

December 9, 2019

## SECTION 12 APPEALS, INTERPRETATIONS AND VARIANCES

**12.1 Purpose** The purpose of Section 12 is to define the authority and procedures of the Board of Appeals of the Town of Boothbay established in accordance with the provisions of 30-A § 2691.

### 12.2 Applicability

**12.2.1** Section 12 applies to requests for:

**12.2.1.1** A variance from the strict interpretation of the standards of this Ordinance;

**12.2.1.2** An administrative appeal in connection with a decision or interpretation of the Code Enforcement Officer

**12.2.1.3** An administrative appeal in connection with a decision of the Planning Board except with respect to subdivision applications, and

**12.2.1.4** An interpretation of a zoning boundary.

**12.2.2** A decision of the Planning Board relative to a subdivision application shall be appealed directly to Superior Court.

### 12.3 Responsibilities

#### 12.3.1 Applicant or Aggrieved Party

**12.3.1.1** An applicant shall have the burden of proving that:

**12.3.1.1.1** The relief requested from the ordinance standards meets all requirements for granting of variances as set forth in Section 12.6; or

**12.3.1.1.2** A zoning boundary should be located as proposed by the applicant.

**12.3.1.2** An aggrieved party shall have the burden of proving that:

**12.3.1.2.1** A decision or action of the Code Enforcement Officer is not in conformity with the purposes and provisions of this Ordinance; or

**12.3.1.2.2** A decision of the Planning Board is not in conformity with the purposes and provisions of this Ordinance; or

**12.3.1.3** The applicant is responsible for determining what, if any, other approvals are needed from Town, State or Federal agencies or authorities.

#### 12.3.2 Board of Appeals

**12.3.2.1 De Novo Administrative Appeals** The Board of Appeals shall conduct a *de novo* review in accordance with the provisions of 12.4.12.2.4 below for the following:

**12.3.2.1.1 Decisions of the Code Enforcement Officer** The Board of Appeals shall hear and shall grant, grant with conditions, remand, or deny administrative appeals from decisions or actions of the Code Enforcement Officer where it is alleged that there is an error in any order, requirement, decision or determination; a failure to act; or inappropriate action by the Code Enforcement Office in his or

her review of a permit application or enforcement responsibilities under this Ordinance.

**12.3.2.1.3 Violations** The Board of Appeals shall hear and shall grant, grant with conditions or deny appeals of notices of violations, including those relating to subdivisions.

**12.3.2.2 Appellate Administrative Appeals** The Board of Appeals shall conduct an appellate review in accordance with the provisions of 12.4.12.2.4 below for the following:

**12.3.2.2.1 Decisions of the Planning Board** The Board of Appeals shall hear and shall grant, grant with conditions, remand, or deny administrative appeals from decisions of the Planning Board where it is alleged that there is an error in any order, requirement, decision or determination; a failure to act by the Planning Board in the administration of this Ordinance.

**12.3.2.3 Interpretations** When requested by an applicant, the Board of Appeals shall interpret the boundaries of a Zoning District, an Overlay District or an Area within the Shoreland Overlay District.

**12.3.2.4 Variances** The Board of Appeals shall hear and shall, subject to the limitations of 12.5, grant, grant with conditions or deny requests for relief from the standards of the Zoning Ordinance that cannot be granted by the Planning Board.

## 12.4 Appeal Procedure

### 12.4.1 Time Limit

**12.4.1.1 Appeal** An administrative appeal must be filed within 30 days of the date of the decision being appealed. The date of a written Code Enforcement Officer decision shall be the date of the decision. The date of the final vote by the Planning Board on an application shall be the date of the decision.

**12.4.1.1.1** The failure to bring an administrative appeal within the time frame provided may be determined by a court to be a forfeiture of the right to challenge the underlying decision in subsequent proceedings.

**12.4.1.2** A variance request and a request for an interpretation of a boundary may be submitted at any time.

### 12.4.2 Application

**12.4.2.1** Applications shall be made to the Code Enforcement Officer in writing on forms prescribed by the Board of Appeals

**12.4.2.1.1** Applications shall be dated and signed by the person requesting a decision by the Board of Appeals, certifying that the information in the application is complete and correct.

**12.4.2.1.2** An application fee in such amount as the Board of Selectmen may from time to time establish by Board of Selectmen order shall accompany the application.

**12.4.2.1.3** Applications shall include a concise written statement indicating what provision or provisions of the Zoning Ordinance requires interpretation or what relief is requested as well as an explanation of why it should be granted.

**12.4.2.1.3.1** A sketch drawn to scale, showing, but not limited to, lot lines, location of existing structures, and other physical features of the lot pertinent to the relief requested shall be included unless the Board of Appeals determines it is not necessary. This requirement shall not apply to administrative appeals of Planning Board actions.

**12.4.2.1.3.2** The Board of Appeals may at any time before approval require the submission of additional information except for administrative appeals of Planning Board actions.

**12.4.2.2** Applications shall only be accepted when:

**12.4.2.2.1** Taxes and accounts payable to the Town are current.

**12.4.2.2.1.1** The applicant's real and personal property taxes, plus any and all other accounts of the applicant payable to the Town, have been paid in full.

**12.4.2.2.1.2** Real and personal property taxes for the property to be developed or used have been paid in full.

**12.4.2.2.1.3** Notification expenses as required by Section **12.4.3.1.2** have been paid in full.

**12.4.2.2.1.4** The requirement that all taxes and accounts be paid prior to making an application under Section 12 may be:

**12.4.2.2.1.4.1** Satisfied by the execution of an agreement with the Town Manager for their payment in full under such terms and conditions as the Town Manager may deem advisable, provided that payment in full is made in or within twelve (12) months from the date of said agreement; or

**12.4.2.2.1.4.2** Waived in whole or in part by the Board of Selectmen upon good cause shown and upon such terms and conditions as are agreeable to the applicant. The Board of Selectmen's decision in this regard shall be final, subject only to an appeal by an aggrieved party to Superior Court.

**12.4.2.2.2** There is no outstanding notice of violation duly issued by the Code Enforcement Officer:

**12.4.2.2.2.1** That has not been appealed to the Board of Appeals within the required time period;

**12.4.2.2.2.2** That is pending before the Board of Appeals or a reviewing court; or

**12.4.2.2.2.3** Where the decision of the Board of Appeals or a reviewing court has not been fully complied with.

**12.4.2.2.3** There is no outstanding notice of violation duly issued by any State or federal environmental agency relating to the property that is the subject of the application:

**12.4.2.2.3.1** That is pending before the State or federal environmental agency or a

reviewing court; or

**12.4.2.2.3.2** Where the decision of the State or federal environmental agency or a reviewing court has not been fully complied with, or no further action will be taken by the issuing agency.

**12.4.2.3** The Code Enforcement Officer shall record on each application the date and time of its receipt.

**12.4.2.3.1** The Code Enforcement Officer shall determine if all pages of the current application forms have been submitted and, if not, notify the applicant that the application must be on the current forms and be complete.

**12.4.2.4** Any inconsistency or conflicting information in an application shall be construed against the applicant.

#### **12.4.3 Notification**

**12.4.3.1** The Code Enforcement Officer shall notify by U. S. Postal Service first class mail:

**12.4.3.1.1** The applicant and the owner of the property where the is relief requested;

**12.4.3.1.2** Owners as listed by the Boothbay Tax Assessor of property within 100 feet of any property line of the property;

**12.4.3.1.3** The Boothbay Region Water District if the property is within the Water Reservoirs Protection or Well Head Protection Districts or in the Watershed Overlay Zone;

**12.4.3.1.4** The Planning Board if the appeal is from its decision or is a zoning interpretation request;

**12.4.3.1.5** The Board of Selectmen; and

**12.4.3.1.6** The Boothbay Harbor or Edgecomb Town Clerk if the proposed variance or appeal is for a property abutting or including any portion of their Town.

**12.4.3.2** The notification shall be at least seven (7) days before the first Board of Appeals meeting on the application and include:

**12.4.3.2.1** The date, time and place of the first public hearing on the request, variance or appeal; and

**12.4.3.2.2** The location and a general description of the request, variance or appeal.

**12.4.3.3** The Code Enforcement Office or Board of Appeals may determine that additional property owners should be made aware of the application. The applicant shall reimburse the Town for the expense of these additional notifications. No further action shall be taken on the application until the Town has been reimbursed.

**12.4.3.3.1** Failure to receive a notice of a public meeting shall not necessitate another public meeting or invalidate any action taken by the Board of Appeals.

**12.4.4 Notice** The Code Enforcement Officer shall publish at least two times in the Boothbay Register a notice of the date, time and place of the first meeting to be held on a request for interpretation, a variance, or an appeal. The first publication of the notice shall be at

least seven (7) days before the meeting. In addition, the notice shall be posted in a public place in Boothbay. The notice shall include the location and a general description of the request for interpretation, a variance, or an appeal.

**12.4.4.1** A copy of each variance request in the Shoreland Overlay Zone, including the application and all supporting information supplied by the applicant, shall be forwarded by the Code Enforcement Officer to the Commissioner of the Department of Environmental Protection at least 20 days prior to the first Board of Appeals hearing on the application.

**12.4.5 Record of Decision being Appealed** The Code Enforcement Officer shall transmit to the Board of Appeals all documentation in connection with the decision being appealed. For decisions of the Planning Board this shall include the Board's findings of fact and the minutes of the meetings at which the Board considered the application.

#### **12.4.6 Public Hearing**

**12.4.6.1 Completeness Review** The Board of Appeals shall hold a public hearing on a request for an interpretation, a variance, or an appeal within 35 days of its receipt of an application.

**12.4.6.1.1** The purpose of a Completion Review is to determine if information required being on paper is sufficiently complete to proceed to an Application Review.

**12.4.6.1.2** At the conclusion of Completeness Review, the Board of Appeals shall notify the applicant that:

**12.4.6.1.2.1** An Application Review has been scheduled, or

**12.4.6.1.2.2** An Application Review has been scheduled conditioned upon the receipt of specific additional information. Such information shall be provided in accordance with the deadline for submission specified in the application form.

**12.4.6.2 Application Review** Within 35 days of the conclusion of a Completeness Review specified in **12.4.6.1** an Application Review meeting shall be held.

**12.4.6.2.1** The Planning Board and Board of Selectmen shall be made parties to the action.

**12.4.6.2.2** For Administrative Appeals of Code Enforcement Officer decisions, variance requests and interpretations, the Board of Appeals shall permit testimony and the presentation of evidence at any public hearing by any interested person, provided that such testimony and evidence is relevant to the proceeding and not unduly repetitious.

**12.4.6.2.2** For Administrative Appeals of Planning Board decisions subject to appellate review, the Board of Appeals shall limit testimony and the presentation of evidence at any public hearing only to people who participated in or attended the Planning Board meetings at which the application that is the subject of the appeal was considered. Any testimony shall be limited to information that was presented at the Planning Board meeting. The Board of Appeals shall not accept

new information that was not available to the Planning Board at the public hearing.

**12.4.6.2.2** An applicant may agree to an extension of time for Board of Appeals review, public hearings or decision on an application.

**12.4.6.2.3** The purpose of the Application Review meeting is to interpret the boundaries of a Zoning District, an Overlay Zone or an Area within the Shoreland Overlay Zone, or to determine if:

**12.4.6.2.3.1** The proposed deviation from the Ordinance standards meets the requirements for approval of Sections 12.5 and 12.6,

**12.4.6.2.3.2** The decision or action of the Code Enforcement Officer was in conformance with the standards of the Zoning Ordinance and other applicable regulations, or

**12.4.6.2.3.3** The decision or action of the Planning Board was in conformance with the standards of the Zoning Ordinance.

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**12.4.6.2.4 Administrative Appeal**

**12.4.6.2.4.1** The Board of Appeals will examine the facts that were presented to the Planning Board or the Code Enforcement Officer as the case may be, and will determine if the Planning Board or Code Enforcement Officer was correct in applying the Zoning Ordinance to those facts.

**12.4.6.2.4.2** For a *de novo* review of a decision or action of the Code Enforcement Officer, the Board of Appeals will accept the presentation of facts, whether orally or in documentary form, from any person. They may accept the presentation of such facts from any person who did not present facts in the decision of the Code Enforcement Officer, and they may examine other facts that had not been presented to the Code Enforcement Officer. The Board of Appeals will listen to the parties and to their lawyers or other representatives that the parties may bring to the Board of Appeals.

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**12.4.6.2.4.3** For an appellate review of a decision of the Planning Board, the Board of Appeals shall confine its review to the record of the application review by the Planning Board and any information provided at the public hearing that relates directly to the information available to the Planning Board during its consideration of the application. The Board of Appeals shall not consider any information that was not available to the Planning Board except advice from the Town's legal counsel.

**12.4.6.2.4.4** When the Board of Appeals has completed its work under **12.4.6.2.4.1**, **12.4.6.2.4.2**, or **12.4.6.2.4.3** above, the Board of Appeals will take one of the following three actions:

**12.4.6.2.4.4.1** The Board of Appeals can decide that the Planning Board or Code Enforcement Officer needs to consider more facts before making a valid decision, in which case the Board of Appeals will send the matter back to the Planning Board or Code Enforcement Officer with instructions

to consider these additional facts and then make a decision based on all of the facts; or

**12.4.6.2.4.4.2** The Board of Appeals can decide that the Planning Board or Code Enforcement Officer did not apply the Zoning Ordinance properly, or did not interpret the Zoning Ordinance properly, in which case the Board of Appeals can reverse or modify the decision of the Planning Board or Code Enforcement Officer; or

**12.4.6.2.4.4.3** The Board of Appeals can decide that the Planning Board or Code Enforcement Officer was correct in its interpretation and application of the Zoning Ordinance, in which case the Board of Appeals can uphold the decision of the Planning Board or Code Enforcement Officer

**12.4.6.2.4.4.4** If the Board of Appeals sends the matter back to the Planning Board or the Code Enforcement Officer under **12.4.6.2.4.4.1** above, then the Planning Board or Code Enforcement Officer will hold another hearing or otherwise conduct further proceedings, at which time additional facts will be presented in accordance with the instructions from the Board of Appeals, and make a decision based on all the facts.

~~**12.4.12.2.4.1** When conducting a *de novo* review, the Board of Appeals shall hear and decide the matter afresh, undertaking its own independent analysis of the evidence upon which the decision of the Code Enforcement Officer or Planning Board was made. For all matters before the Board of Appeals, the person filing the appeal or request shall have the burden of proof. The Board of Appeals shall affirm or reverse, in whole or in part, the decision of the Code Enforcement Officer or the Planning Board or remand the matter to the Code Enforcement Officer or Planning Board for further consideration. (DEP §§ 16-D, H(3) & H(4)(b)(ii))~~

**12.4.6.2.4.1** Any comments received from the Commissioner of the Department of Environmental Protection in connection with a variance request in the Shoreland Overlay Zone prior to the action by the Board of Appeals shall be made part of the record and shall be taken into consideration by the Board of Appeals.

~~**12.4.12.2.4.5 Site Visit** The Board of Appeals may hold a public meeting on the site of a proposed development or use as part of a *de novo* review.~~

**12.4.6.3.1** The reasons and basis for its decision, including a statement of the facts found and conclusions reached, as well any conditions shall be stated in writing.

**12.4.6.3.2** A copy of the decision shall, within seven (7) days of reaching a decision, be sent to the applicant, Code Enforcement Officer, Planning Board and Board of Selectmen.

**12.4.6.3.3** If the action involves a variance within the Shoreland overlay District, written notice of a decision shall be mailed to the Department of Environmental Protection within seven (7) days of the decision.

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**12.4.6.4 Variance Recorded** If the Board of Appeals grants a variance, a certificate indicating the name of the current property owner, identifying the property by reference to the last recorded deed in its chain of title, and indicating the fact that a variance, including any conditions on the variance, has been granted and the date of the granting, shall be prepared in recordable form. This certificate must be signed by the Board of Appeals members approving the variance and recorded by the applicant in the Lincoln County Registry of Deeds within ninety (90) days of the date stated on the final written approval of the variance or the variance is void. The variance is not valid until the certificate of variance is recorded.

**12.4.6.4.1** A variance in connection with a subdivision must be included as a note on the face of the subdivision plan being recorded and must be recorded within ninety (90) days of the final Planning Board vote on the subdivision application.

#### **12.4.7 Approved Appeals**

**12.4.7.1** All approvals of appeals shall lapse and become void unless Start of Construction or Operation there under, as defined in Section 2, begins within one year of the date of the authorization. On showing of good cause before the expiration of the one year period, the Board of Appeals may grant a one year extension. If operations under any use permit do not begin or cease for a period of more than one year, such use permit shall lapse and a new permit shall be required before recommencement of such use. *{DEP § 16 F}*

**12.4.7.2** Every building permit shall be displayed in a conspicuous place on the premises and a copy of all other permits shall be on site while work authorized by the permit is being conducted.

**12.4.7.3** On approval of an appeal of a required water supply protection buffer, the Board of Appeals shall sign the original and 4 copies of the final site plan. The Code Enforcement Officer and applicant shall each retain one signed copy and the applicant shall:

**12.4.7.3.1** File the original and one copy with the Lincoln County Registry of Deeds.

**12.4.7.3.2** File one copy with the Town of Boothbay Assessor. This copy shall include the Registry's Book and Page reference.

**12.4.8 Reconsideration** The Board of Appeals may reconsider any decision reached within forty-five (45) days of the date of the final vote on the appeal or interpretation or variance request. The request to the Board to reconsider a decision must be filed within ten (10) days of the final vote to be reconsidered. A vote to reconsider and the action taken on that reconsideration must occur and be completed within forty-five (45) days of the final vote on the original decision. The Board of Appeals in reconsidering a prior decision may conduct an additional hearing and receive additional evidence and testimony.

**12.4.9 Appeal to Superior Court** An aggrieved party may appeal a decision of the Board of Appeals to Superior Court in accordance with Rule 80B of the *Maine Rules of Civil Procedure* within forty-five (45) days of the date of the final Board of Appeals vote on the appeal or interpretation or variance request.



**12.4.9.1** Appeal of a reconsideration decision must be made within fifteen (15) days the final vote on the reconsideration request.

#### **12.4.10 Remanded Appeals**

**12.4.10.1 Code Enforcement Officer** The Code Enforcement Officer shall, within thirty-five (35) days of receiving the reasons why an appeal from his/her decision is being remanded, approve, approve with conditions or deny the application..

**12.4.10.2 Planning Board** The Planning Board shall consider all remanded appeals as Old Business at its next regularly scheduled Public Hearing.

**12.4.11 Records** The Code Enforcement Officer shall keep a complete record of all essential transactions of the office, including applications and associated documentation submitted, permits granted or denied, applications approved or denied, waivers and variances granted or denied, revocation actions, revocation of permits and approvals, appeals, court actions, violations investigated, violations found, and fees collected.

~~12.5.1.1.1.1 The land in question cannot yield a reasonable return unless a variance is granted;~~

**12.5.1 General** The Board of Appeals may grant a variance:

**12.5.1.1** If the activity, development or use is not prohibited by this Ordinance and is consistent with the land use goals and objectives of Section 1.8.

**12.5.1.2** If the proposed development or use would meet the standards of this Ordinance except for the specific provision(s) from which relief is sought;

**12.5.1.3** If the minimum setback for new subsurface wastewater disposal systems from water bodies required by the *Maine Subsurface Wastewater Disposal Rules* is not reduced; and

**12.5.1.4** Except as provided in Sections 12.5.2, 12.5.3 and 12.5.6, only when strict application of this Ordinance to the petitioner and the petitioner's property would cause undue hardship.

**12.5.1.4.1** Except as provided in Section 12.5.6, the term "Undue Hardship " as used in Section 12.5 shall mean all of the following:

**12.5.1.4.1.1** The land in question cannot yield a reasonable return unless a variance is granted;

**12.5.1.4.1.2** The need for a variance is due to the unique circumstances of the property and not to general conditions in the neighborhood;

**12.5.1.4.1.3** The granting of a variance will not alter the essential character of the locality; and

**12.5.1.4.1.4** The hardship is not the result of action taken by the applicant or a prior owner.

**12.5.2 Dimensional Standards Variance** A variance may be granted from the dimensional standards relating to lot area, developable area, frontage and setback standards, when strict application of this Ordinance to the petitioner and the petitioner's property would cause a practical difficulty and when all of the following conditions exist:

- 12.5.2.1** That the need for a variance is due to the unique circumstances of the property and not to general conditions in the neighborhood;
  - 12.5.2.2** The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties;
  - 12.5.2.3** The practical difficulty is not the result of action taken by the petitioner or a prior owner;
  - 12.5.2.4** No other feasible alternative to a variance is available to the petitioner;
  - 12.5.2.5** The granting of a variance will not adversely affect the natural environment to an unreasonable degree; and.
  - 12.5.2.6** The property is not located in whole or in part within the Shoreland Overlay District.
  - 12.5.2.7** As used in **12.5.2**, “dimensional standards” means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements.
  - 12.5.2.8** As used in **12.5.2**, “practical difficulty” means that the strict application of this Ordinance to the property precludes the ability of the petitioner to pursue a use permitted where the property is located and results in significant economic injury to the petitioner.
- 12.5.3 Disability Variance** A dimensional variance may be granted to an owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The Board of Appeals shall restrict any variance granted under **12.5.3** solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability. The Board of Appeals may impose conditions on the variance, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. The term “structures necessary for access to or egress from the dwelling” shall include railing, wall or roof systems necessary for the safety or effectiveness of the structure.
- 12.5.6.4 Endangered Species Variance** A dimensional variance in connection with developments or uses affecting endangered species may be granted if the Commissioner of Inland Fisheries and Wildlife certifies that the proposed action would not pose a significant risk to any population of endangered or threatened species and a public hearing is held on the proposed action.
- 12.5.6.5 Registered Farmland Variance** A dimensional variance permitting development upon or use of land for residential purposes within one hundred (100) feet of Registered Farmland or land held in common ownership with the registered farmland, may be granted if the parcel of land was subdivided prior to registration of the farmland. Any variance granted for such a purpose shall be conditioned to provide the maximum feasible setback from the abutting registered farmland.
- 12.6.5.12.1** A variance is not required for residential development if the exceptions of Title 7 §§ 52 and 56 are met.
- 12.5.6 Set-back Variance for One Family Dwellings** A dimensional variance from a set-

back requirement for a one family dwelling that is the primary year-round residence of the petitioner shall only be permitted when strict application of the zoning ordinance to the petitioner and the petitioner's property would cause undue hardship. The variance shall not exceed twenty (20) percent of a set-back requirement and shall not be granted if the variance would cause the area of the dwelling to exceed the maximum permissible lot coverage and developable area.

**12.5.6.1** The term “undue hardship” as used in Section 12.5.6 means all of the following conditions apply:

**12.5.6.1.1** The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

**12.5.6.1.2** The granting of a variance will not alter the essential character of the locality;

**12.5.6.1.3** The hardship is not the result of action taken by the applicant or a prior owner;

**12.5.6.1.4** The granting of the variance will not substantially reduce or impair the use of abutting property; and

**12.5.6.1.5** That the granting of a variance is based upon demonstrated need, not convenience, and no other feasible alternative is available. *{30-A § 4353(4-B)}*

**12.5.6.2** In the Shoreland Overlay District, the standards for a set-back variance for one family dwellings of **12.5.1** shall apply. The standards of **12.5.6** shall not apply.

**12.5.7 Limitations** The Board of Appeals shall limit any variances granted as strictly as feasible in order to insure conformance with the purposes and provisions of this Ordinance to the greatest feasible extent, and in doing so, may impose such conditions on a variance as it deems necessary. The party receiving the variance shall comply with any conditions imposed. of **12.5.1** shall apply to any variance granted under **12.5.2, 12.5.4, 12.5.5** and **12.5.6**.

**12.5.7.1** A variance shall not be granted for establishment of any use prohibited by this Ordinance.