

# **Town of White Creek Board of Appeals April 2016**

## **A. Purpose**

A Board of Appeals shall be maintained and operate in accordance with Article 16 of the New York State Town Law, Sections 267, 267-a and 267-b. The Board of Appeals shall have all of the authority, jurisdiction and duties granted to such Boards by Sections 267, 267-a, 267-b and any other applicable State law, and shall fulfill its duties in accordance with those grants of authority and in accordance with the Town of White Creek Subdivision and Site Plan laws.

## **B. Membership**

The Board shall consist of five (5) members appointed by the Town Board for staggered terms of five (5) calendar years.

1. All members and alternate members of the Board of Appeals shall be residents of the Town of White Creek. No person who is a member of the Town Board shall be eligible for membership on the Board of Appeals.
2. The Town Board shall appoint at least one (1) person as an Alternate Member of the Board of Appeals for a term of five calendar years. All provisions of this Law relating to board member training and continuing education, attendance, conflict of interest, compensation, eligibility, vacancy in office, removal, and service on other boards shall also apply to alternate members. The Chairperson of the Board of Appeals may designate the alternate member to substitute for a member who is unable to participate in deliberations and decisions of the Board of Appeals due to conflict of interest on an application or matter before the Board. That designation of the Alternate Member shall be entered into the minutes of the initial Board of Appeals meeting at which the substitution is made. When so designated: the alternate member shall possess all the powers and responsibilities of such member of the board; shall be allowed to participate in discussions of the proceedings; and shall be allowed to vote. At all other times, an Alternate Member may participate in discussions of the proceedings, but may not vote except due to the disqualification of a regular member and a designation of substitution by the Chairperson.

## **C. Terms of members.**

Members holding office for terms which do not expire at the end of a calendar year shall, upon the expiration of their term, hold office until the end of the year and their successors shall then be appointed for terms which shall be equal in years to the number of members of the Board.

## **D. Training and attendance requirements.**

1. Each member of the Board of Appeals and each Alternate Member shall complete, at a minimum, four (4) hours of training each year designed to enable such members to more effectively carry out their duties. Training received by a member in excess of four (4) hours in any one (1) year may be carried over by the member into succeeding years in order to meet this requirement. Such training shall be approved by the Town Board and may include, but not be limited to, training provided by a municipality, regional or county planning office or commission, county planning federation, state agency, statewide municipal association, college or other similar entity. Training may be provided in a variety of formats, including but not limited to, electronic media, video, distance learning and traditional classroom training.
2. To be eligible for reappointment to the Board, a member or alternate member shall have completed the required training.

3. No decision of the Board of Appeals shall be voided or declared invalid because of a failure to comply with this training requirement.

**E. Vacancy in office.**

If a vacancy shall occur otherwise than by expiration of term, the Town Board shall appoint a new member for the unexpired term.

**F. Removal of members.**

The Town Board may remove, after public hearing, any member or alternate member of the Board of Appeals for cause. Cause for removal of a member or alternate member may include one or more of the following:

1. Any undisclosed or unlawful conflict of interest.
2. Failure to attend 33% of the meetings during the course of one calendar year.
3. Failure to complete mandatory training requirements.

**G. Chairperson.**

The Town Board shall appoint one of the Board of Appeals members as chairperson to preside at all meetings and hearings and to fulfill the authorized duties of that office. The Chairperson shall annually appoint one of the Board of Appeals members as Vice Chairperson. In the absence of the Chairperson, the Vice Chairperson shall act as Chairperson and shall have all the powers of the Chairperson. The Vice Chairperson shall have such other powers and duties as may be provided by the rules of the Board. All meetings of the Board of Appeals shall be held at the call of the Chairperson and at such other times as the board may determine. The Chairperson, or in his or her absence, the Acting Chairperson, may administer oaths to applicants, witnesses, or others appearing before the board and may compel the attendance of witnesses.

**H. Board of Appeals Clerk and public record.**

Upon recommendation by the Board of Appeals, the Town Board shall appoint a Board of Appeals Clerk who shall attend all proceedings of the Board of Appeals.

1. The Clerk shall keep minutes of the proceedings of the Board of Appeals, showing the vote of each member upon every question, or if absent or failing to vote, indicating that fact, and shall also keep record of its examinations and other official actions.
2. The Town Clerk shall provide for keeping a file of all records of the Board of Appeals, and those records shall be public records open to inspection at reasonable times and upon reasonable notice.

**I. Board of Appeals procedure.**

1. Meetings, minutes, records. Meetings of the Board of Appeals shall be open to the public except for records exempted from disclosure under the New York State Public Officers Law (Freedom of Information Law) or documents which are protected by attorney-client privilege. The Board of Appeals shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and shall also keep records of its examinations and other official actions.

2. **Filing requirements.** Every rule, regulation, every amendment or repeal thereof, and every order, requirement, decision or determination of the Board of Appeals shall be filed in the office of the town clerk within five (5) business days and shall be a public record.
3. **Assistance to Board of Appeals.** The Board shall have the authority to call upon any department, agency or employee of the town for such assistance as the Board deems necessary. All costs incurred by any department, agency or employee for providing assistance in a particular proceeding shall be borne by the applicant.
4. **Hearing appeals.** Unless otherwise provided in this Law or other local law, generally the jurisdiction of the Board of Appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to Article 16 of New York State Town Law. For the purposes of this law, the administrative official charged with enforcement shall include the Code Enforcement Officer. The Board of Appeals shall have the power, upon appeal from a decision or determination of the Enforcement Officer, to grant variances. Where a proposed site plan, or subdivision contains one or more features which do not comply with those regulations, application may be made to the Board of Appeals for an area variance without the necessity of a decision or determination by the Code Enforcement Officer.
5. **Filing of administrative decision and time of appeal.**
  - a. Each order, requirement, decision, interpretation or determination of the Enforcement Officer charged with the enforcement of any Town of White Creek local law or ordinance shall be filed in the office of such Enforcement Officer, within five (5) business days from the day it is rendered, and shall be a public record.
  - b. All appeals must be taken within sixty (60) days after the filing of any order, requirement, decision, interpretation or determination of the Enforcement Officer by filing with the Enforcement Officer and with the Board of Appeals a notice of appeal. The notice of appeal shall: specify the grounds for such appeal; the relief sought; identify specifically the section of the local law or ordinance or other code or law involved; describe precisely and in detail either the interpretation claimed or the variance or other relief that is sought and the grounds upon which it is claimed the relief should be granted. The notice of appeal shall be accompanied by a short or full Environmental Assessment Form as required by the State Environmental Quality Review Act (SEQRA), by an Agricultural Data Statement as required by NY AML 25-aa, and by other documents relevant to the appeal specified by the Board of Appeals. The appellant shall also be required to pay a filing fee at the time of the filing of the appeal in an amount to be established by the Town Board. The cost of sending notices relating to such appeal by certified mail, or a reasonable fee relating thereto, shall be borne by the appealing party and shall be paid to the Board prior to the hearing of such appeal. Upon receiving a notice of appeal, the Enforcement Officer shall transmit to the Board of Appeals all papers constituting the record upon which the action appealed from was taken.
6. **Stay upon appeal.** An appeal shall stay all proceedings in furtherance of the action appealed from unless the Enforcement Officer determines and certifies in writing to the Board of Appeals, after the notice of appeal shall have been filed with the Enforcement Officer, that by reason of facts stated in the certificate, a stay would, in his or her opinion,

cause imminent peril to life or property. Should such a certification be made, the proceedings shall not be stayed other than by a restraining order granted by the Board of Appeals or by a court of record on application, on notice to the Enforcement Officer from whom the appeal is taken and on due cause shown.

7. **Public Hearing.** The Board of Appeals shall fix a reasonable time for the hearing of the appeal or other matter referred to it. The appellant and any other parties to the appeal shall be given written notice of the hearing date and of the fact that at such hearing he or she may appear in person or be represented by an attorney or other agent. Said notice shall be provided at least ten (10) days in advance of the hearing and shall be provided to the appellant by certified mail. The Board of Appeals shall additionally provide notice as follows:
  - a. The Board of Appeals shall give public notice of such public hearing by publication in an official paper of general circulation in the town at least ten (10) days prior to the date thereof. The cost of sending or publishing any notices relating to such appeal, or a reasonable fee relating thereto, shall be borne by the appealing party and shall be paid to the Board prior to the hearing of such appeal. Upon the hearing, any party may appear in person, or by agent or attorney.
  - b. If a New York State Park shall be located within five hundred (500) feet of the property affected by the appeal, at least ten (10) calendar days prior to such public hearing, the Board of Appeals shall send notices to the regional State Park Commission having jurisdiction over the State Park.
  - c. The Board of Appeals shall also give notice to the Washington County planning agency as required by Section 239-m of the New York State General Municipal Law. Such notice shall be in writing sent at least ten (10) calendar days prior to such public hearing.
  - d. If the land affected by the appeal lies within five hundred (500) feet of the boundary of any other municipality, the Clerk of the Board of Appeals shall also submit at least ten (10) calendar days prior to the public hearing to the municipal clerk of such other municipality or municipalities a copy of the notice of the substance of every appeal, together with a copy of the official notice of such public hearing.
  - e. In any application or appeal for a variance, the Clerk of the Board of Appeals shall provide written notice of the public hearing, along with the substance of the variance appeal or application, to: the owners of all property abutting, or directly opposite, that of the property affected by the appeal; and to all other owners of property within five hundred (500) feet of the property which is the subject of the appeal. Such notice shall be provided by certified mail at least ten (10) calendar days prior to the date of the hearing. Compliance with this notification procedure shall be certified to by the Clerk.
  - f. The names and addresses of surrounding property owners to be notified in accordance with the forgoing shall be taken from the last completed tax roll of the Town.
  - g. Provided that there has been substantial compliance with this provision, failure to give notice in exact conformance herewith shall not be deemed to invalidate an action taken by the Board of Appeals in either granting or denying a variance from a specific provision of this Law.

8. Referrals and Notice to Washington County Planning Board & Town of White Creek Planning Board.
  - a. At least ten (10) days before such hearing, the Board of Appeals shall mail notice to the Washington County Planning Board as required by Section 239-m of the New York State General Municipal Law. The notice shall be accompanied by a full statement of the proposed action, as defined in subdivision one of Section 239-m of the General Municipal Law. No action shall be taken by the Board of Appeals until an advisory recommendation has been received from the County Planning and Development Department or thirty (30) calendar days have elapsed since the Planning and Development Department received such full statement. In the event that the Washington County Planning Board recommends disapproval of the requested variance or the attachments of conditions thereto within such time period or at a later date prior to final action by the Board of Appeals, the Board of Appeals shall not act contrary to such recommendation except by a vote of a majority plus one (1) of all the members after the adoption of a resolution fully setting forth the reasons for such contrary action. Within thirty (30) days after such final action, the Board of Appeals shall file a report of the final action it has taken with the Washington County Planning Board.
  - b. The Board of Appeals shall transmit to the Town of White Creek Planning Board a copy of the appeal or application, and shall request that the Planning Board submit to the Board of Appeals its advisory opinion on said appeal or application. The Planning Board shall submit a report of such advisory opinion prior to the date of the public hearing. The failure of the Planning Board to submit such report within thirty five (35) days from the date the Board of Appeals transmitted their request for an advisory opinion with a copy of the appeal or application to the Planning Board shall be interpreted as a favorable opinion for the appeal or application.
9. Compliance with state environmental quality review act. The Board of Appeals shall comply with the provisions of the State Environmental Quality Review Act (SEQRA) under Article 8 of the Environmental Conservation Law and its implementing regulations as codified in Title Six, Part 617 of the New York Codes, Rules and Regulations.
10. Time of decision. The Board of Appeals shall decide upon the appeal within sixty-two (62) days after the hearing is completed. The time within which the Board of Appeals must render its decision may be extended by mutual consent of the applicant and the Board.
11. Voting requirements.
  - a. Decision of the board. Except for the voting requirements for rehearing in (I) (13) below, every motion or resolution of a Board of Appeals shall require for its adoption the affirmative vote of a majority of all the members of the Board of Appeals as fully constituted regardless of vacancies or absences. Where an action is the subject of a referral to the county planning agency the voting provisions of Section 239-m of the New York State General Municipal Law and (I) (8) of this Law shall apply.
  - b. Default denial of appeal. In exercising its appellate jurisdiction only, if an affirmative vote of a majority of all members of the Board is not attained on a motion or resolution to grant a variance or reverse any order, requirement, decision or determination of the

enforcement official within the time allowed by (I)(10) of this Law, the appeal is denied. The board may amend the failed motion or resolution and vote on the amended motion or resolution within the time allowed without being subject to the rehearing process as set forth in (I) (13) of this Law.

12. Filing of decision and notice. The decision of the Board of Appeals on the appeal shall be filed in the office of the Town Clerk within five (5) business days after the day such decision is rendered, and a copy thereof mailed to the applicant.
13. Rehearing. A motion for the Board of Appeals to hold a rehearing to review any order, decision or determination of the board not previously reheard may be made by any member of the Board. A unanimous vote of all members of the board then present is required for such rehearing to occur. Such rehearing is subject to the same notice provisions as an original hearing. Upon such rehearing the Board may reverse, modify or annul its original order, decision or determination upon the unanimous vote of all members then present, provided the Board finds that the rights vested in persons acting in good faith in reliance upon the reheard order, decision or determination will not be prejudiced thereby.

**J. Permitted action by the Board of Appeals.**

1. Orders, requirements, decisions, interpretations, determinations. The Board of Appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the Enforcement Officer charged with the enforcement of such ordinance or local law, and to that end, shall have all the powers of such Enforcement Officer from whose order, requirement, decision, interpretation or determination the appeal is taken.
2. Use variances.
  - a. The Board of Appeals, on appeal from the decision or determination of the Enforcement Officer, shall have the power to grant use variances.
  - b. No such use variance shall be granted by the Board of Appeals without a showing by the applicant that applicable regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the Board of Appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located,
    1. the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
    2. that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
    3. that the requested use variance, if granted, will not alter the essential character of the neighborhood; and
    4. that the alleged hardship has not been self-created.

- c. The Board of Appeals, in the granting of use variances, shall grant the minimum variance that it shall deem necessary and adequate to address the unnecessary hardship proven by the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

3. Area variances.

- a. The Board of Appeals shall have the power, upon an appeal from a decision or determination of the Enforcement Officer, to grant area variances as defined herein. In addition, the Board of Appeals shall also have the power to grant area variances which are necessary in the course of site plan and subdivision application for which application for such area variance may be made directly to the Board of Appeals without the necessity of a decision or determination of an administrative official charged with enforcement of the regulations as authorized by Town Law Sections 274-a(3) [site plan], and 277(6) [subdivisions].
  - b. In making its determination, the Board of Appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the Board shall also consider:
    - 1. whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
    - 2. whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
    - 3. whether the requested area variance is substantial;
    - 4. whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
    - 5. whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the Board of Appeals, but shall not necessarily preclude the granting of the area variance.
  - c. The Board of Appeals, in the granting of area variances, shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.
4. Imposition of conditions. The Board of Appeals shall, in the granting of both use variances and area variances, have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property. Such conditions shall be consistent with the spirit and intent of this Law, and shall be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community

**K. Relief from Decisions.**

Any person or persons, jointly or severally aggrieved by any final decision of the Board of Appeals, may apply to the New York State Supreme Court for review by a proceeding under Article 78 of the New York Civil Practice Law and Rules. Such proceeding shall be governed by the specific provisions of CPLR Article 78 except that the action must be commenced as therein provided within thirty (30) days after the filing of the decision of the Board of Appeals in the office of the Town Clerk

**L. Strict Construction.**

All provisions of this Article pertaining to the Board of Appeals shall be strictly construed. The Board of Appeals shall act in strict conformity with all provisions of law and of this Article and in strict compliance with all limitations contained therein, provided however, that if the procedural requirements set forth in this Article have been substantially observed, no applicant or appellant shall be deemed deprived of the right of application or appeal.

**M. Other Provisions of New York State Town Law Section 267-a.**

All other provisions of New York State Town Law Section 267-a with regard to Board of Appeals procedure not set forth herein, are incorporated herein by reference and shall apply to the Board of Appeals.