



City of Elkins

Board of Zoning Appeals

May 22, 2025

4:00 PM

Phil Gainer Community Center

142 Robert E. Lee Ave. Ext.

AGENDA

1. **Call to order and roll call**
2. **Public comment**
3. **Minutes**
 - a. Proposed minutes for the meeting of October 24, 2025
4. **Reports**
5. **New business**
 - a. Variance training exercise
 - b. Conditional use process review
6. **Announcements**
7. **Adjournment**



CITY OF ELKINS AGENDA ITEM REPORT

Meeting Date:	May 22, 2025
Section:	Minutes
Category:	Action Item
Agenda Item Name:	Proposed minutes for the meeting of October 24, 2025
Recommended By:	City Clerk
Summary:	Minutes proposed for the Board's October 24 meeting
Fiscal Impact:	n/a
Recommendation:	Consider for approval
Attachments:	1. Board of Zoning Appeals - 2024_10_24 - minutes_proposed

**BOARD OF ZONING APPEALS
REGULAR MEETING
MINUTES**

*Phil Gainer Community Center
142 Robert E. Lee Ave. Ext.
October 24, 2024
4 p.m.*

Present were members D. Turner (Chair), C. Friddle, V. White, C. Ellswood, and L. Douglas.

Also present: G. Roberts (City Attorney), S. Stokes (City Clerk and Recording Secretary).

PUBLIC COMMENT

There was no public comment.

MINUTES

Friddle **MOVED APPROVAL OF THE MINUTES OF THE MEETING OF APRIL 4, 2024.** The motion carried.

NEW BUSINESS

For training purposes, the Board reviewed forms and procedures, then discussed a variance appeal that had been denied by the Fairmont Board of Zoning Appeals.

The meeting adjourned 4:44 p.m.

Name & Title

Signature



CITY OF ELKINS AGENDA ITEM REPORT

Meeting Date:	May 22, 2025
Section:	New business
Category:	Action Item
Agenda Item Name:	Variance training exercise
Recommended By:	City Clerk
Summary:	<p>This exercise consists of a hypothetical scenario in which a variance has been requested by a property owner to make the property safer for a young child.</p> <p>For reference, the following are also attached:</p> <ul style="list-style-type: none"> • Board's standard application form for variances • Excerpt from the WVU training presentation concerning BZA action on variances
Fiscal Impact:	n/a
Recommendation:	Review and discuss
Attachments:	<ol style="list-style-type: none"> 1. 2015.11.15 Variance Exercise 2. BZA_variance - 2024_04_04 - adopted 3. BZA - Variance - WVU law clinic - 2024_04_04

Summary

A mock board of zoning appeals hearing will occur to decide whether to grant a variance to Mr. and Mrs. Smith to build a deck. Mr. and Mrs. Smith are requesting a variance from Section 10-Dimensional Requirements of the City of Green's Zoning Ordinance. If the variance is granted it will allow Mr. and Mrs. Smith to build a deck off the back of their house. Currently, the Smith's need a variance as the deck does not meet the rear setback requirement in the ordinance. Other neighbors have received variances in the past to construct decks on their homes.

Variance Information

Mr. and Mrs. Smith live at 102 Circle Drive in the City of Green. The majority of the homes on Circle Drive have backyards that drop steeply to the Washington River. They purchased the two-story residential home in 2008. The zoning ordinance requires a 30 foot rear setback. Mr. and Mrs. Smith recently applied for a building permit to add a 20 X 20 deck on the rear of the house to provide a place for their 2 year old son to play. This has left them with a setback of only 28 feet, therefore a variance is needed.

Mr. and Mrs. Smith's Testimony

We have lived in the City of Green for 10 years. In 2008, we purchased our first home on Circle Drive so we could begin to start a family. In 2011, our first son Connor was born. Now that Connor is 2, we need a place for him to play. Our backyard is very steep and offers no place for Connor to enjoy nature and play outside. Our backyard is basically unusable and due to the steepness of our backyard, it is also very unsafe for Connor. Therefore, we would like to build a deck so he can play outside but in a safe environment. Allowing us to build a deck would not alter the character of the neighborhood, as many of our neighbors have decks. This is a real hardship situation due to the topography of our lot and a variance should be given to so we can allow our son to play outside.

Mr. Lee's Testimony

I live next door to the Smiths at 104 Circle Drive. I have lived in the neighborhood for over 10 years. My home is like everyone else's on the street in that we have very steep backyards. The construction of a new deck onto the Smith's home would allow them to have a deck further out on the hillside than any other property on our street. This would obstruct my view of the Washington River. It would also obstruct the view of the river for other residents on the street. It would also alter the character of the neighborhood and set a precedent for future variances. I don't think a variance should be given.

West Virginia Code, Chapter 8A-7-11

- a. A variance is a deviation from the minimum standards of the zoning ordinance and shall not involve permitting land uses that are otherwise prohibited in the zoning district nor shall it involve changing the zoning classifications of a parcel of land.
- b. The board of zoning appeals shall grant a variance to the zoning ordinance if it finds that the variance:
 1. Will not adversely affect the public health, safety or welfare, or the rights of adjacent property owners or residents;
 2. Arises from special conditions or attributes which pertain to the property for which a variance is sought and which were not created by the person seeking the variance;
 3. Would eliminate an unnecessary hardship and permit a reasonable use of the land; and;
 4. Will allow the intent of the zoning ordinance to be observed and substantial justice done.

Should the BZA grant the variance based on the testimony and Code requirements?



APPLICATION FOR ZONING VARIANCE

BOARD OF ZONING APPEALS

Version adopted April 4, 2024

Name of Applicant: _____ Are you the property owner? YES NO

Applicant Address: _____

Applicant Phone No: _____ Applicant Email: _____

Name of Property Owner if Different from Applicant: _____

Address of Structure: _____ Zoning District: _____

Current Use: _____

See the back of this form for requirements for the granting of a variance.

In addition to this form, the following shall be submitted prior to review by the City of Elkins:

1. Application for Certificate of Zoning Compliance showing denial
2. A plan drawn to scale which shall depict the overall site layout including building location, parking area, circulation, setbacks, lighting, landscaping, screening, signage, and building location on adjacent parcels.
3. The preliminary building plans and elevations illustrating modifications and alterations including an indication of exterior materials, textures, and colors being used on the project.
4. A letter summarizing the request along with any other information deemed helpful by the applicant or necessary by the Board to explain the nature of the requested variance and its consistency with the standards outlined on the back of this application.
5. Legal Description (may be found in deed)
6. Application Fee of \$200. You will be billed separately for the cost of legal advertisement and notification posters.

I certify under penalty of perjury that the information contained in this application and its supplements are true and correct.

Applicant Signature

Date

Owner Signature

Date

From Elkins City Code § 152.028 VARIANCES.

A variance is a deviation from the minimum standards of this code and shall not involve permitting land uses that are otherwise prohibited in the zoning district nor shall it involve changing the zoning classifications of a parcel of land.

The Board of Zoning Appeals shall grant a variance to this code if it finds that the variance:

- (1) Will not adversely affect the public health, safety, or welfare, or the rights of adjacent property owners or residents;
- (2) Arises from special conditions or attributes which pertain to the property for which a variance is sought and which were not created by the person seeking the variance;
- (3) Would eliminate an unnecessary hardship and permit a reasonable use of the land; and
- (4) Will allow the intent of this code to be observed and substantial justice done.

The Board of Zoning Appeals shall not grant a variance to allow the establishment of a use in a zoning district when such use is prohibited by the provisions of this code.

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§ 8A-7-11. Variance

- The Board shall grant a variance if it finds:
 - Will not adversely affect the public health, safety or welfare, or the rights of adjacent property owners or residents;
 - Arises from special conditions or attributes which pertain to the property for which a variance is sought and which were not created by the person seeking the variance
 - Would eliminate an unnecessary hardship and permit a reasonable use of land; and
 - Will allow the intent of the zoning ordinance to be observed and substantial justice be done

Variance example:

- Resident wants to build a front porch on their house
- Front setback in the Single-Family Zoning District is 10 feet
- House is 20 feet back from property line, which would only allow resident to build a 10 foot porch
- Resident asks for a variance of 5 feet
- Should the variance be granted?

What is public health, safety, and welfare and rights of adjacent property owners mean?

- BZA has significant discretion to determine what is in the public interest.
- BZA should consider both the zoning classification of the property as well as actual development patterns in the vicinity.
- When a variance would result in negative impacts to nearby residential areas, the neighborhood impact criteria usually weighs against granting the requested variance relief.
- Other relevant considerations may include nuisance impacts, such as noise and dust, environmental impacts, the effect that the variance will have on parking and traffic congestion, its interference with views, safety issues that would be created or exacerbated by the variance, and the variance's effect on property values in the neighborhood.

What are special conditions or attributes?

- Narrow lot
- Steep topography
- Oddly shaped lot

What is hardship?

- Not defined in West Virginia Code
- Not well defined in case law in West Virginia
- No cases that cite the statute
- Look at general case law, text books, and treatises
- Does the property owner have a reasonable use of their property? If they can't use the property themselves, can they sell for a fair market value? Can they rent?
- Unnecessary hardship and reasonable use of property go together

What is hardship?

- As a general rule, hardship that is personal to the property owner will not support the grant of a variance. Personal hardships include those where the primary benefit of the variance would be one of convenience for the property owner. An Oregon court, for example, denied a variance to construct a pool house within the required setback area of a residential property, for instance, on the reasoning that without the variance the property owners would merely have to “perform their ablutions in and navigate the 15-foot distance from [the] house to the pool.”
- Personal hardships also include hardships relating to the health or physical infirmity of the applicant or a member of her family. For example, a Texas court upheld the denial of a variance to build a screened backyard structure where the purpose of the structure was to protect the property owner from her sun and insect allergies.

What is hardship?

- Some courts are more sympathetic than others when it comes to personal hardships. In a Washington case, for example, the court upheld a variance where the property owner's ill health made it difficult for him to maintain the property. Although seemingly a personal hardship, the board characterized it instead as a hardship relating to the land, because "there was evidence that it would be difficult for any person, regardless of his health, to maintain the lot because of its unique shape and location."
- Personal hardships insufficient to support the grant of a variance have been found in many other circumstances. A few examples include cases where the property owner's hardship is the result of her own design decisions, cases where hardship is related to a desire to be closer or provide more space for family members, and cases where the hardship relates to disputes with neighbors.
- Despite the general requirement that hardships must relate to the land, variances may be required to accommodate personal hardships under the Americans with Disabilities Act

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What is hardship?

- To warrant a zoning variance, the practical difficulties or hardship suffered must be due either to exceptional narrowness, shallowness, or shape of the property or to the property's exceptional topographical conditions or other extraordinary or exceptional situations or conditions. *Clouser v. David*, 309 F.2d 233 (D.C. Cir. 1962).
- To satisfy its burden for a special exception, an applicant must establish that the proposed use meets the specific objective criteria of the zoning ordinance; these definite criteria are in contrast to the general, non-specific or non-objective requirements such as health and safety. *Inter-Maritime Forwarding Co., Inc. v. U.S.*, 60 Cust. Ct. 930, 1968 WL 11135 (Cust. Ct. 2 Div. 1968).
- Where an applicant for a variance has not suffered a financial loss different in any degree from the other members of the area he is not being unduly deprived of his property by a zoning restriction. Loss of anticipated profits that could be realized if the restriction were lifted is not an unnecessary hardship. In granting variances the interest of all the people in the use district must be considered and in the absence of proof of oppression, imposition of a great financial burden, or great individual injustice a variance should not be granted. *Priest v. Griffin*, 284 Ala. 97, 222 So. 2d 353 (1969)

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Will allow the intent of the zoning ordinance to be observed and substantial justice be done

- The New Hampshire Supreme Court affirmed the denial of a variance in a 2018 ruling, agreeing with the zoning board that permitting the property owner to build a larger residence would have been “contrary to the spirit of the ordinance.”
- The court explained that a variance would be contrary to the spirit of the ordinance if it conflicted with the ordinance’s “basic zoning objectives.” Accordingly, it was necessary to examine the stated purposes of the ordinance, which in this case included “preventing the overcrowding of the land,” “assuring proper use of natural resources,” and “providing for harmonious development of the land and its environs.”

BZA Decision

- In writing
- Within 30 days of hearing
- Contain findings of fact and conclusions of law

New Timeline Rule

- SB 782, effective June 3, 2024
- Applies to a “request”, which means “an application for a permit, license, variance, or any other type of prior approval from a governing body or planning commission of a municipality or county for an action related to the development or improvement of property.” (was BZA inadvertently omitted?)
- Request must be approved or denied within 60 days
- If not approved or denied within 60 days, deemed approved
- If approved, may not impose on the applicant additional requirements related to the request

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New Timeline Rule

- If denied, must provide applicant a statement in writing of the reasons for the denial
- If denied as being incomplete, must provide the applicant a statement in writing of the reasons that the request is incomplete
- Incomplete means failing to “contain all information required by law or by a previously adopted rule, ordinance, or policy.”
- Time may be extended:
 - If request requires prior approval of a state or federal agency
 - If the applicant requests an extension in writing

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CITY OF ELKINS AGENDA ITEM REPORT

Meeting Date:	May 22, 2025
Section:	New business
Category:	Action Item
Agenda Item Name:	Conditional use process review
Recommended By:	City Clerk
Summary:	<p>Representatives of the Interact Children's Museum have indicated that they are seeking to purchase a property to house the museum in a neighborhood zoned City Residential.</p> <p>The Elkins Zoning Code permits the use "Museum" in City Residential conditionally. (The code defines "Museum" as "a building or part of a building that displays, preserves, and/or exhibits objects of community and cultural interest in one or more of the arts and sciences, intended to be used by members of the public for viewing, with or without an admission charge.")</p> <p>The BZA's application form for conditional use approval and an excerpt from the WVU Law Clinic's presentation concerning conditional uses are attached.</p>
Fiscal Impact:	n/a
Recommendation:	Review and discuss
Attachments:	<ol style="list-style-type: none"> 1. BZA - Conditional - WVU law clinic - 2024_04_04 2. BZA_Conditional Use_application - 2024_04_04

Conditional Uses

- The BZA is limited in its review of a conditional use permit by the requirements, or standards, set forth in the zoning ordinance.
- Findings of fact, conclusions of law, the decision, and any conditions must be in writing.
- If the BZA finds that the applicant has complied with the standards or requisites set forth in the ordinance, the landowner has the right to the exception. *Petition of Skeen*, 190 W.Va. 649, 651, 441 S.E.2d 370, 372 (1994). In *Petition of Skeen*, The BZA relied on the “virtual unanimous opposition of the neighboring landowners” to deny the permit. *Id.* The court found the denial improper. *Id.*

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Section 152.09-Conditional Use Standards

- The use is consistent with the policies and intent of the corresponding purpose for the zoning district in which it lies and the City’s comprehensive plan.
- The use is physically and operationally compatible with the surrounding neighborhood and surrounding existing uses.
- Use will be designed, constructed, operated, and maintained so that it does not cause substantial injury to adjoining property.
- The use will be adequately served by public facilities and services that include but are not limited to water, sewer, electric, schools, streets, fire and police protection, storm drainage, public transit, and public parks and trails.

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Section 152.09-Conditional Use Standards

- Adequate off-street parking will be provided on the same property as the proposed conditional use as well as adequate ingress and egress to the property in compliance with the standards set forth in this code.
- Any storage of hazardous material will comply with all state, federal, and local regulations, and all such material will be listed and made known to the Chief of the City of Elkins Fire Department.
- The use will not endanger public health or safety or constitute a public nuisance.
- The use will not conduct operations in connection with the use that are offensive, dangerous, or destructive of the environment.
- **The board may impose additional conditions and safeguards deemed necessary.**

Conditions that can be imposed:

- location on a site of activities that generate potential adverse impacts such as noise and glare;
- hours of operation and deliveries;
- location of loading and delivery zones;
- light intensity and hours of full illumination;
- placement and illumination of outdoor vending machines;
- loitering;
- litter control;
- placement of trash receptacles;
- on-site parking configuration and facilities;
- on-site circulation;
- privacy concerns of adjacent uses.

Conditional Use Example

- Gas Station is a Conditional Use in the Commercial Zoning District
- The owner of a proposed gas station submits a conditional use application
- The gas station will border a residential neighborhood on the main street in town
- The BZA sets the following conditions:
 - 20 foot vegetative buffer or 6 foot fence must be installed to buffer existing residential dwellings
 - Gas Station must close at 11 PM and cannot re-open until 7 AM
 - Lights must be turned off (except for security lighting) at 11 PM
 - Only one access point with a designated enter and exit shall be permitted



APPLICATION FOR CONDITIONAL USE PERMIT

BOARD OF ZONING APPEALS

Version adopted April 4, 2024

Name of Applicant: _____ Are you the property owner? YES NO

Applicant Address: _____

Applicant Phone No: _____ Applicant Email: _____

Name of Property Owner if Different from Applicant: _____

Address of Structure: _____ Zoning District: _____

Proposed Use: _____

Was the existing structure originally used as a Permitted Use in the district? YES NO

In order for the Conditional Use Permit to be granted, the applicant must demonstrate to the Board that all standards described on the back of this application will be met.

In addition to this form, the following shall be submitted prior to review by the City of Elkins:

1. Application for Certificate of Zoning Compliance showing denial
2. A plan drawn to scale which shall depict the overall site layout including building location, parking area, circulation, setbacks, lighting, landscaping, screening, signage, and building location on adjacent parcels.
3. The preliminary building plans and elevations illustrating modifications and alterations including an indication of exterior materials, textures, and colors being used on the project.
4. A letter summarizing the request along with any other information deemed helpful by the applicant or necessary by the Board to explain the nature of the proposed use and its consistency with the standards outlined on the back of this application.
5. Legal Description (may be found in deed)
6. Application Fee of \$100. You will be billed separately for the cost of legal advertisement and notification posters.

I certify under penalty of perjury that the information contained in this application and its supplements are true and correct.

Applicant Signature

Date

Owner Signature

Date

The BZA shall approve an application for a conditional use permit, subject to such reasonable conditions and restrictions as are directly related to and incidental to the proposed conditional use permit, if it finds that the following general standards have been met:

1. The use is consistent with the policies and intent of the corresponding purpose for the zoning district in which it lies and the City's comprehensive plan.
2. The use is physically and operationally compatible with the surrounding neighborhood and surrounding existing uses.
3. The use will be designed, constructed, operated, and maintained so that it does not cause substantial injury to adjoining property.
4. The use will be adequately served by public facilities and services which include but are not limited to water, sewer, electric, schools, streets, fire and police protection, storm drainage, public transit, and public parks and trails.
5. Adequate off-street parking will be provided on the same property as the proposed conditional use as well as adequate ingress and egress to the property in compliance with the standards set forth in this code.
6. Any storage of hazardous material will comply with all state, federal, and local regulations, and all such material will be listed and made known to the Chief of the City of Elkins Fire Department.
7. The use will not endanger public health or safety or constitute a public nuisance.
8. The use will not conduct operations in connection with the use which are offensive, dangerous, or destructive of the environment.

Conditions may be imposed on a proposed conditional use to ensure that potential significant adverse impacts on surrounding uses will be reduced to the maximum extent feasible, including but not limited to conditions or measures addressing:

1. Location on a site of activities that generate potential adverse impacts such as noise and glare;
2. Hours of operation and deliveries;
3. Location of loading space and delivery zones;
4. Light intensity and hours of full illumination;
5. Placement of outdoor vending machines;
6. Loitering;
7. Litter control;
8. Placement of trash receptacles;
9. On-site parking configuration and facilities;
10. On-site circulation; and
11. Privacy concerns of adjacent uses.

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