

**ORDINANCE 2024-01 – BOARD OF ADJUSTMENT – DRAFT****Article 1. Board of Adjustment****§ 1-01. Composition**

The Board of Adjustment shall consist of 5 members, who shall be residents of the Town who have knowledge of the problems of urban and rural development.

**§ 1-02. Organization****A. Terms.**

- (1) Each member of the Board of Adjustment shall be appointed for a period of 3 years, except that 1 of the initial members shall be appointed for a 1-year term, 2 of the initial members shall be appointed for a 2-year term, and 2 of the initial members shall be appointed for a 3-year term.
- (2) All subsequent appointments to the Board of Adjustment shall be for a period of 3 years.

**B. Appointment.**

- (1) The President of the Commissioners of the Town of Bellefonte, acting as the chief executive officer for the town, shall appoint all members of the Board of Adjustment.
- (2) No member of, or appointees to, the Board of Adjustment shall be candidates or members of the Commission or employees of the Town of Bellefonte.
- (3) All appointments to the Board of Adjustment must be confirmed by a majority vote of the Commissioners of the Town of Bellefonte.

**C. Vacancy**—A vacancy occurring otherwise than by the expiration of term shall be filled for the remainder of the unexpired term in the same manner as an original appointment.

**D. Removal**—Any member of the Board of Adjustment may be removed from office by the Commissioners for cause after a hearing by a majority vote of all the elected Commissioners.

**E. Election of Chairperson and Secretary.**

- (1) The Board of Adjustment, once confirmed by a majority vote of the Commissioners of the Town of Bellefonte, shall elect from among their own number a Chairperson and a Secretary.
- (2) Each year after appointment or reappointment of a member, the Board of Adjustment shall elect a Chairperson and Secretary.

**§ 1-03. Board to Adopt Rules**

**A.** The Board of Adjustment shall adopt rules as to the manner of filing appeals and applications, for the conducting of hearings, and for the giving of such notice or notices as may be required or deemed advisable by the Board.

**B.** All of the rules and regulations shall conform to the requirements of State law and all ordinances governing the Town of Bellefonte.

**C.** Rules of conduct may be adopted or amended by majority vote of the Board of Adjustment.

**§ 1-04. Summary of Powers and Responsibilities****A. Appeals.**

- (1) To hear and decide appeals from any decision or act of any administrative officer **relating to zoning review and enforcement** under the Bellefonte Land Use Code pursuant to Title 22, §

327 of the Delaware Code, except as relating to property maintenance, which is under the jurisdiction of the County pursuant to Ordinance 2005-3 **and except as relating to the New Castle County Building Code, which is under the jurisdiction of the County pursuant to Ordinance 2016-03.**

- (2) To hear any appeal of any decision of the **Zoning Review Board** as permitted by law or ordinance including any fine, violation notice, or cease and desist order issued pursuant to Article 10 Zoning Appeals in the Town Of Bellefonte Land Use Code, except as relating to property maintenance, which is under the jurisdiction of the County pursuant to Ordinance 2005-3, **and except as relating to the New Castle County Building Code, which is under the jurisdiction of the County pursuant to Ordinance 2016-03.**
  - (3) To hear and decide any appeal, matter, or application prescribed by State law or Town Ordinance that permits an appeal to or decision by the Board of Adjustment, except as relating to property maintenance, which is under the jurisdiction of the County pursuant to Ordinance 2005-3, **and except as relating to the New Castle County Building Code, which is under the jurisdiction of the County pursuant to Ordinance 2016-03.**
- B. Extensions and Changes of Nonconforming Uses.
- (1) To authorize, after public notice and hearing, the extension of a nonconforming use or building, in cases where such extension is for a use which is a necessary incident to the existing use, and does not exceed in value 50% of the replacement valuation of existing buildings.
  - (2) To authorize the change of a nonconforming use to another nonconforming use which is not more detrimental to the neighborhood; or the alteration of a nonconforming building; but not the extension of a nonconforming building in connection with a change of use, unless the extension itself be conforming in its use and construction.
- C. Certification of Nonconforming Status—To certify the nonconforming status of a property or a situation as legal upon finding that sufficient evidence exists to substantiate the legal existence of the nonconforming situation pursuant to Article 7 in the Town Of Bellefonte Land Use Code.
- D. District Boundary Locations—To determine the correct location of district boundaries in any disputed case pursuant to Section 1.10 in the Town Of Bellefonte Land Use Code.
- E. Vested-Rights Exemptions—To hear and decide applications from any person, entity, owner or equitable owner of property not otherwise exempted from the requirements of the Land Use Code, who asserts a vested right to continue development under the ordinances, regulations, laws, policies, standards, or fee structures in place immediately before the adoption of the Land Use Code or any amendment thereto pursuant to the standards in Section 1.13 in the Town Of Bellefonte Land Use Code.
- F. Beneficial-Use Appeals—To hear and decide applications for beneficial-use appeals where it is alleged that no beneficial use remains in a property and that some level of relief from the Land Use Code is warranted.
- G. Special Exceptions—To hear and decide applications for special exceptions pursuant to Title 22, § 327 of the *Delaware Code*.
- H. Variances—To hear and decide applications for variance from the strict application of the Land Use Code (as amended) pursuant to Title 22, § 327 of the *Delaware Code*.

#### **§ 1-05. Conduct of Hearings**

- A. The Board of Adjustment shall hold a public hearing on each application, petition, or appeal that it is authorized to hear.

- B. At such hearing, any resident or property owner of the Town of Bellefonte may appear in person or by agent, or by counsel.
- C. The Board of Adjustment shall consider all testimony offered by any witnesses in rendering its decision.
- D. The decision of the Board of Adjustment shall be in writing and a copy thereof shall be sent to the parties in interest.
- E. The written decision of the Town of Bellefonte shall be final upon the filing of the decision in the office of the Board of Adjustment.
- F. In exercising its powers, the Board of Adjustment may reverse or affirm, wholly or partly, or may modify, any order, requirement, decision, or determination appealed from, and to that end shall have all the powers of the officer from whom the appeal is taken.
- G. Approval of an application or appeal by the Board of Adjustment does not supersede or obviate the need for complying with any other applicable ordinance, standards, approvals, or review procedures.

**§ 1-06. Appeals; Hearing on Reversal; Limitation on Reapplication**

- A. Appeal to a Court of Law or Equity—Any party aggrieved by any decision of the Board of Adjustment shall have the remedies prescribed by State law. Any applicant appealing a decision of the Board of Adjustment shall be required to pay the full cost of preparing the record for appeal.
- B. Limitation on Reapplications—The Board of Adjustment shall not hear or accept an application requesting the same relief or permission for the same property for a period of 12 months from the date that the Board of Adjustment took final action on the application.

**§ 1-07. Filing Applications**

- A. Filing—Applications shall be filed in the office of the Board of Adjustment, or with appropriate Town staff as designated by the Board. The Board, or Town staff as designated by the Board, may provide forms to facilitate application processing.
- B. Content—Applications shall be made in writing and shall provide the following information.
  - (1) Information about the owner and applicant;
  - (2) Statement of the type of relief, permission, or review requested;
  - (3) Information about the property for which the application or review is being made;
  - (4) Information to support the application;
    - (a) Information about the property for which the application or review is requested; or
    - (b) Identification of the provisions of the Land Use Code, with which the application must comply, and statements as to how the application complies with those provisions;
  - (5) Plans or drawings that support or clarify the relief, review, or permission requested;
  - (6) Other information requested by the Board of Adjustment, including, but not limited to, survey information.
- C. Incomplete Applications.
  - (1) No application is complete until all required items are received and applicable fees are paid in full.
  - (2) Incomplete applications may be rejected, and the application shall not be deemed filed until the applicable fee is paid in full.
- D. Burden of Proof on Applicant—Every applicant shall have the burden of presenting the information needed by the Board of Adjustment to make a determination.

**§ 1-08. Fee**

The fee for any variance request, appeal, vested rights exemption, beneficial use appeal, special exception, or any other matter to be heard by the Board of Adjustment is \$700.00 to cover administrative and advertising costs. No variance request, appeal, vested rights exemption, beneficial use appeal, special exception, or any other matter to be heard by the Board of Adjustment shall be considered filed until the application fee is paid in full.

**§ 1-09. Public Notice Provisions**

- A. Newspaper Notice—The Town shall advertise the public hearing in a newspaper of general circulation. The notice shall appear at least 15 calendar days prior to the public hearing date and shall contain the following information:
- (1) The type of application;
  - (2) A short description of the proposed action;
  - (3) A description of the parcel and the approximate street location or address;
  - (4) The location, date, and time of the public hearing;
  - (5) Information on where full details of the application may be obtained, including the hours of availability and phone number.
- B. Notice to Owner/Applicant—The Town shall notify by regular mail the owner and/or applicant of the time and place of the public hearing.
- C. Notice to Nearby Property Owners—The Town shall send by regular mail a copy of the public hearing notice to the last known address of all property owners within a 100-foot radius of the property measured at each property line or 12 different property owners, whichever is greater; no fewer than 15 calendar days prior to the public hearing. The notice shall contain the same information as in the newspaper notice.
- D. Property-Posted Notice—The applicant shall erect a sign giving notice of a public hearing on all subject properties at least 10 days in advance of a public hearing.
- (1) Location—The posted sign shall be placed in a conspicuous location (no greater than 7 feet from a residential or local road right-of-way, and no greater than 10 feet from a collector or arterial right-of-way); one (1) along each adjacent right-of-way and shall be perpendicular to the street so as to be clearly visible to the public. The Town shall have the discretion to require the applicant to move the posted sign to a more acceptable location if the Town determines that the location is inappropriate for public viewing. The Town shall also have the discretion to permit only one (1) posted sign on corner lots of less than one (1) acre.
  - (2) Size—The posted sign shall be double-faced and each side shall consist of a 4-foot by 4-foot laminated sign with a yellow background with two (2) inch black lettering in a sans serif typeface. If a posted sign already exists at the site, the notice for the public hearing may be affixed to the existing sign.
  - (3) Contents—The sign shall display prominently the applicant's name, type of application, tax parcel number(s) and the date, time, and location of the hearing.
  - (4) Maintenance—The applicant shall be responsible to clean or replace any posted sign no more than once which has been defaced to the extent that the information to be conveyed is no longer legible.
  - (5) Proof of Posting—The applicant shall provide the Town with photographic proof of posting and a signed affidavit prior to the public hearing. Failure of any such posted notice to remain in

place after the notice has been posted shall not be deemed a failure to comply with these standards or be grounds to challenge the validity of any decision made on the application unless the notice was removed by the applicant or at his or her direction.

- (6) Removal—The applicant shall remove the posted sign no later than 10 days after the public hearing being advertised has been completed. If the posted notice sign is giving notice of other public hearings concerning the property, the posted notice sign shall remain until after the hearings have taken place.
- E. Posting at Town Hall—Notice shall be posted at Town Hall no fewer than 15 calendar days prior to the hearing and shall contain the same information as required for the newspaper notice.

### **§ 1-10. Appeals**

- A. Procedure for Filing an Appeal—Any person aggrieved or affected by any decision of the Zoning Review Board may appeal from such decision to the Board of Adjustment as provided by law.
- (1) Notice of appeal, specifying the grounds thereof, shall be given in writing to the Zoning Review Board and to the Board of Adjustment within 30 days from the date of the decision of the Zoning Review Board.
  - (2) Thereupon, the Board of Adjustment shall hold a public hearing on the appeal within 45 days of the filing of the appeal and shall publish notice of said hearing in a newspaper generally circulated in the Town of Bellefonte, at least once before said hearing.
- B. Stay of Proceedings—An appeal stays all proceedings in furtherance of the action appealed from unless the Zoning Review Board ~~Building Inspector~~ certifies to the Board of Adjustment that a stay would cause imminent peril to life or property. In such a case, proceedings shall be stayed only by a restraining order granted by the Board of Adjustment or a court having jurisdiction.
- C. Special Appeal Procedure For Property Maintenance Related Permits—Pursuant to Ordinance 2005-3, New Castle County has property maintenance jurisdiction within the Town of Bellefonte. Any person aggrieved or affected by any property maintenance related permits or violations within the Town of Bellefonte shall appeal in and through the New Castle County appeal and review process. The Bellefonte Board of Adjustment shall have no jurisdiction to hear appeals concerning permits granted within Bellefonte if such permits or violations are initiated by New Castle County through the County's property maintenance jurisdiction-
- D. Special Appeal Procedure for Building Permits - Pursuant to Ordinance 2016-03, New Castle County has jurisdiction over the application, inspection, and enforcement of the New Castle County Building Code within the Town of Bellefonte. Any applicant within the Town of Bellefonte who is aggrieved by the issuance, denial, suspension, or revocation of any permit under that jurisdiction or any violation action under that jurisdiction shall appeal in and through the New Castle County appeal and review process. The Bellefonte Board of Adjustment shall have no jurisdiction to hear appeals concerning building permits granted by New Castle County, except where such violation is Bellefonte, except where the Town of Bellefonte Zoning Review Board has determined that the work proposed or being performed is in violation of the standards set forth in the Land Use Code, or other laws of the Town of Bellefonte. It is intended that this provision is to clarify the existing law, shall supersede any inconsistent provision in Ordinance 2016-03, and is intended to apply retroactively to the adoption of Ordinance 2016-03.

**§ 1-11. Beneficial Use Appeals**

- A. Who May Apply—A landowner who alleges that the application of the Bellefonte Land Use Code denies all, or substantially all, economically viable use of property may apply for relief after exhausting all other available avenues of appeal (including variance requests) to the Board of Adjustment.
- B. Application Details—In addition to the general information required in § 1-07, the following data shall accompany all applications for a beneficial use appeal:
- (1) Documentation of the purchase date and price of the property.
  - (2) A description of the physical features of the property, total acreage, and present use, the use of the property at the time of the adoption of the Land Use Code or amendment thereto, and any known prior uses.
  - (3) A description of the specific portions of the Land Use Code which allegedly eliminate all or substantially all economically viable use of the property, together with all appraisals, studies, any other supporting evidence, and any actions taken by the Town related to the property.
  - (4) A description of the use which the landowner believes represents the minimum beneficial use of the property and all documentation, studies, and other evidence supporting that position.
  - (5) If the property has been listed for sale since the adoption of the Land Use Code or amendment thereto, originals or copies of all bids, offers-to-purchase, and other correspondence regarding the sale of such property.
- C. Deprivation Standards—In determining if a landowner has been deprived of the beneficial use of property, the Board of Adjustment shall take into account the following factors:
- (1) Diminution in Value—The property value, prior to the adoption of the Land Use Code, shall be compared to the property value with the regulations as applied. A mere decrease in value does not deprive the landowner of all or substantially all beneficial use of property. The diminution in value must be such that it effectively deprives the landowner of all or substantially all viable use or enjoyment of the property.
  - (2) Common Land Uses—A use common to the Town and/or the area of the subject site, although it may not involve further development of the land, may be considered a beneficial use. Attention shall also be given to land uses considered to be the lowest intensity in the Town or adjoining areas, but which uses still provide for occupation and living by the landowner.
  - (3) Subsidy—A minimum beneficial use of the land may be a use where a governmental subsidy is provided. If such a subsidy exists, its value should be reflected in the considered minimum beneficial use on a valuation basis. The cumulative public costs of a subsidy should be considered payment to the landowner for the restriction on the property if the annual subsidy enhances the economic return of the existing use to the landowner. The value of the proposed use shall be adjusted to reflect the degree to which a subsidy enhances the property value by determining the value of the use without the subsidy.
  - (4) Adverse Impacts—The extent to which the Land Use Code protects users, future users, or neighbors from threats to health, safety or general welfare shall be considered. A use that seriously threatens the health, safety or general welfare of current or future residents or neighbors shall not be considered a use the property owner is entitled to enjoy and shall not, when restricted by the Land Use Code, constitute a denial of all or substantially all economic viable use of the property.

- (5) Expectations—Expectations shall, in general, not be considered. Only expectations backed by reasonable investments made prior to the adoption date of the regulations in question may be considered.
- (6) Nuisances—In no case shall a use that is a nuisance per se, or a use that in that particular location constitutes a nuisance, constitute grounds for relief.
- (7) Other—The Board of Adjustment may also take into account any factors that have been considered by a federal court or a Delaware court in determining whether all, or substantially all, economic use of a property has been denied a landowner who has made a takings claim pursuant to the federal or state Constitution.

D. Granting Relief.

- (1) If the finding is that a landowner has been denied all or substantially all economic viable use of the property, the Board of Adjustment shall grant relief. In the alternative, the Board of Adjustment may also find that some beneficial use of the property remains. The Board of Adjustment shall grant only that level of relief necessary to provide for a beneficial use of the property.
- (2) Minimum Increase—In granting relief, the landowner shall be given the minimum increase in use intensity or other possible concessions from the Land Use Code to permit a beneficial use of the land. The following guidelines shall be used to determine the minimum beneficial use of the property.
  - (a) The reality of limited development potential, given the natural condition of the property, shall not be attributed to the regulations applied to the property.
  - (b) The potential for damages to either future residents or property shall be assessed in determining a beneficial use. Conditions shall be placed on sites where damage from hazardous conditions is likely. The conditions may include location restrictions, size limitations, and increased building standards.

**§ 1-12. Variances**

- A. Definition—Relief from the strict application of the provisions of the Land Use Code when, owing to special conditions or exceptional situations, a literal interpretation of the Land Use Code will result in exceptional practical difficulties to the property owner.
- B. Required Findings—Pursuant to Title 22, Section 327 of the *Delaware Code* and applicable law, the Board of Adjustment shall determine whether each variance application meets the statutory and common-law standards for the grant of the variance.
  - (1) The variance relates to a specific parcel of land, and the hardship is not shared generally by other properties in the same zoning district and vicinity.
  - (2) The variance can be granted without substantial detriment to the public good.
  - (3) The benefits from granting the variance would substantially outweigh any detriment.
  - (4) Approval of the variance would not substantially impair the intent and purposes of the comprehensive plan or the Land Use Code.
- C. Additional Considerations—The Board of Adjustment shall also consider at least the following factors in reaching its decision on each variance application:
  - (1) Nature of the zone where the property lies.
  - (2) Character of the immediate vicinity.
  - (3) Whether the restrictions, if lifted, would affect neighboring properties and uses.

- (4) Whether the restriction would tend to create a hardship on owner in relation to normal improvements.

D. Additional Standards.

- (1) Use Variances—Use variances may be granted only when such use variances strictly comply with the requirements for use variance under Delaware law. These provisions governing use variances shall not be construed to permit the Board of Adjustment, under the guise of a variance, to authorize a use of land not otherwise permitted in this Land Use Code.

**§ 1-13. Special Exceptions**

A. Definition—A use permitted in a particular zoning district when it is shown that such use in a specified location will comply with all the conditions and standards for the location or operation of the use as specified in the Land Use Code and authorized by the Board of Adjustment.

B. Required Findings—The Board of Adjustment shall determine whether each Special Exception application meets the following conditions:

- (1) Is in harmony with the purposes and intent of the comprehensive plan.
- (2) Will be in harmony with the general character of its neighborhood considering density, design, bulk, and scale of proposed new structures.
- (3) Will not be detrimental to the use, peaceful enjoyment, economic value, or development of surrounding properties.
- (4) Will not cause objectionable noise, vibrations, fumes, odors, dust, glare, or physical activity.
- (5) Will have no detrimental effect on vehicular or pedestrian traffic.
- (6) Will not adversely affect the health, safety, security, or general welfare of residents, visitors, or workers in the area.
- (7) Complies with all other applicable standards, laws, and regulations in addition to the provisions of the Land Use Code.
- (8) Meets all other additional requirements for certain special exceptions in § 1-13.C.

C. Additional Required Findings for Certain Special Exceptions—In addition to the required findings in § 1-13.B, the Board of Adjustment shall also determine whether each special exception application in this Subsection meets its applicable conditions.

- (1) Commercial Communications Tower.

(a) New Freestanding Tower/Monopole.

[1] In Residential Districts—Any new freestanding tower/monopole in any residential district requires a minimum lot size of 1 acre.

[2] In Mixed Use Districts—No minimum lot size is required, however, any new freestanding tower/monopole proposed to be erected within five hundred (500) feet of any residentially zoned lot, improved or which can be improved with a residential dwelling unit.

(b) Co-Location—Co-location of telecommunication equipment (such as antenna) in any zoning district on existing or replacement freestanding towers/monopoles, buildings, water towers/tanks, pole signs, lighting standards, silos, smokestacks, steeples, billboards, telephone poles, and other similar structures is preferred.

(c) Submission Requirements.

[1] In addition to any other information required in the Land Use Code in connection with an application for a commercial telecommunications facility, all applicants shall submit

a site plan and appropriate written documentation demonstrating compliance with the applicable conditions listed in this Section. Any application for a new tower/monopole shall include documentation substantiating the need for such tower at the proposed location and shall include an area map showing the location of all known commercial communication towers/antenna within a 1-mile radius of the proposed facility.

[2] Required Documentation.

- [a] Evidence that no existing facilities are located within the area targeted to be served and which meet the applicant's engineering requirement.
- [b] Evidence that existing facilities do not have sufficient height or cannot be increased to a height at a reasonable cost to meet the applicant's engineering requirements.
- [c] Evidence that existing facilities do not have sufficient structural strength or space to support the proposed antenna and related equipment and that those existing facilities cannot be reinforced at a reasonable cost to accommodate new equipment.
- [d] Evidence that applicant's antenna or equipment would cause electromagnetic interference with the antenna on the existing towers or structures or the antenna or equipment on the existing facility would cause interference with the applicant's proposed antenna.
- [e] Evidence of non-cooperation of landowners for alternative sites that might have been a better location.