

Chapter

5 APPEAL AUTHORITY

APPEAL AUTHORITY APPEAL AUTHORITY

The regulations set forth in this chapter describe the Appeal Authority. Its function and responsibilities as defined in State Law and the Bear River City Land Management and Development Code.

Contents of this chapter

- 5.1 Establishment of an Appeal Authority.....2
- 5.2 Term of Office2
- 5.3 Resignation or Grounds for Removal2
- 5.4 Powers and Duties of the Appeal Authority 2
- 5.5 Condition Precedent to Judicial Review 3
- 5.6 Time to appeal 3
- 5.7 Variances 3
- 5.8 Appealing a Land Use Authority's Decision 5
- 5.9 Burden of Proof 5
- 5.10 Due Process 5
- 5.11 Scope of Review of Factual Matters on Appeal 6
- 5.12 Final Decision6
- 5.13 District Court Review7
- 5.14 Enforcement 9
- 5.15 Penalties. 10

5.1 Establishment of an Appeal Authority

In order to avail the City of the powers provided in Title 10 Chapter 9(a)-701 of of the Utah Code (1953, as amended), there is hereby created an Appeal Authority.

5.2 Term of OfficeTerm of Office Term of Office

- (a) The Appeal Authority shall be appointed by the Mayor with the advice and consent of the City Council.
- (b) The Appeal Authority shall be appointed for a on going term in an at will contract.
- (c) The Appeal Authority shall, at a minimum, have such training and experience as will qualify them to conduct administrative or quasi-judicial hearings regarding land use, land development, and regulatory codes dealing with issues related to land use.
- (d) The City Council or Appeal Authority may terminate the contract for any reason by giving 60 day written notice to the other party.
- (e) In the case of death, resignation, removal or disqualification, the position of Appeal Authority shall be promptly filled by a replacement appointed by the City Council.
- (f) The Appeal Authority shall be considered an independent contractor; and as such will enter into an at will contract for services at the beginning of the appointment. Terms for compensation and reimbursement will be determined and agreed upon in the aforementioned contract. The terms and conditions of the contract shall ultimately be approved by the City Council prior to any individual entering into an agreement with the City to serve as the Appeal Authority .
- (g) The City Council may, from time to time, appoint an Appeal Authority pro tempore on a temporary basis when necessitated by the absence, unavailability, incapacity or disqualification of the regularly appointed Appeal Authority . Each Appeal Authority pro tempore shall, at a minimum, have qualifications which are similar to the regularly appointed Appeal Authority.
- (h) The City Council may appoint a special Appeal Authority in cases that require technical expertise such as engineering, geo-technology hydrology.

5.3 Resignation or Grounds for RemovalResignation or Grounds for Removal Resignation or Grounds for Removal

The Appeal Authority may resign by letter to the City. If the Appeal Authority fails to perform in a reasonable time period, they may be called before the City Council and asked to resign or be removed for cause by the City Council.

5.4 Powers and Duties of the Appeal AuthorityHearings Before the Appeal Authority Hearings Before the Appeal Authority

The Appeal Authority shall hear appeals and variances as authorized by Utah Code, section 10-9a-702, as amended.

- (a) An appeal authority shall hear and decide:
 - (i) requests for variances from the terms of land use ordinances;
 - (ii) appeals from land use decisions applying land use ordinances; and
 - (iii) appeals from a fee charged in accordance with Utah State Code Section 10-9a-510.
- (b) An appeal authority may not hear an appeal from the enactment of a land

use regulation

- (c) An appeal authority shall:
 - (i) act in a quasi-judicial manner; and
 - (ii) serve as the final arbiter of issues involving the interpretation or application of land use ordinances; and
 - (iii) may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority.
 - (iv) require an adversely affected party to present to an appeal authority every theory of relief that the adversely affected party can raise in district court;
 - (v) not require a land use applicant or adversely affected party to pursue duplicate or successive appeals before the same or separate appeal authorities as a condition of an appealing party's duty to exhaust administrative remedies

5.5 Condition Precedent to Judicial Review

As a condition precedent to judicial review, each adversely affected party shall timely and specifically challenge a land use authority's land use decision, in accordance with local ordinance.

5.6 Time to appeal

Bear River City hereby establishes 10 calendar days to appeal to an appeal authority a written decision issued by a land use authority.

5.7 Variances

Variances from the provisions of the Code may be granted by the Appeal Authority as per Utah Code, section 10-9a-702, as amended, whenever a strict or literal application of the provisions of this Code would create a hardship on the owner of the subject property that is unique to that property.

5.7.1 Any person or entity desiring a waiver or modification of the requirements of a land use ordinance as applied to a parcel of property that he owns, leases, or in which he holds some other beneficial interest may apply to the Appeal Authority for a variance from the terms of the ordinance.

5.7.2 The Appeal Authority may grant a variance only if each of the following conditions is met:

- (a) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances;
- (b) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;
- (c) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;

- (d) the variance will not substantially affect the general plan and will not be contrary to the public interest; and
- (e) the spirit of the land use ordinance is observed and substantial justice done.

5.7.2.1

- (i) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under subsection 5.7.2, the Appeal Authority may not find an unreasonable hardship unless the alleged hardship:
 - (i) is located on or associated with the property for which the variance is sought; and
 - (ii) comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.
- (b) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under subsection 5.7.2.1, the Appeal Authority may not find an unreasonable hardship if the hardship is self-imposed or economic.

5.7.2.2

In determining whether or not there are special circumstances attached to the property under Subsection 5.7.2, the Appeal Authority may find that special circumstances exist only if the special circumstances:

- (c) relate to the hardship complained of; and
- (b) deprive the property of privileges granted to other properties in the same zone.

5.7.3 The applicant shall bear the burden of proving that all of the conditions justifying a variance have been met.

5.7.4 Variances run with the land.

5.7.5 The Appeal Authority may not grant a use variance.

5.7.6 In granting a variance, the Appeal Authority may impose additional requirements on the applicant that will:

- (1) mitigate any harmful effects of the variance; or
- (2) serve the purpose of the standard or requirement that is waived or modified.

5.8 Appealing a Land Use Authority's Decision

5.8.1 A letter of application for appealing a land use authority's decision must be filed with the City Clerk, and the required fee paid in advance within ten (10) calendar days of the written decision of a Land Use Authority..

5.8.2 The land use applicant, a board or officer of the municipality, or an adversely affected party may, within the applicable time period, appeal that decision to the appeal authority by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or

interpretation of the land use ordinance.

5.8.3

- (a) A land use applicant who has appealed a decision of the land use authority administering or interpreting the municipality's geologic hazard ordinance may request the municipality to assemble a panel of qualified experts to serve as the appeal authority for purposes of determining the technical aspects of the appeal.
- (b) If a land use applicant makes a request under 5.8.2(a), the municipality shall assemble the panel described in 5.8.2(a) consisting of, unless otherwise agreed by the applicant and municipality:
 - (i) one expert designated by the municipality;
 - (ii) one expert designated by the land use applicant; and
 - (iii) one expert chosen jointly by the municipality's designated expert and the land use applicant's designated expert.
- (c) A member of the panel assembled by the municipality under Subsection (2)(b) may not be associated with the application that is the subject of the appeal.
- (d) The land use applicant shall pay:
 - (i) 1/2 of the cost of the panel; and
 - (ii) the municipality's published appeal fee.

5.9 Burden of Proof

The appellant has the burden of proving that the land use authority erred.

5.10 Due Process

- (a) Each Appeal Authority shall conduct each appeal and variance request as provided in Bear River City Land Use and Management Code Chapter 5.
- (b) Each Appeal Authority shall respect the due process rights of each of the participants.

5.11 Scope of Review of Factual Matters on Appeal

Appeal Authority requirements.

5.11.1 Bear River City designates the scope of review of factual matters for appeals of land use authority decisions.

- (a) A review of the land use authority's finding of facts and supporting documents and materials
- (b) A review of the appellant's documents and materials showing cause for appeal.

5.11.2 If the scope of review of factual matters is on the record, the Appeal Authority shall determine whether the record on appeal includes substantial evidence for each essential finding of fact.

5.11.3 The Appeal Authority shall:

- (a) determine the correctness of the land use authority's interpretation and application of the plain meaning of the land use regulations; and
- (b) interpret and apply a land use regulation to favor a land use application unless the land use regulation plainly restricts the land use application.

5.11.4

- (a) An Appeal Authority's land use decision is a quasi-judicial act.
- (b) A legislative body may act as an Appeal Authority unless both the legislative body and the appealing party agree to allow a third party to act as the Appeal Authority.

5.11.5 Only a decision in which a land use authority has applied a land use regulation to a particular land use application, person, or parcel may be appealed to an Appeal Authority.

5.12 Final Decision

- (a) A decision of an Appeal Authority takes effect on the date when the Appeal Authority issues a written decision, or as otherwise provided by ordinance.
- (b) A written decision, or other event as provided by ordinance, constitutes a final decision under Utah State Code Subsection 10-9a-801(2)
 - (a) or a final action under Subsection 10-9a-801(4).

5.13 District Court Review

Effect date 11-11-2021

5.13.1

No person may challenge in district court a land use decision until that person has exhausted the person's administrative remedies.

5.13.2

(a) Subject to 5.13.1, a land use applicant or adversely affected party may file a petition for review of a land use decision with the district court within 30 days after the decision is final.

(b)

(i) The time under 5.13.2(a) to file a petition is tolled from the date a property owner files a request for arbitration of a constitutional taking issue with the property rights ombudsman under Utah State Code Section 13-43-204 until 30 days after:

(A) the arbitrator issues a final award; or

(B) the property rights ombudsman issues a written statement under Utah State Code Subsection 13-43-204(3)(b) declining to arbitrate or to appoint an arbitrator.

(ii) Atolling under 5.13.2(b)(i) operates only as to the specific constitutional taking issue that is the subject of the request for arbitration filed with the property rights ombudsman by a property owner.

(iii) A request for arbitration filed with the property rights ombudsman after the time under 5.13.2(a) to file a petition has expired does not affect the time to file a petition.

5.13.3

(a) Acourt shall:

(i) presume that a land use regulation properly enacted under the authority of this chapter is valid; and

(ii) determine only whether:

(A) the land use regulation is expressly preempted by, or was enacted contrary to, state or federal law; and

(B) it is reasonably debatable that the land use regulation is consistent with this chapter.

(b) Acourt shall:

(i) presume that a final land use decision of a land use authority or an Appeal Authority is valid; and

(ii) uphold the land use decision unless the land use decision is:

(A) arbitrary and capricious; or

(B) illegal.

(c)

(i) A land use decision is arbitrary and capricious if the land use decision is not supported by substantial evidence in the record.

(ii) A land use decision is illegal if the land use decision is:

(A) based on an incorrect interpretation of a land use regulation; or

(B) contrary to law.

(d)

(i) Acourt may affirm or reverse a land use decision.

(ii) If the court reverses a land use decision, the court shall remand the matter to the land use authority with instructions to issue a land use

decision consistent with the court's ruling.

5.13.4

The provisions of 5.13.2(a) apply from the date on which Bear River City takes final action on a land use application, if the municipality conformed with the notice provisions of 5.13.2, Notice, or for any person who had actual notice of the pending land use decision.

5.13.5

If Bear River City has complied with Utah State Code Section 10-9a-205, a challenge to the enactment of a land use regulation or general plan may not be filed with the district court more than 30 days after the enactment.

5.13.6

A challenge to a land use decision is barred unless the challenge is filed within 30 days after the land use decision is final.

5.13.7

- (a) The land use authority or Appeal Authority, as the case may be, shall transmit to the reviewing court the record of the proceedings of the land use authority or Appeal Authority, including the minutes, findings, orders, and, if available, a true and correct transcript of the proceedings.
- (b) If the proceeding was recorded, a transcript of that recording is a true and correct transcript for purposes of 5.13.7(a).

5.13.8 (a)

- (i) If there is a record, the district court's review is limited to the record provided by the land use authority or Appeal Authority, as the case may be.
- (ii) The court may not accept or consider any evidence outside the record of the land use authority or Appeal Authority, as the case may be, unless that evidence was offered to the land use authority or Appeal Authority, respectively, and the court determines that the evidence was improperly excluded.
- (b) If there is no record, the court may call witnesses and take evidence.

5.13.9

- (a) The filing of a petition does not stay the land use decision of the land use authority or Appeal Authority, as the case may be.
- (b)
 - (i) Before filing a petition under this section or a request for mediation or arbitration of a constitutional taking issue under Utah State Code Section 13-43-204, a land use applicant may petition the Appeal Authority to stay the Appeal Authority's land use decision.
 - (ii) Upon receipt of a petition to stay, the Appeal Authority may order the Appeal Authority's land use decision stayed pending district court review if the Appeal Authority finds the order to be in the best interest of the municipality.

- (iii) After a petition is filed under this section or a request for mediation or arbitration of a constitutional taking issue is filed under Utah State Code Section 13-43-204, the petitioner may seek an injunction staying the Appeal Authority's land use decision.

5.13.10

If the court determines that a party initiated or pursued a challenge to a land use decision on a land use application in bad faith, the court may award attorney fees.

5.14 Enforcement

5.14.1

- (a) Bear River City or an adversely affected party may, in addition to other remedies provided by law, institute:
 - (i) injunctions, mandamus, abatement, or any other appropriate actions; or
 - (ii) proceedings to prevent, enjoin, abate, or remove the unlawful building, use, or act.
- (b) Bear River City need only establish the violation to obtain the injunction.

5.14.2

- (a) Bear River City may enforce the City's ordinance by withholding a building permit.
- (b) It is an infraction to erect, construct, reconstruct, alter, or change the use of any building or other structure within Bear River City without approval of a building permit.
- (c) Bear River City may not issue a building permit unless the plans of and for the proposed erection, construction, reconstruction, alteration, or use fully conform to all regulations then in effect.
- (d) Bear River City may not deny an applicant a building permit or certificate of occupancy because the applicant has not completed an infrastructure improvement:
 - (i) that is not essential to meet the requirements for the issuance of a building permit or certificate of occupancy under the building code and fire code; and
 - (ii) for which Bear River City has accepted an improvement completion assurance for landscaping or infrastructure improvements for the development.

5.15 Penalties.**5.15.1**

The municipality may, by ordinance, establish civil penalties for violations of any of the provisions of this chapter or of any ordinances adopted under the authority of this chapter.

5.15.2

Violation of any of the provisions of this chapter or of any ordinances adopted under the authority of this chapter is punishable as a class C misdemeanor upon conviction either:

- (a) as a class C misdemeanor; or
- (b) by imposing the appropriate civil penalty adopted under the authority of this section.

5.15.3

Prior to imposing upon an owner of record a civil penalty established by ordinance under authority of this chapter, a municipality shall provide:

- (a) written notice, by mail or hand delivery, of each ordinance violation to the address of the:
 - (i) owner of record on file in the office of the county recorder; or
 - (ii) person designated, in writing, by the owner of record as the owner's agent for the purpose of receiving notice of an ordinance violation;
- (b) the owner of record a reasonable opportunity to cure a noticed violation; and
- (c) a schedule of the civil penalties that may be imposed upon the expiration of a time certain.