

**Town of Durham
Land Use Ordinance**

As Adopted at Town Meeting
April 2, 2016

*Proposed Revisions
For Town Meeting
April 4, 2020*

***PART 3 – AMENDMENTS TO APPEALS
PROCESSES
(Articles 6, 7, 8, 9, 11, 12, 14, 15, 17, and 18)***

NOTE: Proposed changes are indicated with ~~strikethrough~~ text indicating language to be deleted and underlined text indicating language to be inserted. Explanatory notes are in ***(bold italic text enclosed by parentheses)***.

B. Waivers of Procedural Requirements: The Board may allow an applicant to combine the final plan and preliminary plan application steps into one procedure, upon making all of the following written findings of fact:

1. No new streets are proposed;
2. No approvals are required from the Maine Department of Environmental Protection under the Site Location of Development Act, Stormwater Law, or Natural Resources Protection Act, other than a “Permit by Rule;”
3. The Board agrees to approve a waiver from the requirements to submit a stormwater management plan and sedimentation and erosion control plan; and,
4. The application contains all other applicable submissions required for both the preliminary and final plan steps, except for those items for which a waiver of a required submission has been requested and granted by the Planning Board.

C. Waivers of Performance Standards: Where the Board makes written findings of fact that due to special circumstances of a particular tract proposed to be subdivided, the provision of certain required improvements is not requisite to provide for the public health, safety or welfare, or an alternative design is equal to or better in meeting the statutory review criteria, it may waive the design standards, subject the following criteria:

1. The applicant has provided the Planning Board with a factual basis for granting the waiver that is supported by sound engineering and/or environmental analysis (cost considerations are not justification);
2. The waiver(s) do not have the effect of nullifying the intent and purpose of the zoning regulations or these subdivision regulations;
3. The performance standards of these regulations have been substantially met and the criteria of the subdivision statute have been or will be met by the proposed subdivision; and,
4. The requested performance standard waivers are noted on the recorded subdivision plan (submission waivers and procedural waivers are not noted on the plan).

~~Section 6.36. — APPEALS~~

~~The Board of Appeals may hear and decide appeals from any final decision of the Planning Board, by any aggrieved party. The Board of Appeals shall not conduct a de novo review, but shall act in a purely appellate capacity, and shall limit its review to the record developed before the Planning Board, and to the parties’ arguments based on that record. The burden of proof shall be on the appellant to demonstrate that the Planning Board erred. The Board of Appeals shall have the power to affirm, reverse, or modify, with or without conditions, the decision of the Planning Board or, if the record is not sufficient or further information needs to be provided, to remand the matter back to the Planning Board for further proceedings. The Board of Appeals shall reverse the decision of the Planning Board only upon a finding that the decision was clearly contrary to the applicable provisions of the Ordinance or that the record evidence compels a contrary conclusion.~~

- B. **Compliance with Land Use Ordinance Standards:** The proposed conditional use shall meet all applicable criteria and design or performance standards in all articles of the Land Use Ordinance.

Section 7.5. CONDITIONS OF APPROVAL

- A. **Planning Board Approval Conditions:** Upon consideration of the criteria listed in subsection 7.4, the Planning Board may by majority vote attach such conditions, in addition to those required by other provisions of this Ordinance, as it finds necessary to ensure compliance with those criteria and all other applicable requirements of this Ordinance. Violation of any of those conditions shall be a violation of this Ordinance. Such conditions may include, but are not limited to, requirements for:
1. Increased property line setbacks;
 2. Fences and planting screens to create effective buffers between uses;
 3. Limits on hours of operation; and,
 4. Location of parking and signs.
- B. **Design Aspects of Approval Conditions:** For projects requiring Planning Board site plan approval, the specific design of improvements required to mitigate impacts under Section 7.5.A will be determined during the site plan review process. For projects not requiring separate site plan review and approval, the Planning Board may apply the design standards of Article 8 in establishing specific approval conditions.

~~Section 7.6. APPEALS OF CONDITIONAL USE DECISIONS~~

~~The Board of Appeals may hear and decide appeals from any final decision of the Planning Board, by any aggrieved party. The Board of Appeals shall not conduct a de novo review, but shall act in a purely appellate capacity, and shall limit its review to the record developed before the Planning Board, and to the parties' arguments based on that record. The burden of proof shall be on the appellant to demonstrate that the Planning Board erred. The Board of Appeals shall have the power to affirm, reverse, or modify, with or without conditions, the decision of the Planning Board or, if the record is not sufficient or further information needs to be provided, to remand the matter back to the Planning Board for further proceedings. The Board of Appeals shall reverse the decision of the Planning Board on a conditional use permit only upon a finding that the decision was clearly contrary to the applicable provisions of the Ordinance or that the record evidence compels a contrary conclusion.~~

- N. **Technical Ability:** The applicant shall retain qualified contractors and consultants to supervise, construct and inspect the required improvements in the proposed project. In determining the applicant's technical ability, the Board shall consider the applicant's previous experience, the experience and training of the applicant's consultants and contractors, and the existence of violations of previous approvals granted to the applicant.

Section 8.7. SITE PLAN REVIEW WAIVERS

- A. **Waivers of Certain Submission Requirements:** Where the Board makes written findings of fact that there are special circumstances of a particular site, or that the application is simple and minor in nature, it may waive portions of the submission requirements, unless prohibited by these regulations or Maine statutes, provided the applicant has demonstrated that the criteria and performance standards of these regulations have been or will be met, the public health, safety, and welfare are protected, and provided the waivers do not have the effect of nullifying the intent and purpose of the comprehensive plan, the zoning regulations, or these site plan review regulations.
- B. **Waivers of Performance Standards:** Where the Board makes written findings of fact that due to special circumstances of a particular site proposed to be developed, the provision of certain required improvements is not requisite to provide for the public health, safety or welfare, or an alternative design is equal to or better in meeting the site plan review criteria, it may waive the design standards, subject the following criteria:
1. The applicant has provided the Planning Board with a factual basis for granting the waiver that is supported by sound engineering and/or environmental analysis (cost considerations are not justification);
 2. The waiver(s) do not have the effect of nullifying the intent and purpose of the zoning regulations or these site plan review regulations;
 3. The criteria of these site plan review regulations have been or will be substantially met by the proposed site plan; and,
 4. The requested performance standard waivers are noted on the approved site plan.

Section 8.8. APPEALS

~~The Board of Appeals may hear and decide appeals from any final decision of the Planning Board, by any aggrieved party. The Board of Appeals shall not conduct a de novo review, but shall act in a purely appellate capacity, and shall limit its review to the record developed before the Planning Board, and to the parties' arguments based on that record. The burden of proof shall be on the appellant to demonstrate that the Planning Board erred. The Board of Appeals shall have the power to affirm, reverse, or modify, with or without conditions, the decision of the Planning Board or, if the record is not sufficient or further information needs to be provided, to remand the matter back to the Planning Board for further proceedings. The Board of Appeals shall reverse the decision of the Planning Board on a site plan application~~

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~~only upon a finding that the decision was clearly contrary to the applicable provisions of the Ordinance or that the record evidence compels a contrary conclusion.~~

presented that the proposed use will meet all of the following criteria. The applicant shall have the burden of proving that the proposed land use activity is in conformity with the purposes and provisions of this Article:

1. Will maintain safe and healthful conditions;
2. Will not result in water pollution, erosion, or sedimentation to surface waters;
3. Will adequately provide for the disposal of all wastewater;
4. Will not have an adverse impact on spawning grounds, fish, aquatic life, bird or other wildlife habitat;
5. Will conserve shore cover and visual, as well as actual, points of access to waters;
6. Will protect archaeological and historic resources as designated in the comprehensive plan; and,
7. Is in conformance with the provisions of Section 9.11., Land Use Standards.

H. **Expiration of Permits:** Permits shall expire one (1) year from the date of issuance if a substantial start is not made in construction or in the use of the property during that period. If a substantial start is made within one (1) year of the issuance of the permit, the applicant shall have one (1) additional year to complete the project, at which time the permit shall expire.

I. **Installation of Public Utility Service:** A public utility, water district, sanitary district or any utility company of any kind may not install services to any new structure located in the shoreland zone unless written authorization attesting to the validity and currency of all local permits required under this or any previous Article has been issued by the appropriate municipal officials or other written arrangements have been made between the municipal officials and the utility.

~~J. **Appeals of Shoreland Zoning Permit Decisions:** The Board of Appeals may hear and decide appeals from any final decision of the Code Enforcement Officer or Planning Board by any aggrieved party. The Board of Appeals shall not conduct a de novo review, but shall act in a purely appellate capacity, and shall limit its review to the record developed before the Code Officer or Planning Board, and to the parties' arguments based on that record. The burden of proof shall be on the appellant to demonstrate that the Code Officer or Planning Board erred. The Board of Appeals shall have the power to affirm, reverse, or modify, with or without conditions, the decision of the Code Officer or Planning Board or, if the record is not sufficient or further information needs to be provided, to remand the matter back to the Code Officer or Planning Board for further proceedings. The Board of Appeals shall reverse the decision of the Code Officer or Planning Board on a shoreland zoning permit only upon a finding that the decision was clearly contrary to the applicable provisions of the Article or that the record evidence compels a contrary conclusion.~~

K. **Enforcement:** Any violation of this Ordinance shall be deemed to be a nuisance and shall be enforced according to the following provisions:

other document previously described. The construction requirement shall also be clearly stated on any map, plat, or plan to be signed by the Planning Board or local reviewing authority as part of the approval process.

Section 11.9. APPEALS AND VARIANCES

~~The Board of Appeals of the Town of Durham may, upon written application of an aggrieved party, hear and decide appeals where it is alleged that there is an error in any order, requirement, decision, or determination made by, or failure to act by, the Code Enforcement Officer or Planning Board in the administration or enforcement of the provisions of this Article.~~

The Board of Appeals may grant a variance from the requirements of this Article consistent with state law and the following criteria:

- A. Variances shall not be granted within any designated regulatory floodway if any increase in flood levels during the base flood discharge would result.
- B. Variances shall be granted only upon:
 1. a showing of good and sufficient cause; and,
 2. a determination that should a flood comparable to the base flood occur, the granting of a variance will not result in increased flood heights, additional threats to public safety, public expense, or create nuisances, cause fraud or victimization of the public or conflict with existing local laws or ordinances; and,
 3. a showing that the issuance of the variance will not conflict with other state, federal or local laws or ordinances; and,
 4. a determination that failure to grant the variance would result in "undue hardship," which in this sub-section means:
 - a. that the land in question cannot yield a reasonable return unless a variance is granted; and,
 - b. that the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; and,
 - c. that the granting of a variance will not alter the essential character of the locality; and,
 - d. that the hardship is not the result of action taken by the applicant or a prior owner.
- C. Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief, and the Board of Appeals may impose such conditions to a variance as it deems necessary.
- D. Variances may be issued for new construction, substantial improvements, or other development for the conduct of a functionally dependent use provided that:
 1. other criteria of Section 11.9. and Section 11.6.K. are met; and,

reasons and the recommendations, if any, as appearing in the records of the Commission.

~~5. **Appeals jurisdiction:** The Zoning Board of Appeals established in accordance with Title 30 A.M.R.S.A., Sections 2691 and 4353 may, upon written application of an aggrieved party and after public notice, hear appeals from determinations of the Historic District Commission or from the Code Enforcement Officer in the administration of this Article.~~

6. **Amendment:** An amendment to this Article may be adopted by:

- a. An annual town meeting in the manner normally required for changes in ordinances.
- b. the Town Selectmen shall hold a public hearing on the proposed amendment as required for any proposed ordinance to be placed on the Town Meeting Warrant. The Planning Board and the Historic District Commission shall report its recommendation regarding the proposed amendment at the public hearing.

Section 12.5. STANDARDS OF EVALUATION

The standards and requirements contained in this section, and the Secretary of the Interior's Standards for Rehabilitation (1990 Edition) shall be used in review of applications for certificates of appropriateness. Exterior design considerations and structural factors related to maintaining historic structures in good condition shall be the Commission's primary areas of focus.

- A. **Construction Reconstruction, alterations and maintenance:** The exterior of a Contributing Resource located in an Historic District, or any part thereof, or any appurtenance related to such structures, including but not limited to walls, fences, light fixtures, steps, paving and signs, shall not be reconstructed, altered or maintained, and no certificate of appropriateness shall be issued for such actions, unless they will preserve or enhance its historical and architectural character.
- B. **Construction of new buildings and structures in Historic District:** The construction of a new building or structure within an Historic District shall be generally of such design, form, proportion, mass, configuration, building material, texture, color and location on a lot as will be compatible with other buildings in the Historic District and with streets and open spaces to which it is visually related and in keeping with the area.
- C. **Visual compatibility factors for any Contributing Resource including but not limited to new construction, repair, rehabilitation and additions within Historic Districts:** All construction shall be visually related generally in terms of the following factors:
 1. **Height:** The height of proposed buildings shall be compatible with adjacent buildings.

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to determine compliance with the provisions of this ordinance. Upon the initial inspection of small borrow pits currently in existence following approval of this Article; the Code Enforcement Officer shall be authorized to require any signage or fencing needed to ensure public safety. On any new small borrow pits covered under this ordinance; such requirements shall be set by the Planning Board prior to issuing a Conditional Use Permit. Any blasting licenses in effect may be renewed by the Code Enforcement Officer during the annual inspection. Should there be a complaint regarding compliance with this ordinance, the complaint or concern should be directed to the Town Office. The Town Administrator will log such complaint or concern and then forward to the Regulator for investigation. Results of such investigation will be shared with the complainant and then be made part of the public record at the Town Office.

Section 14.8. CLOSING OF PITS

When any small borrow pit reaches the limitation established in Section 14.6.C. and D. of this Article, or when the saleable material has been exhausted as determined by the Code Enforcement Officer, or when the small borrow pit has not been active for a period of twelve (12) months (i.e., active shall mean the annual registration and payment of the fee), the small borrow pit shall be deemed closed and the banks or edge shall be sloped to (1') foot vertical rise for each two and one half (2.5') feet horizontal cut or less and set out to suitable vegetation (trees grasses and shrubs) that result in a permanent ninety (90%) percent groundcover. Further, this planting must result in a permanent stand or a stand that is capable of regeneration and succession, sufficient to ensure seventy-five (75%) percent survival rate.

Section 14.9. VIOLATIONS ENFORCEMENT

This Article shall be enforced by the Regulator as defined in Article 19. Violations prosecuted in accordance with 30-A M.R.S.A. §4452, as amended.

Section 14.10. VARIANCES

A request for variance may be filed with the Board of Appeals in the manner described in Section 17.6. The Board of Appeals may grant a variance if it finds that the applicant would otherwise suffer undue hardship as defined in Section 17.3.B.

~~Section 14.11. APPEALS~~

~~The Board of Appeals may grant an appeal if it determines that the Planning Board erred in its interpretation or application of the terms of this Article.~~

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order requiring a showing of compliance within thirty (30) days of issuance. Such order shall contain a description of the violation or suspected violation and shall be directed to and served on the alleged offender and the owner of the mobile home park. Service shall be by mail or personal. If compliance is not shown within the thirty (30) days, the Building Inspector shall notify the municipal officers for the purpose of taking court action.

- C. **Violations:** Any condition existing in violation of any provisions of this Article or any provision incorporated herein is a nuisance.

~~Section 15.10. APPEAL~~

~~Any person aggrieved by an order or decision of any officer or board under this Article may appeal to the Board of Appeal. The Board of Appeals may grant appeals and issue variances from the strict application of the Mobile Home Park requirements in the same manner as are set forth in Article 17.~~

Section 15.11. PENALTY

Any person found in violation of any provision of this Article or any provision incorporated herein shall be fined not more than one hundred (\$100) dollars plus costs. Each day that a violation continues shall be deemed a separate offense.

- B. The term “conflict of interest” shall be construed to mean direct or indirect pecuniary interest, which shall include pecuniary benefit to any member of the person’s immediate family (parents, spouse, grandparents, children, grandchildren, e.g.) or employer or the employer of any member of the person's immediate family.

Section 17.3. POWERS AND DUTIES

The powers and duties of the Board of Appeals shall be as follows:

- A. **Administrative Appeals:** ~~To hear and decide appeals where it is alleged that there is an error in any requirement, decision, or determination made by, or failure to act by, the Code Enforcement Officer, Planning Board, Road Commissioner or Plumbing Inspector in the administration of this Ordinance; and where it is alleged that there is an error in any requirement, decision, or determination made by the Code Enforcement Officer in the enforcement of this Ordinance by an aggrieved party as set forth below.~~ The hearing on the appeal shall be considered a public hearing and subject to the public hearing notice requirements of Section 17.7. below. The burden of proof shall be on the Appellant to demonstrate that the decision maker whose decision is being appealed erred. The Board shall not conduct a de novo review but shall act in a purely appellate capacity and shall limit its review to the record evidence that was before the decision maker and the parties' arguments based on that record evidence. In acting on administrative appeals, the Board of Appeals may sustain or reverse the action of the decision maker, or remand for further information or proceedings. The Board of Appeals may reverse the action being appealed only upon a finding that said action was clearly contrary to applicable provisions of the Ordinance or that the record evidence compels a different conclusion.
1. **Code Enforcement Officer:** ~~The Board of Appeals may hear and decide appeals by an aggrieved party where it has been alleged that there is an error in any interpretation, determination, requirement or decision action or failure to act made by the Code Enforcement Officer or in any other matter involving the Code Enforcement Officer in the administration or enforcement of this Ordinance. Except that, with respect to Article 9, only final decisions by the Code Enforcement Officer granting or denying a permit shall be subject to appeal. The burden of proof shall be on the Appellant to demonstrate that the Code Enforcement Officer erred. The Board shall not conduct a de novo review but shall act in a purely appellate capacity and shall limit its review to the record evidence that was before the Code Enforcement Officer and the parties' arguments based on that record evidence. In acting on administrative appeals, the Board of Appeals may sustain, modify or reverse the action of the Code Enforcement Officer. The Board of Appeals may reverse the Code Enforcement Officer's action only upon a finding that said action was clearly contrary to applicable provisions of the Ordinance or that the record evidence compels a different conclusion.~~
 2. **Planning Board:** ~~The Board of Appeals may hear and decide appeals from any final decision of the Planning Board, by any aggrieved party. The Board of Appeals shall not conduct a de novo review, but shall act in a purely appellate capacity, and shall limit its review to the record developed before the Planning~~

~~Board, and to the parties arguments based on that record. The burden of proof shall be on the appellant to demonstrate that the Planning Board erred. The Board of Appeals shall have the power to affirm, reverse, or modify, with or without conditions, the decision of the Planning Board or, if the record is not sufficient or further information needs to be provided, to remand the matter back to the Planning Board for further proceedings. The Board of Appeals shall reverse the decision of the Planning Board only upon a finding that the decision was clearly contrary to the applicable provisions of the Ordinance or that the record evidence compels a contrary conclusion.~~

3. **Road Commissioner:** ~~The Board of Appeals may hear and decide appeals by an aggrieved party where it has been alleged that there is an error in any interpretation, determination, requirement or decision action or failure to act made by the Road Commissioner in the administration of this Ordinance. The burden of proof shall be on the Appellant to demonstrate that the Road Commissioner erred. The Board shall not conduct a de novo review but shall act in a purely appellate capacity and shall limit its review to the record evidence that was before the Road Commissioner and the parties' arguments based on that record evidence. In acting on administrative appeals, the Board of Appeals may sustain, modify or reverse the action of the Road Commissioner. The Board of Appeals may reverse the Road Commissioner's action only upon a finding that said action was clearly contrary to applicable provisions of this Ordinance or that the record evidence compels a different conclusion.~~
4. **Historic District Commission:** The Board of Appeals may hear and decide appeals from any final decision of the Historic District Commission.

B. **Variances Appeals:** To authorize variances, within the limitations set forth in this Ordinance.

1. **Dimensional Variance:** The Board of Appeals shall not grant a variance from dimensional requirements unless it finds that:
 - a. The proposed structure or use would meet the performance standards of this Ordinance except for the specific provision which has created the nonconformity and from which relief is sought; and,
 - b. The strict application of the terms of this Ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means:
 - 1) The land in question cannot yield a reasonable return unless a variance is granted; and,
 - 2) The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; and,
 - 3) The granting of a variance will not alter the essential character of the locality; and,
 - 4) The hardship is not the result of action taken by the applicant or a prior owner.

- h. Commercial, industrial structures and additions to commercial and industrial structures, >2,400 sq. ft. of floor area - \$0.30 per square foot of floor area
 - i. Structural alterations - \$50.00
 - j. Outdoor pools with filtering systems - \$25.00
 - k. Satellite dish - \$5.00
 - l. Demolition of structures - no fee
 - m. Municipal or public education structures - no fee
 - n. Re-inspection due to failure - \$50.00
 - o. 2nd re-inspection due to failure - \$ 100.00
3. Local Plumbing Inspector. Application fees for a permit from the Local Plumbing Inspector shall be as required by the State of Maine.
4. Planning Board. Application fees for a permit from the Planning Board shall be as specified in the Ordinance.
5. Board of Appeals. Application fees for a permit from the Board of Appeals shall be seventy (\$70) dollars, plus any and all advertising costs.
6. Select Board. License fees shall be as follows, plus any and all advertising costs:
- a. Graveyard or Junkyard License - sixty (\$60) dollars for each license.
 - b. Automobile Recycling Business -\$300 for a five-year license.
7. After-the-fact permit - Double Permit Fee, Minimum \$100.00

Section 18.5. ENFORCEMENT

- A. **Violations:** If the Code Enforcement Officer finds that any provisions of this Ordinance has been violated, he shall notify by certified mail the property owner and such other person as may be responsible for the violation, indicating the nature of the violation and ordering the action necessary to correct. The Town Attorney or Code Enforcement Officer with approval from the Board of Selectmen, shall institute, in the name of the Town, any and all action, legal and equitable, that may be appropriate or necessary for the enforcement of the provisions of this Ordinance. Any person, firm or corporation owning or having control of any building or premises or part thereof who violates any provisions of this Ordinance, or fails to take the required corrective measures, shall be subject to the provisions of 30-A MRSA, §4452 as the same shall be amended from time to time. Each day such violation exists shall constitute a separate offense.
- B. **Consent agreements:** The Board of Selectmen, or its authorized agent, may enter into a consent agreement to eliminate violations and to collect civil penalties. Only the Board of Selectmen may enter into a consent agreement that would allow an illegal structure or use to continue.
- ~~C. **Appeals:** Appeals from enforcement determinations of the Code Enforcement Office shall be taken to the Board of Appeals.~~