

**§ 14-16-4-2 SPECIAL EXCEPTIONS.****(A) Application and Fee.**

- (1) Special exceptions to this Zoning Code which may be applied for are:
  - (a) Conditional use;
  - (b) Variance; and
  - (c) Expansion of nonconforming use.
- (2) Request for special exceptions is initiated by application to the city on prescribed forms. Each application shall be accompanied by at least one copy of an accurate site plan, building development plan, sketch or other related information, as required by the Zoning Hearing Examiner.
- (3) An application for the same special exception on the same site may not be considered within 12 months of the date of final city action on a prior application.
- (4) An application fee of \$100 shall accompany each application. When an application is withdrawn after it has been advertised for public hearing, the application fee shall not be refunded. When an application is withdrawn before such advertisement, all but \$20 of the fee shall be refunded. Where the city is the applicant or agent, the application fee is waived.

**(B) Hearing and Decision.**

- (1) A duly filed application for a special exception to the regular zoning provisions shall be decided upon the record after a hearing by the Zoning Hearing Examiner.
- (2) At least 15 days in advance of a hearing, the Planning Director shall publish notice of the hearing in a newspaper of general circulation in the city, and at least 15 days in advance of a hearing shall mail notice individually to the following:
  - (a) The applicant;
  - (b) The applicant's agent;
  - (c) The owners, as shown by the records of the County Assessor, of lots comprising the application site and lots within 100 feet, excluding public right-of-way, of the application site;
  - (d) Any neighborhood association which has filed its articles of incorporation, bylaws, or other document indicating its existence which includes key contact people, organizational structure, current boundaries and preferred mailing address with the Office of Neighborhood Coordination, if the boundaries of the organization include any part of the parcel of the requested special exception, or any land within 100 feet thereof, excluding public right-of-way; and
  - (e) Any other person, agency, or organization that has filed with the Planning Director a request to receive notices of hearings and has paid a reasonable fee therefor.
- (3) The notice shall:

- (a) Give the time and place of hearing;
  - (b) Contain a statement describing location of the property and the subject matter of the hearing; and
  - (c) Specify how additional information can be obtained.
- (4) The applicant shall post and maintain one or more signs, as provided and where instructed by the Planning Director, at least 15 days before the date of the hearing. The applicant is responsible for removing such sign within five days after the hearing is completed. Failure to properly post signs is grounds for deferral.
- (5) Prior to hearing, the Planning Director shall request city departments and other agencies which he judges would be interested to comment on the application. Comments received shall be submitted to the Zoning Hearing Examiner and shall be part of the hearing record.
- (6) A written statement giving the name and address of the person making the appearance, signed by him or by his agent, and filed with or maintained by the Zoning Hearing Examiner prior to the Hearing Examiner's terminating public comment on the case, constitutes appearance of record. The parties to a hearing shall be any of the following persons who have entered an appearance of record:
  - (a) A person entitled to notice under divisions (2)(a) through (d) above;
  - (b) The representatives of any department or agency of the city or another unit of local government in the metropolitan area which may be affected by the application; or
  - (c) A person who satisfied the Zoning Hearing Examiner that he has a significant personal, pecuniary, or property right or interest in the subject matter of the hearing.
- (7) A party shall be afforded an opportunity to present evidence and argument and to question witnesses on all relevant issues, but the Zoning Hearing Examiner may impose reasonable limitations on the number of witnesses heard, and on the nature and length of their testimony and questioning. The Zoning Hearing Examiner may call witnesses and introduce papers on his own volition during the public hearing. All testimony at the hearing shall be under oath or affirmation. Nothing in this Zoning Code shall prohibit interested members of the public from testifying at hearings.
- (8) The Planning Director shall make a full record of the hearing by sound recording; any person shall have the opportunity to listen to, copy, or transcribe the recording at any reasonable time at the office of the Planning Director. Summary minutes shall be kept of all Zoning Hearing Examiner's hearings, and they shall be kept available for public inspection.
- (9) Prior to making a decision, the Zoning Hearing Examiner shall neither:
  - (a) Communicate, directly or indirectly, with any party or his representatives in connection with the merits of any issue involved, except upon notice and opportunity for all parties to participate;
  - (b) Use nor rely upon any communication, reports, staff memoranda, or other materials prepared in connection with the particular case unless made a part of the record; nor
  - (c) Inspect the site with any party or his representative unless all parties are given opportunity to be present.

- (10) An advertised hearing may be continued to a time and place announced at the hearing without readvertising or reposting of signs.
  - (11) The Zoning Hearing Examiner shall act on an application within 15 days of the conclusion of the hearing. He shall prepare a written decision, which includes the key findings of fact. This report shall be made part of the record. Each material finding shall be supported by substantial evidence or, if it is noted on the record, by the personal knowledge of or inspection of the Zoning Hearing Examiner.
  - (12) The Zoning Hearing Examiner may, when approving a special exception, impose conditions necessary to meet the stated criteria for granting special exceptions.
  - (13) Notification. When any special exception is approved, approved with conditions, or denied, as provided in this section, written notification of the action listing any conditions imposed shall be sent within one day of the action to every party and to any other person who has entered an appearance and also requested a copy of the decision; however, when the decision is made in the public hearing, notice shall be mailed only to the applicant and other persons who have entered an appearance and who have requested to be so informed.
- (C) **Criteria for Decision.** The city shall approve a special exception if the evidence presented to the record shows that the following criteria are met. Although others may submit evidence, it is the burden of the applicant to ensure that there is such evidence in the record.
- (1) A conditional use shall be approved if and only if, in the circumstances of the particular case and under conditions imposed, the use proposed:
    - (a) Will not be injurious to the adjacent property, the neighborhood, or the community;
    - (b) Will not be significantly damaged by surrounding structures or activities.
  - (2) Variance. A variance shall be approved if and only if the following tests are met:
    - (a) The property is exceptional:
      1. The parcel is exceptional as compared with other land in the vicinity subject to the same regulations by reason of the physical characteristics of the land, which physical characteristics existed at the time of the adoption of the regulation or were created by natural forces or by governmental action for which no compensation was paid.
      2. The parcel is exceptional as compared with other land in the vicinity subject to the same regulations by reason of the conditions or use of the parcel or other land in the vicinity which condition or use existed at the time of adoption of the regulations; or
      3. The parcel is irregular, unusually narrow or shallow in shape, and the conditions existed at the time of the adoption of the regulation or were created by natural forces or governmental action for which no compensation was paid; and
    - (b) As a result of the exceptional aspect of the property, the regulations produce unnecessary hardship; an unnecessary hardship is one that either:
      1. Creates an exceptional, substantial, and unjustified limitation of the property owner's reasonable use of his property; or

2. Deprives the owner of a reasonable return on the property under any use permitted by its existing zone.
- (c) A particular variance is appropriate to prevent the unnecessary hardship. The decision on whether to grant a particular variance depends upon a comparison of the special circumstances shown by the applicant (i.e., as per divisions (a) and (b) above) and the public interest. To be justified, a variance must permit only development which meets the following criteria:
1. It differs from development which would be permitted under existing regular zoning regulations no more than is necessary to overcome the unnecessary hardship;
  2. The variance will not significantly interfere with the enjoyment of other land in the vicinity; and
  3. It is consistent with the spirit of this Zoning Code, substantial justice, and the general public interest.
- (d) Financial gain or loss shall not be the sole determining factor in deciding a variance.
- (3) The expansion of a nonconforming use, including the expansion of a building to accommodate such expanded nonconforming use, shall be approved if and only if, in the circumstances of the particular case and under conditions imposed:
- (a) The expanded use will not significantly interfere with the enjoyment of other land in the vicinity;
  - (b) The expanded use will not be significantly damaged by surrounding structures or activities;
  - (c) The expanded use is consistent with the spirit of this Zoning Code, substantial justice, and the general public interest;
  - (d) The owner will experience unnecessary hardship and in addition will be denied a continued reasonable use of the property if the expansion is not approved;
  - (e) The expansion does not exceed 25% of the floor or ground area in nonconforming uses on the site at the time it became nonconforming; and
  - (f) The owner covenants that the use of the entire premises will be ceased or made conforming at the time specified by this Zoning Code for termination of the original nonconforming use on the premises.

**(D) Voiding of Special Exceptions.**

- (1) An approved special exception shall be void one year after the date approval vested if the rights and privileges granted thereby have not been utilized.
- (2) An approved special exception shall be void if it is utilized in a way materially in violation of the terms of approval for a continuous period of one year or more. Such voidance is in addition to and not instead of other remedies available to the city at any time for violation of this Zoning Code.

(3) An approved conditional use shall be void if, after the use has begun, it ceases on the approved site for a continuous period of one year or more.

(E) A person who acquires a property interest in a site which was previously granted a special exception has the responsibility to learn the terms of such approval. The existence of an activity or structure which is not in compliance with regular zoning provisions constitutes constructive notice that there may be a special exception, the terms of which must be met.

('74 Code, § 7-14-42) (Ord. 80-1975; Am. Ord. 78-1980; Am. Ord. 49-1987; Am. Ord. 58-1987; Am. Ord. 45-1990; Am. Ord. 13-1991; Am. Ord. 8-1995; Am. Ord. 32-1995; Am. Ord. 23-2001; Am. Ord. 30-2002)

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