

# ARTICLE 12: VARIANCES AND APPEALS

*Introduction: This Article of the Burlington Comprehensive Development Ordinance establishes the process by which a variance from the strict interpretation of dimensional standards of this ordinance can be considered, as well the process to consider appeals of decisions made by the administrative officer or the DRB.*

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## **Sec. 12.0.1 Purpose**

It is the purpose of this Article to provide for review of all questions arising out of or with respect to the implementation of this ordinance. Except as specifically provided herein, no DRB may amend, alter, invalidate or affect any development plan or bylaw or the implementation or enforcement thereof, or allow any use not permitted by any zoning regulations or other bylaw.

## **PART 1. VARIANCES**

### **Sec. 12.1.1 Variances**

Use variances shall not be allowed under this ordinance. A variance from the provisions of this ordinance may be granted by the DRB, and a decision rendered in favor of the request for a structure that is not primarily a renewable energy resource structure, if all of the following facts are found and specified in its decision:

- (a) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that unnecessary hardship is due to such conditions, and not the circumstances or conditions

- generally created by the provisions of the zoning regulation in the neighborhood or district in which the property is located;
- (b) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning regulation and that the authorization of a variance is, therefore, necessary to enable the reasonable use of property;
  - (c) The unnecessary hardship has not been created by the applicant;
  - (d) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, substantially or permanently impair the appropriate use or development of adjacent property, reduce access to renewable energy resources, nor be detrimental to the public welfare;
  - (e) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least deviation possible from the zoning regulation and from the municipal development plan; and that,
  - (f) The variance, if granted, will not result in either the extension of a non-complying situation or allow the initiation of a nonconforming use of land.

### **Sec. 12.1.2 Variances: Renewable Energy Resource Structures**

Where a variance from the provisions of this ordinance is requested for a structure that is primarily a renewable energy resource structure, the DRB may grant such variances, and render a decision in favor of the request if all the following facts are found and the finding is specified in its decision:

- (a) It is unusually difficult or unduly expensive for the appellant to build a suitable renewable energy resource structure in conformance with the regulations; and,
- (b) That the hardship was not created by the appellant; and,
- (c) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, substantially or permanently impair the appropriate use or development of adjacent property, reduce access to renewable energy resources, nor be detrimental to the public welfare; and,
- (d) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least deviation possible from the zoning regulation and from the municipal development plan.

### **Sec. 12.1.3 Filing a Request, Public Hearing and DRB Decision**

A request for a variance is taken by filing a written request with the administrative officer. Such request shall include:

- (a) the name and address of the appellant;

- (b) a brief description of the property with respect to which the appeal is taken;
- (c) a reference to the regulatory provisions applicable;
- (d) the relief requested by the appellant; and,
- (e) the grounds why such requested relief is believed proper under the variance criteria in **Sec 12.1.1** or **Sec. 12.1.2**.

The DRB shall set a date and place for a public hearing of a request for a variance under this ordinance, which shall be within sixty (60) days of the filing with the administrative officer. The board shall give public notice of the hearing in accordance with **Section 2.6.2** hereof.

The burden of presenting evidence sufficient to allow the DRB to reach the conclusions set forth in this Part, as well as the burden of persuasion on those issues, remains with the applicant seeking the variance.

In rendering a decision in favor of a variance, the DRB may attach such conditions as it may consider necessary and appropriate under the circumstances to implement the purposes of this ordinance and the municipal development plan, and to ensure that the property to which the variance applies will be as compatible as practicable with the surrounding properties.

A variance may be issued for an indefinite duration or only for a specified duration. The nature of the variance and any conditions attached to it shall be entered on the face of the zoning permit, or the zoning permit may simply note the issuance of the variance and refer to the written record of the variance for further information. All such conditions are enforceable in the same manner as any other applicable requirements of this chapter.

## **PART 2. APPEALS**

### **Sec. 12.2.1 Interested Persons**

For the purposes of this ordinance, an interested person means any one of the following:

- (a) A person owning title to property affected by a bylaw who alleges that such regulation imposes on such property unreasonable or inappropriate restrictions of present or potential use under the particular circumstances of the case;
- (b) The City of Burlington or any municipality which adjoins the city;
- (c) A person owning or occupying property in the immediate neighborhood of a property which is the subject of any decision or act taken under the ordinance, who can demonstrate a physical or environmental impact on the person's interest under the criteria reviewed, and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes or terms of the plan or bylaw of

that municipality;

- (d) Any ten (10) persons owning real property within the city or an adjoining municipality who, by signed petition to the DRB, the plan or bylaw of which is at issue in any appeal brought under this article, allege that any relief requested by a person under this article, if granted, will not be in accord with the policies, purposes or terms of the plan or bylaw of the city. Such a petition must designate one person so serve as a representative of the petitioners regarding all matters related to the appeal;
- (e) Any department and administrative subdivision of the State of Vermont owning property or any interested therein, the city or an adjoining municipality, and the Vermont Agency of Development and Community Affairs; and,
- (f) the Burlington Conservation Board.

### **Sec. 12.2.2 Appeals of Administrative Officer Decisions**

Any interested person may take an appeal from any final order or decision of the administrative officer to the DRB within fifteen (15) days after the date of decision or act appealed from as follows;

#### **(a) Notice of Appeal:**

An appeal must be taken within fifteen (15) days after the date of decision or act appealed from, and is taken by filing a written notice of appeal with the administrative officer and the DRB. Such notice of appeal shall include:

1. the name and address of the appellant;
2. a brief description of the property with respect to which the appeal is taken;
3. a reference to the regulatory provisions applicable to that appeal;
4. the relief requested by the appellant; and,
5. the alleged grounds why such requested relief is believed proper under the circumstances.

A notice of appeal shall be considered filed with the administrative officer and the DRB when delivered to the planning department, and the date and time of filing shall be entered on the notice by the planning staff; and,

Whenever an appeal is filed, the administrative officer shall forthwith transmit to the DRB all the papers constituting the record relating to the action appeal from.

#### **(b) Hearing within 60 Days:**

The DRB shall set a date and place for a public hearing of an appeal under this ordinance, which shall be within sixty (60) days of the filing of the notice of such appeal with the administrative officer pursuant to (a) above. The board shall give public notice of the hearing in accordance with **Section 2.6.2** hereof.

**(c) Right to Be Heard:**

Any person or body empowered under this Article to take an appeal with respect to the property at issue may appear and be heard in person or be represented by an agent or attorney at such hearing.

**(d) Burden of Proof:**

When an appeal is taken to the DRB in accordance with this section, the administrative officer shall have the initial burden of presenting sufficient evidence and argument to justify the order or decision appealed from. The burden of presenting evidence and argument to the contrary then shifts to the appellant, who shall also have the burden of persuasion.

**(e) Rejection of Appeal:**

The DRB may reject an appeal without hearing and render a decision, which shall include findings of fact, within ten (10) days of the date of filing of the notice of appeal, if the DRB considers the issues raised by the appellant in his or her appeal to have been decided in an earlier appeal or the same in substantially or materially the same facts by or on behalf of that appellant, such decision shall be rendered, or notice given, as in the case of a decision under and shall constitute a decision of the board for the purpose of appeal to environmental court.

**(f) Stay of Enforcement:**

If a notice of appeal includes a request for a stay of enforcement, and states the grounds for such request with a statement under oath by the appellant that irreparable damage will directly result if such stay is not granted, the DRB may grant a stay of enforcement of the regulatory provisions referred to in the notice of appeal, under such terms and conditions, including, without limitation, a bond to be furnished by the appellant, as the board deems in its judgment and discretion appropriate under the circumstances. Any stay of enforcement granted under this section shall expire upon the expiration of the time to appeal to the environmental court. The grant or denial of a request for a stay shall be given in writing by the board, and shall be sent by registered or certified mail, or delivered, to the appellant within fifteen (15) days of the filing of the notice of appeal with the board.

Whenever practicable, the DRB shall conduct a hearing before deciding on a request for a stay. Any hearing under this section shall be held after publication of notice thereof in a newspaper of general circulation in Burlington, and in two public places within the city, and by mail to the appellant, at least five (5) days prior to the hearing date. However, the DRB may give abbreviated notice where, in its judgment, circumstances require prompt action.

**Sec.12.2.3 Appeals of Development Review Board Decisions**

An interested person may appeal a decision of the DRB to the Vermont Environmental Court within 30 days of the date of the written decision as follows;

**(a) Notice of Appeal:**

The appeal shall be taken in such a manner as the Supreme Court or the environmental court may by rule provide for appeals from state agencies governed by **Sections 801 through 816 of Title 3, Vermont Statutes Annotated**. Notice of the appeal shall be sent by mail to every interested person appearing and having been heard at the hearing before the DRB, and, if any one or more of those persons are not then parties to the appeal, upon motion they shall be granted leave by the court to intervene.

**(b) Appeal to Environmental Court - On the Record:**

If the city council has determined (or been instructed by the voters) to provide that appeals of DRB determinations shall be on the record, has defined the magnitude or nature of the development proposal shall be subject to the production of an adequate record by the panel, and has provided that the **Municipal Administrative Procedure Act** shall apply in these instances, then an appeal from such decision of the DRB shall be taken on the record in accordance with the **Vermont Rules of Civil Procedure**.

**Sec. 12.2.4 Exclusivity of Remedy**

Except as otherwise provided by state statute, the exclusive remedy of an interested person with respect to any decision or act taken, or any failure to act, under this ordinance or any one or more of its provisions shall be the appeal to the DRB, and the appeal to Vermont environmental court from an adverse decision upon such appeal.

Except as otherwise specified by statute, the exclusive remedy of an interested person with respect to any decision or act taken, or any failure to act, under this chapter or with respect to any one or more of the provisions of any plan or bylaw shall be an appeal to the DRB, and the appeal to the environmental court from an adverse decision upon such appeal. The appeal to the environmental court, if not on the record, as allowed under **24 VSA Section 4471**, shall be governed by the **Vermont Rules of Civil Procedure** and such interested person shall be entitled to a de novo trial in the environmental court. If the appeal to the environmental court is on the record, according to the provisions of **24 VSA Section 4471**, it shall be governed by the **Vermont Rules of Civil Procedure**. Whether proceeding on the record or de novo, the court shall have and may exercise all powers and authorities of a superior court.

**Sec. 12.2.5 Finality**

Upon the failure of any interested person to appeal to the DRB or to the environmental court, all interested persons affected shall be bound by such decision or act of such administrative officer, such provisions or such decisions of the DRB, as the case may be, and shall not thereafter contest, either directly or indirectly, such decision or act, such provision, or such decision in any proceeding, including without limitation, any proceeding brought to enforce this ordinance.