

Delaware Coalition for Open Government

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Dear President Vincent; Chairman Mills and Director Cornwell

On behalf of the Delaware Coalition for Open Government (DelCOG), an organization committed to promoting and defending the people's right to transparency and accountability in government, we want to bring to your attention a number of issues about the operation of Sussex County's Board of Adjustment (Board).

This email describes four obstacles and issues at the Board that prevent it from being a public body that is truly open to the public.

The four obstacles and issues are:

- **Accessibility to the Board's key documents in a usable format;**
- **Lack of public input to the Board's operation during a meeting;**
- **There is no administrative mechanism for opponents of cases brought to the Board to challenge Board decisions;**
- **The Board is not properly administering oaths and affirmations in obtaining testimony in cases.**

1) Accessibility to Board's key documents in a usable format.

The Sussex County's Board of Adjustment puts some of its case documents online but not all key documents.

It posts its agendas and minutes of meetings online, but it does not make oral versions of them available for the blind or other sight-impaired residents... or if it does, it does not make this common knowledge.

Conversely, the Board records its hearings and puts the recording online, but it does not transcribe the recordings.

If there are transcriptions made or if they can be requested, the public is not aware of these options. The lack of transcription is a problem for the deaf and other hearing-impaired residents.

One key document that the Board does not post online is the Findings of Fact.

Before the Board considers a case closed, it must approve the Findings at a subsequent hearing--up to 60 days after the vote.

At the hearing where Findings are approved, the Board simply generically lists "Findings of Fact" as an agenda item without indicating which case they pertain to, then the Board votes on them without publicly identifying the applicable case(s), without a reading or discussion of the Findings, or making them available to the public prior to the vote.

The public only knows a week or so before that hearing that some Findings will be voted on when the Board posts the agenda that lists the Findings.

Further, even after the vote, the Findings of a case are not posted online nor is an oral version made available; if someone wants them, they have to go the Planning and Zoning Office in Georgetown to obtain a hard copy--no electronic version is available.

Why they are not posted online is a mystery.

The lack of online access of Findings of Fact are a hardship for anyone with visual or mobility issues.

It seems the simple solution would be to make them available online and/or provide an oral version.

2) Lack of public input to the Board's operations during a meeting.

Contrary to the Board's Rules of Procedures, if someone wants to comment on pertinent points about the Board's operation, there is no way to raise such points to the Board as part of its regular meetings.

This is not consistent with the Board's Rules, which state in Rule 2.2 Order of Business; Conduct of Business: "The privilege of the floor may be granted to the public at any time by the presiding officer."

Although interested parties can comment about specific cases during the meetings, the public cannot make public comments or suggestions about how the board operates, is organized, or other aspects of the Board at these meetings.

We understand the Board is an administrative hearing board, but there does not seem to be a public mechanism for raising concerns.

For example, no where in the Board's Rules of Procedures does it explain this what this process looks like or how the public is to take such action.

Similarly, the County zoning regulation--Article XXVII Chapter 115 covering the Board of Adjustment--is moot on any mechanism or process for public input on the Board's operation, including subchapters 115-207 and 115-208, which establish the Board and its procedures, respectively.

3) There is no administrative mechanism for opponents of cases brought to the Board to challenge Board decisions,

According to the Planning and Zoning Director and staff, which serve as the Board's de facto staff, an applicant can request a rehearing by the Board if he/she is unhappy with the outcome, but there is no such option available to opponents or even disinterested third parties who believe an administrative error was made.

Instead, if opponents want to challenge a decision, they have to file a lawsuit with Superior Court within 30 days of the final decision and approval of the Findings of Fact.

According to the Board's Rules of Procedures, specifically Rule 18--Request for a Rehearing, a rehearing request must be filed within 10 days of the final decision.

According to the Planning and Zoning director Janelle Cornwell, who also administers the Board's business, that mechanism only applies to the applicants whose case the Board considered.

This two-tiered way of handling challenges to Board decisions is neither fair nor equitable to opponents.

It's particularly inequitable and onerous for poor challengers who oppose cases decided by the board because they cannot afford to hire an attorney to file suit in court.

More substantially, this one-sided rehearing mechanism does not appear to be consistent with the County's zoning regulation pertaining to the Board of Adjustment.

Not only does the County's Board of Adjustment zoning regulation-- Article XXVII Chapter 115--not mention a "rehearing," it specifically states in subchapter 115-208 B. [emphasis added]: "

An appeal to the Board may be taken by any person aggrieved or by any officer, department, board or bureau of the county affected by any decision of the Director. Such appeal shall be taken within 30 days after the decision appealed from by filing with the Director a notice of appeal, specifying the grounds thereof. The Director shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed from was taken. An appeal stays all proceedings in furtherance of the action appealed from unless the Director certifies to the Board that, by reason of facts stated in the certificate, a stay would, in his opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order granted by the Board or by a court of record, on application and on notice to the Director and on due cause shown."

4) The Board is not properly administering oaths and affirmations in obtaining testimony in cases.

There is a conflict between the Board's Rules of Procedures--specifically Rule 2 that says the attorney administers the oath--and the County's zoning regulation covering the Board that says the Board's chairman or the acting chairman does.

State law says in conflicts such as this, the County's regulations overrides the Board's rules.

Therefore, the Board rules need to be revised so they are consistent with state law and the county's regulations and say that the chairman administers the oath!

Further, the consequence may be that the Board has not been in compliance with County code and cases where the attorney administered oaths and affirmations may not be valid.

Under the Board Rules of Procedures sub-rule 2.5, the Board's attorney or other official designated by the presiding officer administers the oath for testimony.

Yet Sussex Zoning Code Chapter 115 specifically creating the Board and describing its structure, function, etc. state in two subchapters that the chairman--or in his absence the acting chair--"may administer the oaths" and obtain testimony (115-207 C. and 115-208 E., respectively).

At the state level, Delaware state law covering rules governing the Board of Adjustment specifically addresses this kind of conflict in favor of County regulations.

In Title 9 Chapter 69, Subchapter 1. General Provisions, section 6915 explains that county government "shall provide and specify in its zoning or other regulations" general rules about how the Board of Adjustment is organized and what its rules and jurisdiction are.

The section also states that Board rules and supplemental rules of procedures can't be "inconsistent with this subchapter" or the County's general rules.

Thank you for your consideration,

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