adversely affected by the land use authority's decision administering or interpreting a land use ordinance may, within the time period provided by ordinance, appeal that decision to the appeal authority by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance.

17-27a-704. Time to appeal.
(1) The county shall enact an ordinance establishing a reasonable time of not less than ten days to appeal to an appeal authority a written decision issued by a land use authority.
(2) In the absence of an ordinance establishing a reasonable time to appeal, an adversely affected party shall have ten calendar days to appeal to an appeal authority a written decision issued by a land use authority.

17-27a-705. Burden of proof.
The appellant has the burden of proving that the land use authority erred.

17-27a-706. Due process.
(1) Each appeal authority shall conduct each appeal and variance request as described by local ordinance.
(2) Each appeal authority shall respect the due process rights of each of the participants.

17-27a-707. Standard of review for appeals.
(1) A county may, by ordinance, designate the standard of review for appeals of land use authority decisions.
(2) If the county fails to designate a standard of review of factual matters, the appeal authority shall review the matter de novo.
(3) The appeal authority shall determine the correctness of a decision of the land use authority in its interpretation and application of a land use ordinance.
(4) Only those decisions in which a land use authority has applied a land use ordinance to a particular application, person, or parcel may be appealed to an appeal authority.

17-27a-708. Final decision.

(1) A decision of an appeal authority takes effect on the date when the appeal authority issues a written decision, or as otherwise provided by local ordinance.

(2) A written decision, or other event as provided by ordinance, constitutes a final decision under Subsection **17-27a-801**(2)(a) or a final action under Subsection **17-27a-801**(4).