

ORDINANCE TO ESTABLISH A BOARD OF APPEALS

A TRUE COPY ATTEST CERTIFIED BY:

Ronda L. Palmer, Town Clerk

ENACTED: April 27, 2009

PART 1

§ 101 SHORT TITLE

This Ordinance shall be known and cited as the "Ordinance to Establish a Board of Appeals". The Board of Appeals shall hereinafter be known as the Board.

§ 102 PURPOSES AND POLICIES

The Town of Jay has enacted this Ordinance to establish a Board of Appeals and administrative procedures to hear and decide:

- A. Administrative Appeals: To hear and decide administrative appeals, on an appellate basis, where it is alleged by an aggrieved party that there is an error in any order, requirement, decision or determination made by, or failure to act by, the Planning Board in the administration of the Jay Shoreland Zoning Ordinance or the Floodplain Management Ordinance for the Town of Jay and by the Municipal Officers in the administration of the Special Amusement Permits under 28-A M.R.S.A. Section 1054; and to hear and decide administrative appeals on a de novo basis where it is alleged by an aggrieved party that there is an error in any order, requirement, decision or determination made by, or failure to act by, the Code Enforcement Officer in his/her review of and action on a permit application under this Ordinance. Any order, requirement, decision or determination made, or failure to act, in the enforcement of the Jay Shoreland Zoning Ordinance is not appealable to the Board of Appeals.
- B. Variance Appeals: To authorize variances upon appeals that are within the limitations set forth in this Ordinance or in the Shoreland Zoning Ordinance or in the Floodplain Management Ordinance for the Town of Jay. This Ordinance shall be liberally construed to effectuate its purposes and policies.

§ 103 AUTHORITY

This Ordinance is enacted pursuant to Article VIII Part Second of the Constitution of the State of Maine and the Laws of the State of Maine, including, without limitation: 30-A M.R.S.A. Section 3001 and Section 2691 and 28-A M.R.S.A. Section 1054.

§ 104 APPLICATION

This Ordinance applies only to appeals from decisions made under the Jay Shoreland Zoning Ordinance, the Floodplain Management Ordinance for the Town of Jay and Special Amusement Permits under 28-A M.R.S.A. Section 1054. The Board of Appeals has no jurisdiction or authority over any other decisions of the Municipal Officers, the Code Enforcement Officer or the Planning Board, including without limitations, any decisions made by the Code Enforcement Officer or Planning Board under the Jay Environmental Control and Improvement Ordinance.

§ 105 GENERAL PROVISIONS

- A. Business of the Board shall be conducted in accord with Maine Statutes and this Ordinance.
- B. It shall be the responsibility of the members of the Board of Appeals to become familiar with the Shoreland Zoning Ordinance and the Floodplain Management Ordinance for the Town of Jay and the Special Amusement Permits under 28-A M.R.S.A. Section 1054 as well as the applicable state and federal statutes.
- C. It shall be the responsibility of the members of the Board to become familiar with the community goals, desires and policies as expressed in the Jay Comprehensive Plan and to grant the minimum relief which will ensure that the goals and policies of the Plan are preserved and justice is done.

§ 106 SEVERABILITY

- A. If any provision or section of this Ordinance, or the application thereof to any person or circumstance, is held void or invalid, such invalidity shall not affect other provisions or applications of this Ordinance that can be given effect in whole or in part without the invalid provision or application, and to this end each provision of this Ordinance is declared to be severable and independent. It is the intent of the Town of Jay that each and every part, clause, paragraph, section and subsection of this Ordinance be given effect to the degree possible.
- B. In any case where a provision of this Ordinance is found to be in conflict with a provision of any other Ordinance or code of the Town of Jay, the provision which established the higher standard for the promotion and protection of health and welfare for the community shall prevail.

§ 107 EFFECTIVE DATE

This Ordinance shall be effective on April 27, 2009. Upon approval of this Ordinance, the previously adopted Ordinance to Establish a Board of Appeals, effective March 15, 1993, is hereby repealed.

PART 2

§ 201 ESTABLISHMENT

The Town of Jay hereby establishes the Jay Board of Appeals.

§ 202 COMPOSITION

The Board shall consist of five members and up to three associate members. Members of the Board and associate members shall be residents of the State of Maine, at least eighteen 18 years of age and citizens of the United States at all times during their term, and shall neither be Municipal Officers, Planning Board members or a spouse of a Municipal Officer or of a Planning Board member nor employees of the Town of Jay.

An associate member shall attend all meetings of the Board and participate in its proceedings, but may vote only when designated by the Chairman to sit for a member. If any member or associate member misses three (3) or more consecutive meetings of the Board then it may be cause for removal of such member.

When a member is unable to act because of interest, absence or any other reason satisfactory to the Chairman, the Chairman shall designate an associate member to sit and vote in his/her stead.

§ 203 APPOINTMENT

The members of the Board and associate members shall be appointed by the Municipal Officers. Any individual Selectman shall have the authority and power to nominate one or more individuals for consideration of the Municipal Officers for appointment to the Board of Appeals.

§ 204 TERMS OF OFFICE

The terms of each member and associate member shall be five (5) years. Members shall serve until their successors are duly appointed, qualified and assume their duties.

§ 205 VACANCIES

The Municipal Officers may declare a vacancy on the Board upon the nonacceptance, resignation, death, removal, or incompetency of any member or associate, relocation of a member's or associate's place of residence outside the State of Maine, or failure of any person to qualify for office. In such circumstances, the Municipal Officers shall fill all positions of members or associate members; pending any such action, the Chairman may designate an associate member to act to fill a vacancy.

§ 206 REMOVAL

After notice and hearing, the Municipal Officers may remove or dismiss any member of the Board or associate for cause before the member or associate term expires. The term "cause" shall mean conduct or conflict affecting the ability of the member to perform his/her duties.

The notice provided hereunder shall be in writing and shall state the reasons for the proposed removal and inform the member or associate of his/her right to a hearing before the Municipal Officers within thirty (30) days of receipt of the notice. This hearing may be held in executive session if the requirements of 1 M.R.S.A. 405 are met or, upon request by the member or associate to be removed, an open meeting may be held in accordance with 1 M.R.S.A. 401 et seq. and this Ordinance.

§ 207 COMPENSATION

All members of the Board and associates shall receive compensation at the rate of \$20 for each meeting attended.

§ 208 OFFICERS

- A. Election of Officers. The Board of Appeals shall, by majority vote, elect a Chairman, Vice Chairman and Secretary at an annual organizational meeting; or upon the resignation, removal or cessation of service of any of the officers, as soon thereafter as practical for the purpose of filling any vacancies. The Chairman, Vice Chairman and Secretary shall each serve a term of one year or until his/her successor is duly elected by the Board. The Chairman, Vice Chairman and Secretary may serve successive terms, if so elected.
- B. Chairman. The Chairman shall preside at all meetings, if present, shall prepare the agenda as provided in Section 2-209.C. herein, shall call special meetings and workshops when necessary, shall transmit reports, plans and recommendations of the Board to the appropriate governing authority, and shall fulfill all the customary functions of his/her office. The Chairman may also administer oaths. The Chairman shall be the official spokesman of the Board.
- C. Vice Chairman. In the absence of the Chairman, the Vice Chairman shall act as Chairman and shall have all the powers of the Chairman.
- D. Secretary. The Secretary, or other person so employed or so designated by the Board, shall assist the Chairman in preparing the agenda for Board meetings and proceedings, send out notice for meetings, public hearings and other proceedings of the Board, record, maintain and show the vote of each member on every question in which a formal recorded vote is made under the procedures of the Board or his/her absence or failure to vote, and shall maintain a permanent record of all correspondence, findings, resolutions and determinations of the Board. All records shall be deemed public and may be inspected at reasonable times. The records shall be filed in the Town Clerk's Office. The Secretary shall also make such certifications of Board action as may be required from time to time.

§ 209 MEETINGS, QUORUM, VOTING, AGENDA

- A. Meetings. The Board shall meet at least once a year for organizational purposes.

Special meetings may be called by the Chairman or any three members of the Board or by the Municipal Officers.

The Board may hold executive sessions as provided in the Maine Freedom of Access Act, 1 M.R.S.A. 401 et seq. Otherwise, all meetings, hearings, proceedings and deliberations of the Board shall be open to the public in accordance with the Maine Freedom of Access Act, 1 M.R.S.A. 401 et seq.

Workshops may be called by the Chairman, or members designated by the Chairman, for the presentation of information. Workshops shall be informational only, shall not be used by the Board for the weighing of positions or reasons for or against a proposition, and shall not be used by the Board for the formulation of formal decisions on any matter.

Any member of the Board may voluntarily disqualify himself or herself from voting on a particular matter for any reason, including conflict. A member shall be disqualified from voting on a particular matter for any reason by a majority vote of the members present and voting, except the member whose disqualification is at issue shall not vote on his/her own disqualification.

If there are two or three associate members, the Chairman shall designate which will serve in the place of the absent or abstaining member or any member who is disqualified on a particular matter.

- B. Quorum and Voting. No business shall be transacted by the Board without a quorum. A quorum shall consist of three (3) members or associate members authorized to vote. The Board shall act by a majority vote, calculated on the basis of the number of members present, the meeting may be adjourned for a period not exceeding three (3) weeks at any one time. A tie vote or favorable vote by a lesser number than the required majority shall be considered a rejection of the application under consideration. If a member has a conflict of interest, said member shall not be counted by the Board in establishing the quorum for such matter.
- C. Agenda. No item of business or plan shall be placed on the Board agenda for any meeting unless such item or plan shall have been submitted to the Board not less than ten (10) days prior to the date of a meeting or other proceeding, provided, however, that the Board may, upon request or on its own motion, waive the ten (10) day advance submissions requirement. The Chairman shall determine the agenda in such a manner as to facilitate the execution of the duties of the Board.

§ 210 POWERS AND LIMITATIONS

- A. The Board shall have the following powers to be exercised only upon receipt of a written appeal by an aggrieved party:

1. The Board may interpret the provisions of the Shoreland Zoning Ordinance and the Floodplain Management Ordinance for the Town of Jay which are called into question.
2. Variance Appeals: The Board may grant a variance appeal in accordance with and as outlined in the Shoreland Zoning Ordinance and the Floodplain Management Ordinance for the Town of Jay.
3. Administrative Appeals: When the Board of Appeals reviews a decision of the Code Enforcement Officer the Board of Appeals shall hold a “de novo” hearing. At this time the Board may receive and consider new evidence and testimony, be it oral or written. When acting in a “de novo” capacity the Board of Appeals shall hear and decide the matter afresh, undertaking its own independent analysis of evidence and the law, and reaching its own decision.

When the Board of Appeals hears a decision of the Planning Board or of the Municipal Officers, it shall hold an appellate hearing, and may reverse the decision of the Planning Board or the Municipal Officers only upon finding that the decision was contrary to specific provisions of the Ordinance or contrary to the facts presented to the Planning Board or the Municipal Officers. The Board of Appeals may only review the record of the proceedings before the Planning Board or the Municipal Officers. The Board of Appeals shall not receive or consider any evidence which was not presented to the Planning Board or the Municipal Officers, but the Board of Appeals may receive and consider written or oral arguments. If the Board of Appeals determines that the record of the Planning Board or the Municipal Officers’ proceedings are inadequate, the Board of Appeals may remand the matter to the Planning Board or the Municipal Officers for additional fact finding.

4. The Board shall have the power to hear and determine all appeals in accordance with Section 102 above:
 - a. rendered by the Code Enforcement Officer or the Planning Board pursuant to the Shoreland Zoning Ordinance;
 - b. rendered by the Planning Board or the Code Enforcement Officer pursuant to the Floodplain Management Ordinance for the Town of Jay; and
 - c. rendered by the Municipal Officers under Title 28-A Section 1054.

PART 3

§ 301 APPEAL PROCEDURE

- A. An administrative or variance appeal may be taken to the Board of Appeals by an aggrieved party from any decision of the Code Enforcement Officer, Planning Board or Municipal Officers, except for enforcement related matters as described in Section 102 above. Such appeal shall be taken within thirty (30) days of the date of the decision appealed from, and not otherwise, except that the Board, upon a showing of good cause, may waive the thirty (30) day requirement.

Applications for appeals shall be made by filing with the Town Clerk a written notice of appeal which includes:

1. A concise written statement indicating what relief is requested and why the appeal should be granted.
2. A sketch drawn to scale showing lot lines, location of existing buildings and structures and other physical features of the lot pertinent to the relief sought (not required for Special Amusement appeals).

The applicant shall file this appeal at the office of the Town Clerk. Upon receiving an application for appeal, the Town Clerk shall notify the Chairperson of the Board, the Code Enforcement Officer, Planning Board or Municipal Officers, as appropriate. Upon being notified of an appeal, the Code Enforcement Officer, Planning Board, or Municipal Officers, as appropriate, shall transmit to the Board of Appeals all of the papers constituting the record of the decision appealed from.

- B. The fee to accompany applications for appeal shall be two hundred (\$200) dollars. Checks are to be made payable to the Town of Jay. If an administrative appeal is granted, the fee shall be refunded to the applicant.
- C. The person filing the appeal shall have the burden of proof.

§ 302 HEARINGS

- A. The Board shall hold a public hearing on all appeals within 35 days of its receipt of a complete written application, unless this time period is extended by the parties.
- B. The Board shall cause notice of the date, time and place of such hearing, the location of the building or lot, and the general nature of the question involved, to be given to the person making the application and to be published in a newspaper of general circulation in Jay, the date of the publication to be at least seven days prior to the hearing. The Board shall also cause notice of the hearing to be given the Municipal Officers, the Planning Board, the Code Enforcement Officer, and the owners of property abutting that for which the appeal is taken at least 7 days prior to the date of the hearing. The notice of hearing shall be mailed to the abutters by Certified Mail, no return receipt required.

C. The Board shall provide as a matter of policy for exclusion of irrelevant, immaterial, or unduly repetitious evidence.

D. The order of business at a public hearing shall be as follows:

1. The Chairman calls the hearing to order.
2. The Chairman determines whether there is a quorum.
3. The Chairman gives a statement of the case and submits all correspondence and reports received to the record of the proceeding.
4. The Board determines whether it has jurisdiction over the appeal.
5. The Board decides whether the applicant has the right to appear before the Board.
6. The Board determines which individuals attending the hearing are "interested parties." "Interested parties" are those persons who are directly affected by the outcome of the proceedings and who request to offer testimony and evidence and to participate in oral cross-examination. They may include abutting property owners and those who might be adversely affected by the Board's decision. Parties may be required by the Board to consolidate or join their interests or contentions if they are substantially similar and such consolidation would expedite the hearing. Municipal Officers, the Planning Board, and the Code Enforcement Officer shall automatically be made parties to the proceeding if they desire.

Other persons attending the hearing and federal, state, municipal, and other governmental agencies shall be permitted to make oral or written statements and to submit oral and written questions through the Chairman.

7. The appellant is given the opportunity to present his/her case without interruption.
8. The Board and interested parties may ask questions of the appellant through the Chairman.
9. The interested parties are given the opportunity to present their case. The Board may call its own witnesses, such as the Code Enforcement Officer.
10. The appellant may ask questions of the interested parties and Board witnesses directly.
11. All parties are given the opportunity to refute or rebut statements made throughout the hearing.
12. The Board shall receive comments and questions from all observers and interested citizens who wish to express their views.

13. The hearing is closed after all parties have been heard. If additional time is needed, the hearing may be continued to a later date. All participants shall be notified of the date, time and place of the continued hearing.

E. The Chairman may waive any of the above rules if good cause is shown.

§ 303 DECISIONS

A. Decisions by the Board shall be made not later than thirty-five (35) days from the date of the final hearing unless the Board and the applicant agree to an extension of time.

B. The final decision on any matter before the Board shall be made by written order signed by the Chairman. The transcript or recording of testimony if such a transcript or recording has been prepared by the Board and exhibits, together with all papers and requests filed in the proceedings, shall constitute public record. All decisions shall become a part of the record and shall include a statement of findings and conclusions, as well as the reasons or basis for the findings and conclusions, upon all the material issues of fact, law or discretion presented and the appropriate order, relief or denial of relief.

C. In reviewing an application on any matter, the standards in any applicable local ordinance or statute shall take precedence over the standards of these rules whenever a conflict occurs. In all other instances, the more restrictive rule shall apply.

D. The Board may reverse the decision, or failure to act, of the Code Enforcement Officer or Planning Board only upon a finding that the decision, or failure to act, was clearly contrary to specific provisions of the Jay Shoreland Zoning Ordinance or the Floodplain Management Ordinance for the Town of Jay or 28-A M.R.S.A. Section 1054 or was unsupported by substantial evidence in the record.

E. Notice of any decision shall be mailed or hand delivered to the petitioner or the petitioner's representative or agent, the Planning Board, the Code Enforcement Officer, the Municipal Officers and the Maine Department of Environmental Protection (MEDEP notice of Shoreland Zoning decisions only) within seven (7) days of the decision.

F. Decisions of the Board shall be immediately filed in the office of the Town Clerk and shall be made public record. The date of filing of each decision shall be entered in the official records and minutes of the Board.

G. Unless otherwise specified, any order or decision of the Board shall expire if no substantial start is made in construction or in the use of the property within ninety (90) days from the date of the decision; however, the Board may extend this time an additional ninety (90) days.

§ 304 RECONSIDERATION

A. In accordance with 30-A M.R.S.A. Section 2691(3)(F), the Board may reconsider any decision, notify all interested parties and make any change in its original decision within

45 days of its prior decision. A request to the Board to reconsider a decision must be filed within ten (10) days of the decision that is being reconsidered. A vote to reconsider and the action taken on that reconsideration must occur and be completed within forty-five (45) days of the date of the vote on the original decision. Reconsideration of a decision shall require a positive vote of the majority of the Board members originally voting on the decision, and proper notification to the landowner, petitioner, Planning Board, Code Enforcement Officer, and other parties of interest, including abutters and those who testified at the original hearing(s). The Board may conduct additional hearings and receive additional evidence and testimony.

Appeal of a reconsidered decision to Superior Court must be made within fifteen (15) days after the decision on reconsideration.

B. Reconsideration shall only be for one of the following reasons:

1. The record contains significant factual errors due to fraud or mistake, regarding facts upon which the decision was based; or
2. The Board misinterpreted the ordinance, followed improper procedures, or acted beyond its jurisdiction.

§ 305 APPEAL TO SUPERIOR COURT

Except as provided in 30-A M.R.S.A. Section 2691(3)(F), any aggrieved party who participated as a party during the proceedings before the Board of Appeals may take an appeal to Superior Court in accordance with State law within 45 days from the date of any decision of the Board of Appeals.