

# **Chapter 31 Appeal Authority**

## **Section 31:1 Definitions**

## **Section 31:2 Appointment**

## **Section 31:3 Term**

## **Section 31:4 Removal**

## **Section 31:5 Duties and Powers**

## **Section 31:6 Appeals to the Appeal Authority**

## **Section 31:7 Variances**

## **Section 31:8 Interpretation of Land Use Ordinance**

## **Section 31:9 Nonconforming Use of Buildings, Structures, and Land**

## **Section 31:10 District Court Review of Appeal Authority Decisions**

### **Section 31:1 Definitions:**

A. "Appeal Authority" means the person appointed by the mayor with the advice and consent of council to hear appeals from person(s) who have been affected by the implementation of the Land Use Ordinances.

B. "Land Use Authority" means anyone who has the authority to interpret or implement the city ordinances as defined by the Land Use Ordinance.

C. "Land Use Ordinance" is defined in Title 10, Chapter 9a of the Utah Code.

### **Section 31:2 Appointment**

There is hereby created an Appeal Authority of one person to be appointed by the Mayor with the advice and consent of the Town Council. The Appeal Authority may not be a resident of the Town, nor have a financial interest in property within the Town. It is the intent of the Town that the appointed individual will not personally benefit from decisions associated with the interpretation of the ordinances of the Town.

### **Section 31:3 Term**

The Appeal Authority shall serve for a term of two (2) years, unless sooner removed as provided herein. Notwithstanding the preceding, the term of office of the initial Appeal Authority shall run from the date of appointment until December 31, 2017. Thereafter all subsequent terms shall commence on January 1st of every other year or until the Appeal Authority position is vacant on account of death, resignation, removal or disqualification. In

the event of early vacancy, the position of Appeal Authority shall be filled in the same manner as an original appointment for the expired term.

### **Section 31:4 Removal**

The appointed Appeal Authority may be removed for cause by the Town Council upon written charges, which shall be filed with the Mayor, and after public hearing, if such public hearing is requested by the appointed Appeal Authority.

### **Section 31:5 Duties and Powers**

A. The Appeal Authority shall have the following powers and duties:

1. To act in a quasi-judicial manner; and
2. To serve as the final arbiter of issues involving the interpretation or the application of Land Use Ordinances.

B. The Appeal Authority shall hear and decide the following:

1. Requests for variances from the terms of the Land Use Ordinances;
2. Appeals from decisions applying the Land Use Ordinances;
3. Determinations regarding the existence, expansion, or modification of nonconforming uses;
4. Special exceptions to the terms of the zoning ordinance where the Town Council has granted jurisdiction to the Appeal Authority to do so, and in the manner so provided; and
5. Appeals from a fee charged in accordance with section 10-9a-510 of the Utah Code.

C. The Appeal Authority 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.

D. The Appeal Authority shall:

1. Comply with the requirements of Chapter 4, Title 52, UCA Open and Public Meetings.
2. Keep minutes of its proceedings, including a record of the examination of evidence and other official actions.

E. The records of the Appeal Authority shall be filed in the Town office with the Town Clerk and shall be public records.

### **Section 31:6 Appeals to the Appeal Authority**

A. As a condition precedent to judicial review, each adversely affected person may specifically challenge a Land Use Authority's decision, within ten (10) business days of the land use decision and pay the related fee.

B. The Appeal Authority shall review the matter de novo and determine the correctness of a decision of the Land Use Authority in its interpretation and application of a Land Use Ordinance.

C. Only those decisions in which a Land Use Authority has applied a Land Use Ordinance to a particular application, person or parcel may be appealed to the Appeal Authority.

D. All documents and exhibits constituting the record upon which the action appealed was made shall be presented to the Town Clerk with the application for hearing.

E. For every appeal, the applicant shall present to the Appeal Authority every theory of relief that it can raise in District Court.

F. The notice of appeal shall specifically allege the error which was made in the order, requirement, recommendation, decision, or determination made by an official or officials in the administration or interpretation of the land use ordinances. A notice of appeal failing to allege such error or specify the grounds for appeal may be summarily dismissed by the Appeal Authority, with or without prejudice.

G. The Appeal Authority shall set the appeal hearing to be held within a reasonable time from the date the appeal is received. Written notice of the date set for hearing the appeal shall be mailed to the applicant at least ten (10) days before the appeal hearing date. At the hearing, the party appealing shall appear in person or by agent or by attorney.

H. After hearing the appeal, the Appeal Authority may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, recommendation, or determination appealed from and may make such order, requirement, decision, recommendation or determination as ought to be made, and to that end shall have all the powers of the officer or body from which the appeal is made.

I. The filing of an appeal shall stay all proceedings and actions in the furtherance of the matter appealed, pending a decision of the Appeal Authority. The stay shall continue unless the Planning Commission or Town Council certifies to the Appeal

Authority, after the notice of appeal shall have been filed, that by reason of facts stated in the certificate, the stay would cause imminent peril to life or property. In such cases proceedings shall not be stayed otherwise than by restraining order issued by the District Court on application, notice and due cause shown.

J. The Town may not require an adversely affected party to pursue duplicate or successive appeals before the same or separate appeal authorities as a condition of the adversely affected party's duty to exhaust administrative remedies.

K. The Appeal Authority shall conduct each appeal and variance request as described by this Chapter.

L. The person or entity who filed the appeal has the burden of proving that the Land Use Authority erred.

M. The Appeal Authority shall respect the due process rights of each of the participants.

N. The Appeal Authority shall issue a written decision within a reasonable time after the hearing.

O. Any applicant may withdraw an appeal at any time prior to a decision by the Appeal Authority. No person shall be entitled to claim a refund of costs for any reason.

P. Land use decisions specified by the Town Council by ordinance, may be appealed directly to the District Court.

### **Section 31:7 Variances**

A. Any person or entity desiring a waiver or modification of the requirements of a Land Use Ordinance as applied to a parcel or 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.

B. The Appeal Authority shall set a hearing to be held within a reasonable time from the date the request is received. Written notice of the date set for hearing the request shall be mailed to the applicant at least ten (10) days before the hearing date. The Town Clerk shall also mail written notice of the date set for the hearing to the parties in interest, including adjoining property owners, at least ten (10) days before the hearing. "Adjoining property owners" shall mean all owners within one hundred fifty feet (150') in each direction from the location for which the variance is requested, as determined from the tax records of the county. The applicant shall furnish the Town Clerk with a complete list containing the names of and last known addresses of such

owners at the time the application is filed. Notice shall be posted in a conspicuous place adjacent to and facing the nearest public street and within one hundred feet (100') of the property where the proposed variance will apply at least ten (10) days before the hearing. At the hearing, the requesting party shall appear in person or by agent or by attorney. After the hearing, the Appeal Authority may wholly or partially grant or deny the applicant's request.

C. The Appeal Authority may grant a variance only if:

1. 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;
2. There are special circumstances attached to the property that do not generally apply to other properties in the same zone;
3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;
4. The variance will not substantially affect the general plan and will not be contrary to the public interest; and
5. The spirit of the Land Use Ordinance is observed and substantial justice done.

D. In determining whether or not enforcement of the Land Use Ordinance would cause unreasonable hardship, the Appeal Authority may not find an unreasonable hardship unless the alleged hardship:

1. Is located on or associated with the property for which the variance is sought; and
2. Comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.
3. Is not self-imposed or economic.

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

1. Relate to the hardship complained of; and

2. Deprive the property of privileges granted to other properties in the same zone.

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

G. Variances run with the land.

H. The Appeal Authority may not grant a use variance.

I. 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.

J. The Town, or any person adversely affected by any decision of the Appeal Authority, may petition the District Court for a review of the decision, provided the petition is filed with the Court within 30 days after the Appeal Authority has issued its final written decision. In the petition, the appealing party may only allege that the Appeal Authority's decision was arbitrary, capricious, or illegal. The Appeal Authority may, after finding that it is in the best interest of the Town to do so, stay its decision pending District Court review.

K. Unless otherwise specified by the Appeal Authority, any order or decision of the Appeal Authority authorizing a variance shall expire if the applicant fails to obtain a building permit within one year from the date of the decision. Any applicant may withdraw a request for variance at any time prior to a decision by the Appeal Authority. No person shall be entitled to claim a refund of costs for any reason.

### **Section 31:8 Interpretation of Land Use Ordinance**

A. Any person alleging there was an error in any order, requirement, decision, or determination made by the Land Use Authority in the administration or interpretation of the Land Use Ordinance may request an interpretation and decision from the Appeal Authority in accordance with section 3.6 of this chapter.

B. The Appeal Authority will overturn decisions of the Land Use Authority only as follows:

1. If the decision or requirement by the Land Use Authority conflicts with the intent or literal interpretation of the Land Use Ordinances; or

2. If the decision or requirement by the Land Use Authority conflicts with state or local laws.

C. In some instances, the Appeal Authority may not fully understand the intent of an ordinance or requirement placed upon any person(s) by the Land Use Authority. Under these circumstances the Appeal Authority may obtain a decision from the Town Council prior to making a final decision (if applicable).

1. If the Appeal Authority requires an interpretation from the Town Council, the Appeal Authority shall make a final decision within ten (10) days after that interpretation is given.

### **Section 31:9 Nonconforming Use of Buildings, Structures, and Land**

A. A “nonconforming structure” shall mean a structure that legally existed before its current land use designation and because of one or more subsequent land use ordinance changes, does not conform to the setback, height restrictions, or other regulation, excluding those regulations, which govern the use of land. A “nonconforming use” shall mean a use of the land that legally existed before its current land use designation, has been maintained continuously since the time the land use ordinance governing the land changed, and because of one or more subsequent land use ordinance changes, does not conform to the regulations that now govern the use of the land. Upon a determination of the Appeal Authority a nonconforming use or a structure may be continued.

B. All matters regarding the nonconforming use of buildings and land shall be determined by the Appeal Authority. All requests for determinations shall be made as follows:

1. A written request for determination of a nonconforming use shall be filed with the Town Clerk.
2. The request shall specify the grounds for the request, and circumstances related thereto.
3. A request shall be accompanied by a fee, established by the Town Council, which amount shall be used to defray the cost of notices and other expenses.
4. The Appeal Authority shall set a hearing to be held within a reasonable time from the date the request is received. Written notice of the date set for hearing the request shall be mailed to the applicant at least ten (10) days before the hearing date. Upon the hearing, the requesting party shall appear in person or by agent or by attorney. The property owner has the burden of establishing the legal existence of a nonconforming structure or use. Any

person claiming that a nonconforming use has been abandoned shall have the burden of establishing the abandonment. After the hearing, the Appeal Authority may wholly or partially grant or deny the applicant's request, and may make such order, requirement, decision, recommendation or determination as ought to be made.

5. The Town, or any person adversely affected by any decision of the Appeal Authority, may petition the District Court for a review of the decision, provided the petition is filed with the Court within 30 days after the Appeal Authority has issued its final written decision. In the petition, the appealing party may only allege that the Appeal Authority's decision was arbitrary, capricious, or illegal. The Appeal Authority may, after finding that it is in the best interest of the Town to do so, stay its decision pending District Court review.

C. Nonconforming buildings and structures with respect to setbacks or height may be continued. Additions, enlargements or structural alterations may be made to the extent that they comply with all requirements of the Town Code. In addition, the Appeal Authority, after a public hearing, may allow an enlargement or structural alteration provided the change is in harmony with the surrounding neighborhood and in keeping with the intent of the General Plan, the Land Use Ordinance, and this ordinance. The proposed change shall not impose any unreasonable impact or burden upon the land located in the vicinity. Reasonable conditions may be attached to the approval in order to assure neighborhood compatibility. If any such nonconforming building is removed, every future use of the land on which the building was located shall conform to Town ordinances.

D. A lawfully existing nonconforming use of land may be continued provided such nonconforming use shall not be expanded or extended into any other open land, except as otherwise provided in the Town Code, including the Land Use Ordinance. If the nonconforming use is discontinued for a continuous period of more than one (1) year it shall constitute an abandonment of the use and any future use of such land shall conform to the provisions of the zone in which it is located.

E. The lawfully existing nonconforming use of a building or structure may be continued and may be expanded or extended throughout such building or structure provided no structural alterations, except those permitted by law, are proposed or made for the purpose of extension. The addition of a solar energy device to a building shall not be considered a structural alteration. If such nonconforming use is discontinued for more than one (1) year it shall constitute an abandonment of the use and any future use of the building or structure shall conform to the provisions of the zone in which it is located.

F. If a nonconforming use is abandoned, it may be succeeded, upon approval of the Appeal Authority, by an equally restrictive or more restrictive nonconforming use, provided such change is effected within one (1) year from the first day of

abandonment. After a change to a less intensive use occurs, the use may not change back to a more intensive use.

G. A use which has been declared nonconforming shall not be enlarged or moved except as provided herein. The Appeal Authority, after a public hearing, may allow an enlargement or modification provided the change is in harmony with the surrounding neighborhood and in keeping with the intent of the General Plan, the Land Use Ordinance, and this ordinance. The proposed change shall not impose any unreasonable impact or burden upon land located in the vicinity. Reasonable conditions may be attached to the approval in order to assure neighborhood compatibility.

H. In the event a nonconforming building or structure is damaged or destroyed by calamity or act of nature, the occupancy or use of such building or structure, or part thereof which existed at the time of the destruction, may be continued or resumed provided that such restoration is in compliance with all building codes. Buildings that become nonconforming as to setbacks due to a government action such as a roadway widening can be fully restored at the original setback. Occupancy or use of such building, structure, or part thereof which existed at the time of such partial destruction may be continued subject to all the provisions of this Title.

I. The Appeal Authority, under authorization of State statute, may provide for the timely modification or removal of a nonconforming structure or use of land. A maximum of a five-year period may be granted in which the nonconforming use shall be modified or removed in order to comply with the General Plan and Zoning Ordinance. The Appeal Authority may provide for a shorter time period by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of any investment in the nonconforming use or structure, if any.

### **Section 31:10 District Court Review of Appeal Authority Decisions**

A. Any person or entity adversely affected by any decision of the Appeal Authority may petition the District Court for a review of the decision.

B. In the petition for review, the petitioner may only allege that the Appeal Authority's decision was arbitrary, capricious, or illegal.

C. The petition is barred unless it is filed within thirty (30) days after the Appeal Authority's decision becomes effective.

D. The Appeal Authority shall transmit to the reviewing court the record of its proceedings including its minutes, findings, orders, and, if available, a true and

correct transcript of its proceedings. If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this subsection.

E. Review of the Appeal Authority's decision shall be done by the court in the manner and upon the standards provided by law.

F. The appellant has the burden of proving that the Land Use Authority erred.

G. No person may challenge in District Court the land use decision made under this chapter, until that person has exhausted the person's administrative remedies as provided in this chapter.

H. Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the District Court within thirty (30) days after the local land use decision is final.

Repealer. This Ordinance supersedes or repeals the provisions of any ordinance, resolution that are inconsistent with the provisions of this Ordinance.

Savings Clause. If any provision or clause in this Ordinance or the application thereof to any person or entity or circumstance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other sections, provisions, clauses, or applications hereof which can be implemented without the invalid provision, clause, or application hereof, and to this end the provisions and clauses of this Ordinance are declared to be severable.

Effective Date. This Ordinance shall become effective immediately upon adoption by the Apple Valley Town Council.