

COUNTY OF HAWAII
BOARD OF APPEALS

RULES OF PRACTICE AND PROCEDURE

Table of Contents

<u>Part 1. General Rules</u>		<u>Page</u>
1-1	Purpose.....	1-1
1-2	Construction of Rules	1-1
	(a) Just and Efficient Construction.....	1-1
	(b) Rules to be Read in Conjunction	1-1
	(c) Conflicting Rules	1-1
1-3	Definitions	1-1
	(1) Agency	1-1
	(2) Board.....	1-1
	(3) Chairperson.....	1-1
	(4) Charter	1-1
	(5) Chief Engineer	1-1
	(6) Code	1-1
	(7) Director	1-1
	(8) Intervenor.....	1-1
	(9) Meeting.....	1-2
	(10) Party	1-2
	(11) Person.....	1-2
	(12) Proceeding	1-2
1-4	The Board.....	1-2
	(a) Office	1-2
	(b) Communications	1-2
	(c) Chairperson; Vice-Chairperson	1-2
1-5	Meetings.....	1-2
	(a) Regular Meetings.....	1-2
	(b) Special Meetings.....	1-3
	(c) Notice of Regular and Special Meetings	1-3
	(d) Emergency Meetings; Notice.....	1-3
	(e) Executive Meetings.....	1-4
	(f) Chance Meetings.....	1-4
	(g) Quorum and Number of Votes Necessary to Validate Acts	1-4
	(h) Minutes	1-4
	(i) Procedure for Testimony at Hearing.....	1-5
	(j) Removal of Person from Meetings	1-5
1-6	Decisions and Orders	1-5
	(a) Effective Date	1-5
	(b) Official Copies	1-5
1-7	Public Records	1-5
	(a) Inspection of Public Records	1-5
	(b) Copies of Public Records.....	1-6
	(c) Denial of Inspection; Application to Circuit Court	1-6
1-8	Computation of Time	1-6

Part 2. Proceedings Before The Board, General Requirements

2-1	Waiver or Suspension of Rules	2-1
2-2	Appearance Before the Board	2-1
	(a) Who May Appear	2-1
	(b) Code of Ethics	2-1
2-3	Disqualification of Board Member	2-1
2-4	Formal Requirements for Filing of Documents	2-2
	(a) Time and Place	2-2
	(b) Format	2-2
	(c) Copies	2-2
	(d) Defective Filing	2-2
	(e) Amended Document	2-2
	(f) Extension of Time	2-3
	(g) Retention of Documents by the Board	2-3
2-5	Continuation or Extension of Time	2-3
2-6	Service of Process	2-3
	(a) By Whom Served	2-3
	(b) Upon Whom Served	2-3
	(c) Service Upon Parties	2-3
	(d) Method of Service	2-3
	(e) When Service Complete	2-3
	(f) Additional Time after Service by Mail	2-4
2-7	Intervention	2-4
	(a) Petition to Intervene; Filing	2-4
	(b) Who May Intervene	2-4
	(c) Contents of Petition	2-4
	(d) Opposition to Intervention	2-4
	(e) Hearing	2-4
	(f) Appeal from Denial	2-5

Part 3. Contested Case Procedure

3-1	Presiding Officer	3-1
	(a) Person Presiding	3-1
	(b) Powers	3-1
	(c) Continuance	3-1
3-2	Notice of Hearing	3-1
3-3	Prehearing Conference	3-1
3-4	Limiting Testimony	3-1
3-5	Removal from Proceeding	3-1
3-6	Order of Procedure	3-1
3-7	Co-Counsel	3-2
3-8	Cross-Examination	3-2
3-9	Requests for Subpoenas	3-2
	(a) Subpoena of a Witness	3-2
	(b) Subpoena of Documents	3-2
	(c) Who May Issue A Subpoena	3-2
	(d) Fees and Mileage	3-2
	(e) Oath	3-2
3-10	Consolidation	3-2
3-11	Substitution of Parties	3-3
3-12	Motions	3-3

	(a)	Timing.....	3-3
	(b)	Form; Contents.....	3-3
	(c)	Service of Motions.....	3-3
	(d)	Memorandum in Opposition.....	3-3
	(e)	Waiver.....	3-3
3-13		Evidence.....	3-3
	(a)	Form and Admissibility	3-3
	(b)	Ruling.....	3-3
	(c)	Objections and Exceptions.....	3-3
	(d)	Offer of Proof.....	3-3
	(e)	Prepared Testimony	3-3
	(f)	Documentary Evidence.....	3-4
	(g)	Exhibits	3-4
	(h)	Board Records.....	3-4
	(i)	Official Notice of Facts.....	3-5
	(j)	Additional Evidence	3-5
3-14		Briefs	3-5
3-15		Oral Arguments.....	3-5
3-16		Close of Hearing.....	3-5
3-17		Time Limit for Board's Decision	3-5
3-18		Issuance of Decisions and Orders.....	3-5
3-19		Service of Decisions and Orders.....	3-6
3-20		Reconsideration of Decision and Order.....	3-6
3-21		Appeal from the Board's Decision	3-6

Part 4. Post Hearing Procedures For Hearings Conducted By Hearing Officer

4-1		Recommendations of Hearing Officer	4-1
	(a)	Submission of Recommendations.....	4-1
	(b)	Contents of Record	4-1
	(c)	Service of Hearing Officer's Report.....	4-1
4-2		Exceptions to Hearing Officer's Report and Recommendations	4-1
	(a)	File; Form; Copies; Time; Service.....	4-1
	(b)	Contents of Exceptions	4-1
	(c)	Waiver of Exceptions.....	4-1
4-3		Support of Hearing Officer's Report and Recommendations	4-1
	(a)	File; Form; Copies; Time; Service.....	4-1
	(b)	Contents of Support Brief or Statement.....	4-1
4-4		Oral Argument Before the Board.....	4-2
	(a)	Party's Request.....	4-2
	(b)	Board Direction.....	4-2
4-5		Board Action.....	4-2
	(a)	No Exceptions Filed.....	4-2
	(b)	Exceptions and Support Statements Filed	4-2

Part 5. Rulemaking Procedures

5-1		Initiation of Rulemaking Proceedings	5-1
	(a)	Motion by Board.....	5-1
	(b)	Petition by Person or Agency	5-1
5-2		Notice of Public Hearing	5-1
	(a)	Publication and Mailing.....	5-1

	(b) Form	5-2
5-3	Conduct of Hearing	5-2
	(a) Presiding Officer	5-2
	(b) Continuance of Hearing	5-2
	(c) Order of Proceeding	5-2
	(d) Submission and Testimony	5-2
	(e) Oral and Written Presentation	5-2
	(f) Transcript of the Evidence	5-3
5-4	Board Action	5-3
5-5	Emergency Rulemaking	5-3
5-6	Filing of Rules	5-3
5-7	Taking Effect of Rules	5-3
5-8	Publication of Rules	5-3

Part 6. Declaratory Rulings

6-1	Petitions for Declaratory Rulings	6-1
	(a) Form and Contents	6-1
	(b) Board Action	6-1
	(c) Dismissal of Petition	6-1
6-2	Request for Hearing	6-1
6-3	Declaratory Ruling on Board's Own Motion	6-1
6-4	Refusal to Issue Declaratory Order	6-1
6-5	Status of Orders	6-2

Part 7. Variances

7-1	Scope	7-1
7-2	Standing to Initiate a Variance	7-1
7-3	Petition; Form and Contents	7-1
7-4	Filing	7-1
7-5	Fees	7-2
7-6	Service of Petition	7-2
7-7	Parties to a Variance Proceeding	7-2
7-8	Standards for Granting a Variance	7-2
7-9	Hearing	7-2
	(a) Time Limit for Hearing	7-2
	(b) Conduct of Hearing	7-2
	(c) Notice of Hearing	7-2
	(d) Notice to Surrounding Property Owners	7-2
	(e) View of the Property	7-3
	(f) Impartial Expert	7-3
	(g) Burden of Proof	7-3
7-10	Withdrawal of Petition	7-3
7-11	Proposed Findings of Fact	7-3
7-12	Decision	7-3
7-13	Conditions of Variances	7-3
	(a) Imposition of Conditions	7-3
	(b) Monitoring	7-3
	(c) Failure to Comply	7-4
	(d) Applicability	7-4
	(e) Modification or Deletion	7-4

7-14	Filing Procedure for Conditions Imposed by the Board	7-4
7-15	Enforcement of Conditions	7-4
	(a) Issuance of Show Cause Order	7-4
	(b) Conduct of Hearing	7-5
7-16	Appeal	7-5
7-17	Reapplication by Petitioner	7-5

Part 8. Appeals

8-1	Scope	8-1
8-2	Standing to Appeal	8-1
8-3	Time Limit for Filing Appeal	8-1
8-4	General Petition; Form and Contents	8-1
8-5	Petition from the Denial of Use of Alternative Materials, and Methods of Construction; Form and Contents	8-2
8-6	Filing	8-2
8-7	Fees	8-2
8-8	Service of Petition	8-2
8-9	Parties to an Appeal	8-3
8-10	Tests	8-3
8-11	Hearing	8-3
	(a) Time Limit for Hearing	8-3
	(b) Conduct of Hearing	8-3
	(c) Notice of Hearing	8-3
	(d) Notice to Surrounding Property Owners	8-3
	(e) View of the Property	8-3
	(f) Impartial Expert	8-3
8-12	Withdrawal of Appeal	8-4
8-13	Proposed Findings of Fact	8-4
8-14	Decision	8-4
8-15	General Standards for Appeals	8-4
8-15A	General Standards for Appeals (Zoning Code)	8-4
8-16	Special Standards for Appeals from the Denial of the Use of Alternative Materials and Methods of Construction	8-5
8-17	Judicial Review	8-5

Part 9. Business Development Related Approvals
(Repealed, Effective – June 9, 2006)

HAWAII COUNTY BOARD OF APPEALS
RULES OF PRACTICE AND PROCEDURE

PART 1. GENERAL RULES

1-1 Purpose.

These rules govern the practice and procedure before the Board of Appeals of the County of Hawaii.

1-2 Construction of Rules.

- (a) Just and Efficient Construction. These rules shall be construed to secure the just and efficient determination of every proceeding.
- (b) Rules to be Read in Conjunction. The rules set forth in Parts 1, 2, 3 and 4 of these Rules of Practice and Procedure are applicable to all proceedings conducted before the Board and should be read in conjunction with the part governing the particular proceeding.
- (c) Conflicting Rules. When there is a conflict between a general rule in Parts 1, 2, 3 or 4 and a special rule in another part, the special rule shall govern.

1-3 Definitions.

As used in these rules, except as otherwise required by context:

- (1) “Agency” means any agency, board, commission, department or officer of the county or state government, including the Board.
- (2) “Board” means the Board of Appeals of the County of Hawaii.
- (3) “Chairperson” means the chairperson of the Board of Appeals of the County of Hawaii.
- (4) “Charter” means the Hawaii County Charter.
- (5) “Chief Engineer” means the Chief Engineer of the Department of Public Works of the County of Hawaii or the Chief Engineer's duly authorized representative.
- (6) “Code” means the Hawaii County Code.
- (7) “Director” means the Director of the Planning Department of the County of Hawaii or the Director's duly authorized representative.
- (8) “Intervenor” means a person who petitions to intervene in a contested case proceeding and is admitted as a party.

- (9) “Meeting” means the convening of the Board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the Board has supervision, control, jurisdiction, or advisory power.
- (10) “Party” means any person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party in a proceeding.
- (11) “Person” means any individual, partnership, firm, association, trust, estate, corporation, or other legal entity, whether or not incorporated, including governmental agencies.
- (12) “Proceeding” means any matter that is brought before the Board in which it has jurisdiction, including but not limited to:
 - (A) Appeals from the actions of the Director.
 - (B) Appeals from actions of the Chief Engineer in the enforcement of the building, electrical, plumbing, housing and excavation, fills, grading, grubbing, stockpiling and erosion and sedimentation control chapters of the Code.
 - (C) Variances from the housing, building, plumbing, and electrical chapters of the Code.
 - (D) Adoption, amendment, or repeal of any rule of the Board.

1-4 The Board.

- (a) Office. The office of the Board is at Hilo, Hawaii.
- (b) Communications. Any communication to the Board shall be addressed to the Board of Appeals of the County of Hawaii, Planning Department, County Building, 25 Aupuni Street, Hilo, Hawaii 96720, unless otherwise directed.
- (c) Chairperson; vice-chairperson. A chairperson and a vice-chairperson shall be elected annually by the members of the Board at its December meeting. The vice-chairperson shall perform all the duties of the chairperson during the absence of the chairperson.

1-5 Meetings.

The Board may meet and exercise its powers in any part of the County of Hawaii. Except as provided by law, all of its meetings are open to the public. The parliamentary procedure to be utilized by the Board in the conduct of its own meetings shall be based on the Revised Edition of Roberts Rules of Order.

- (a) Regular Meetings. Regular meetings shall be held in the Councilroom, Hawaii County Building, on the second Friday of each month, unless otherwise specified by the Board.

- (b) Special Meetings. Special meetings of the Board for the transaction of its business may be held at any time and place as scheduled by the Board.
- (c) Notice of Regular and Special Meetings.
 - (1) The Board shall give written public notice of any regular or special meeting. The notice shall include an agenda which lists all of the items to be considered at the forthcoming meeting, the date, time, and place of the meeting.
 - (2) The Board shall file the notice in the Office of the County Clerk and in the Board's office for public inspection at least six calendar days before the meeting. The notice shall also be posted at the site of the meeting whenever feasible. The Board shall not add items to the agenda, once filed, without a two-thirds recorded vote of all members to which the Board is entitled; provided that no item shall be added to the agenda in the manner provided herein, if it is of reasonably major importance and action thereof by the Board will affect a significant number of persons.
 - (3) The Board shall maintain a list of names and addresses of persons who request notification of meetings and shall mail a copy of the notice to such persons at their last recorded address no later than the time the agenda is filed under subsection (2).
 - (4) Notice of any special meeting shall be published in a newspaper of general circulation in the County at least twenty-four hours in advance of the meeting.
- (d) Emergency Meetings; Notice. An emergency meeting is a meeting in which the six calendar days notice requirement cannot be met. Such a meeting can only be held if there is a written finding that there is imminent peril to the public health, safety, or welfare and provided the following procedures are met:
 - (1) The Board states in writing the reasons for its findings;
 - (2) Two-thirds of the members to which the Board is entitled agree that the findings are correct and an emergency exists;
 - (3) An emergency agenda and the findings are filed with the Office of the County Clerk and in the Board's office;
 - (4) Persons requesting notification pursuant to Rule 1-5(c)(3) are contacted by mail or telephone as soon as practicable; and
 - (5) A notice of the meeting shall be published in a newspaper of general circulation in the County at least twenty-four hours prior to the meeting, or if the requirement with respect to publication of notice cannot be met because of insufficient time, the meeting notice shall be made by broadcasting a minimum of three announcements in the English language over an FCC licensed public radio station in the County or a television station with local audience.

- (e) Executive Meetings. The Board may hold an executive meeting, closed to the public, upon an affirmative vote, taken at an open meeting, of two-thirds of the members present. The vote of each member on the question of holding a meeting closed to the public and the reason for holding such a meeting shall be recorded and entered into the minutes of the meeting. A meeting closed to the public may be held only for one or more of the following purposes:
 - (1) To consult with the Board's attorney;
 - (2) For any other specific purpose authorized by law.
- (f) Chance Meetings. The rules governing meetings shall not apply to any chance meeting, as defined by Section 92-2, Hawaii Revised Statutes, at which matters relating to official business are not discussed. No chance meeting or electronic communication shall be used to circumvent the spirit or requirements of the meeting provisions to make a decision or to deliberate toward a decision upon a matter over which the Board has supervision, control, jurisdiction, or advisory power.
- (g) Quorum and Number of Votes Necessary to Validate Acts. A majority of all members to which the Board is entitled shall constitute a quorum to transact business, and the concurrence of a majority of all members to which the Board is entitled shall be necessary to make valid any action of the Board.
- (h) Minutes. The Board shall keep written minutes of all meetings. Unless otherwise required by law, neither a full transcript nor a recording of the meeting is required, but the written minutes shall give a true reflection of the matters discussed and the views of the participants. The minutes shall include, but need not be limited to:
 - (1) The date, time, and place of the meeting;
 - (2) The members of the Board recorded as either present or absent;
 - (3) The substance of all matters proposed, discussed, or decided; and a record, by individual member, of any votes taken; and
 - (4) Any other information that any member of the Board requests be included or reflected in the minutes.

The minutes shall be public records and shall be available within thirty days after the meeting except where such disclosure would be inconsistent with Section 92-5, Hawaii Revised Statutes, or Section 13-20 of the Charter; provided that minutes of executive meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.
- (i) Procedure for testimony at hearings. The following procedures shall be followed when the applicant/appellant, the applicant's/appellant's representative, or members of the public desire to testify during hearings before the Board:

- (1) The person desiring to testify shall indicate his or her name and residence address.
 - (2) The person testifying shall also indicate whether he or she is testifying on his or her own behalf or as a representative of the applicant/appellant or an organization.
 - (3) An original and ten copies of any written testimony shall be submitted to the Office of the Board ten days prior to the hearing date. The written testimony shall then be transmitted to the Board two days prior to the hearing date.
 - (4) The chairperson or vice-chairperson may require any person desiring to submit testimony, oral or written, to submit such testimony under oath. The oath shall be administered by the chairperson or vice-chairperson.
 - (5) The chairperson or vice-chairperson may limit testimony which is irrelevant or unduly repetitious.
- (j) Removal of Person from Meeting. The chairperson may remove any person or persons who wilfully disrupts a meeting to prevent or compromise the conduct of the meeting.

1-6 Decisions and Orders. All decisions and orders shall be signed by the chairperson or in the chairperson's absence, the vice chairperson, or by any other member of the Board as may be authorized by the Board.

- (a) Effective Date. Unless otherwise indicated in the order, the effective date of a decision and order shall be the date of the oral decision by the Board.
- (b) Official Copies. Official copies of decisions and orders and other Board actions shall be promulgated under the signature of the chairperson, or by such other person as may be authorized by the Board.

1-7 Public Records. The term "public records" shall have the same meaning as is defined in Chapter 92, Hawaii Revised Statutes, and shall include all maps, rules, written statements of policy or interpretation formulated, adopted or used by the Board in its functions, all decisions, orders, minutes of Board meetings and records of any proceeding on file with the Board, but shall not include records which invade the right of privacy of an individual.

- (a) Inspection of Public Records. All public records shall be available for inspection by any person during established office hours unless public inspection of such records is in violation of any other state, federal, or county law; provided that, except where such records are open under any rule of court, the Corporation Counsel or Prosecuting Attorney may determine which records may be withheld from public inspection when such records pertain to the preparation of the prosecution or defense of any action or proceeding to which the County is or may be a party, or when such records do not relate to a matter in violation of law and are deemed necessary for the protection of the character or reputation of any person.

- (b) Copies of Public Records. Copies of records printed or reproduced for persons other than governmental agencies shall be given to any person, provided that the fees or costs prescribed in the Code are paid.
- (c) Denial of Inspection; Application to Circuit Court. Any person aggrieved by the person having custody of any public record of the right to inspect the records or to obtain copies of extracts thereof may apply to the circuit court for an order directing the person having custody of the record to permit the inspection of or to furnish copies or extracts of the public record. The court shall grant the order after hearing, upon a finding that the denial was not for just and proper cause.

1-8 Computation of Time.

In computing any period of time under these rules, by notice, or by any order or rule of the Board, the time begins with the day following the act, event, or default, and includes the last day of the period unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or holiday. When the prescribed period of time is ten days or less, Saturdays, Sundays, or holidays within the designated period shall be excluded in the computation.

PART 2. PROCEEDINGS BEFORE THE BOARD; GENERAL REQUIREMENTS

2-1 Waiver or Suspension of Rules.

For good cause shown, the Board may, by majority vote, waive or suspend any rule or rules of practice and procedure; provided, that rules relating to jurisdictional matters shall not be waived or suspended by the Board.

2-2 Appearance before the Board.

- (a) **Who May Appear.** The applicant/appellant or authorized representative shall appear at all meetings held by the Board regarding its request. Any other party to a proceeding before the Board may appear in his own behalf or as an authorized representative of a partnership, corporation, trust, or association, and an officer or employee of a department or agency of the State or County may represent that department or agency in any proceeding before the Board. A party may be represented by an attorney or by any other person to whom the party has given written or verbal authority. If a party is to be represented by an attorney, any attorney who appears before the Board shall be in good standing before the Hawaii Supreme Court.
- (b) **Code of Ethics.**
 - (1) Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Board, by such act represents that that person is legally authorized to do so and shall comply with the State and County laws and the rules of this Board, and further, that that person shall maintain the respect due to the Board and shall never deceive or knowingly present any false statement of fact or law to the Board. The Board may at any time require any person appearing before the Board in a representative capacity to prove that person's authority and qualification to act in such capacity.
 - (2) No person who has been associated with the Board as a member, officer, employee, or counsel shall be permitted to appear before the Board on behalf of or to represent in any manner any party in connection with any proceeding or matter that such person has handled or passed upon while associated in any capacity with the Board.
 - (3) No person who has been associated with any matter which becomes a proceeding before the Board shall advise the Board in the proceeding.

2-3 Disqualification of Board Member.

Any party to a proceeding may, up to five days before the proceeding, file an affidavit that one or more of the Board members has a personal bias or prejudice. The Board member against whom the affidavit is so filed may answer the affidavit or may file a disqualifying certificate with the Board. Unless the Board member chooses to disqualify himself after receipt of the affidavit, the remaining Board members shall decide by a majority of all the members to which the Board is entitled whether that member should be disqualified from proceeding therein. Every such affidavit shall state

the facts and reasons for the belief that bias or prejudice exists and shall be filed at least five days before the proceeding, or good cause shall be shown for the failure to file it within such time. Any Board member may disqualify himself by advising the chairperson that the Board member deems himself unable for any reason to preside with impartiality in the pending proceeding.

2-4 Formal Requirements for Filing of Documents.

- (a) Time and Place. All requests, appeals, pleadings, submittals, petitions, reports, maps, exceptions, briefs, memoranda and other documents and papers required to be filed with the Board in any proceeding shall be filed at the office of the Board within the time limits prescribed by statute, ordinance, rule, or by order of the Board. Unless otherwise ordered, the date on which the papers are received if hand delivered, or postmarked if delivered by mail, shall be regarded as the date of filing.
- (b) Format.
 - (1) Form and Size. Any paper or document filed with the Board shall be written in ink, typewritten, mimeographed or printed; shall be plainly legible; and shall be on strong, durable paper no larger than 8-1/2" x 11" in size, except that maps, charts, tables, and other similar documents may be larger, folded to the size of the papers to which they are attached.
 - (2) Title and Identification. Any document or paper shall show the title of the proceeding before the Board and the name and address of the party or the party's representative.
 - (3) Signature. The original of each document must be signed in ink by the party or the party's duly authorized representative. The signature of the person signing the document constitutes a certification that that person has read the document; that to the best of that person's knowledge, information, and belief, every statement contained in the document is true and no such statement is misleading; and that it is not interposed for delay.
- (c) Copies. Unless otherwise specifically provided by these rules, an original and ten copies of each document shall be filed.
- (d) Defective Filing. If any document filed in a proceeding is not in substantial conformity with the applicable rules of the Board as to the contents thereof, or is otherwise insufficient, the Board's designated representative shall return the document and require correction of the deficiency. If a document is returned, the document shall be effective as of the date of receipt of the corrected document.
- (e) Amended Document. A document or pleading may be amended at any time prior to hearing. An amendment offered prior to hearing shall be served on all parties and filed with the Board. All parties shall have the opportunity to answer and be heard on an amendment filed after hearing commences, and the chairperson shall decide whether such amendment shall be allowed.

- (f) Extension of Time. Whenever a party is required to file a document within the period prescribed or allowed by these rules, by notice given thereunder or by order or rule, the chairperson may (1) for good cause before the expiration of the prescribed period, with or without notice to the parties, extend such period; (2) pursuant to a stipulation between all of the parties, extend such period; or (3) permit the act to be done after the expiration of a specified period where the failure to act is clearly shown to be the result of excusable neglect. Any request for a continuance, except for stipulations, should be made by written motion, unless the request is made during the course of a hearing.
- (g) Retention of Documents by the Board. Any document filed with or presented to the Board shall be retained in the files of the Board. The chairperson may permit the withdrawal of an original document upon submission of properly authenticated copy to replace such document.

2-5 Continuance or Extension of Time.

Whenever a person or agency has a right or is required to take action within a period prescribed or allowed by these rules, other than the filing of documents, the Board may, upon motion and the concurrence of a majority of all the members to which the Board is entitled, permit the act to be done after expiration of the specified period if the Board determines that there is good cause for an extension of time or that the delinquency is clearly shown to have been the result of excusable neglect. This section shall apply to an act properly before the Board.

2-6 Service of Process.

- (a) By Whom Served. The Board shall cause to be served any order, notice, or other papers issued by it, together with any other papers that the Board is required by law to serve. Any other paper or document shall be served by the party filing the paper or document.
- (b) Upon Whom Served. Any paper or document served by either the Board or any party shall be served upon all parties or their representatives. Any counsel or representative entering an appearance subsequent to the proceeding shall notify all other counsel or representatives then of record and all parties not represented by counsel of such fact.
- (c) Service upon Parties. The final order, and any other paper or document required to be served by the Board upon a party, shall be served upon the party and a copy shall be furnished to the party's representative or counsel of record.
- (d) Method of Service. Service of papers or documents shall be made personally, by first-class mail, or by other means authorized by law.
- (e) When Service Complete. Service upon parties, other than the Board, shall be regarded as complete when the document is properly stamped and properly addressed to the parties involved and deposited in the United States mail.

- (f) Additional Time after Service by Mail. Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice, paper, or document is served upon that person by mail, two days shall be added to the prescribed period.

2-7 Intervention.

- (a) Petition to Intervene; Filing. In any proceeding, a petition to intervene and become a party shall conform to sections 2-2, 2-4 and 2-6 of these rules and shall be filed with the Board. The petition to intervene shall be filed at least ten days prior to the date of the scheduled hearing.
- (b) Who May Intervene.
 - (1) Any department or agency of the State or the County shall be admitted as a party upon timely application for intervention.
 - (2) Any person who has some property interest in the land, who lawfully resides on the land, or who can demonstrate that that person will be so directly and immediately affected by the Board's decision that that person's interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as a party upon timely application for intervention.
 - (3) Any other person may be admitted as a party upon a timely application, when the Board finds there is just cause for intervention.
- (c) Contents of Petition. The petition shall include the following points:
 - (1) The nature of petitioner's statutory or other right.
 - (2) The nature and extent of petitioner's interest and if an abutting property owner, the Tax Map Key description of the property.
 - (3) The effect of any decision in the proceeding or petitioner's interest.If applicable, the petition shall also include the following points:
 - (4) The extent that petitioner's interest in the proceeding differs from that of the other parties.
 - (5) The extent that petitioner's interest in the proceeding can assist in development of a complete record.
- (d) Opposition to Intervention. If any party opposes the petition for intervention, the party shall file written objections to the petition within seven days after being served.
- (e) Hearing. Each petition to intervene shall be heard prior to the Board rendering a decision on the petition.

- (f) Appeal from Denial. Any person whose petition to intervene has been denied may appeal such denial to the circuit court pursuant to Section 91-14, Hawaii Revised Statutes.

PART 3. CONTESTED CASE PROCEDURE

3-1 Presiding Officer.

- (a) Person Presiding. In all hearings before the Board, the chairperson of the Board, or one of its members, or a hearing officer duly appointed and designated, shall preside at the hearing.
- (b) Powers. The presiding officer controls the course of hearings, administers oaths, receives and rules on questions of evidence, holds appropriate conferences before or during hearings, rules upon all objections or motions which do not involve a final determination of the proceeding, receives offers of proof, fixes the time for the filing of briefs, disposes of any other matter that normally and properly arises in the course of a hearing, and takes all other actions authorized by law that are deemed necessary for the orderly and just conduct of a hearing.
- (c) Continuance. The presiding officer may, in the presiding officer's discretion, postpone or continue any hearing.

3-2 Notice of Hearing.

Unless otherwise provided by law, the notice of hearing will be served on all parties and persons on the mailing list for this purpose at their last recorded addresses within a reasonable time after the hearing date has been set. The notice shall be published in a newspaper of general circulation in the County at least twenty days prior to the hearing and shall also be filed at least six calendar days prior to the hearing with the Office of the County Clerk.

3-3 Prehearing Conference.

The presiding officer may hold a prehearing conference with the parties for the purpose of formulating or simplifying the issues, arranging for the exchange of proposed exhibits or proposed written testimony, setting of schedules, exchanging names of witnesses, limitation of number of witnesses, and any other matters that may expedite the orderly conduct and disposition of the proceeding.

3-4 Limiting Testimony.

To avoid unnecessary cumulative evidence, the presiding officer may limit the number of witnesses or the time for testimony upon a particular issue.

3-5 Removal from Proceeding.

Any person who wilfully disrupts a hearing to prevent or compromise the conduct of the hearing shall be removed from the hearing room.

3-6 Order of Procedure.

In hearings on appeals and variances, the appellant or applicant shall open and close. Intervenor shall be heard in such order as the presiding officer directs.

3-7 Co-Counsel.

Where a party is represented by more than one counsel or representative, only one of the counsel shall be permitted to cross-examine a witness or to state any objections or to make closing arguments.

3-8 Cross-Examination.

Each party shall have the right to conduct such cross-examination of the witnesses as may be required for a full and true disclosure of the facts and shall have the right to submit rebuttal evidence. The Board may also examine and question all witnesses.

3-9 Requests for Subpoenas.

- (a) Subpoena of a Witness. Any request for the issuance of a subpoena, requiring the attendance of a witness for the purpose of taking oral testimony before the Board, shall be in writing and shall state the reasons why the testimony of the witness is believed to be material and relevant to the issues involved. Only a party or a member of the Board may request the issuance of a subpoena.
- (b) Subpoena of Documents. Any request for the issuance of a subpoena for the production of documents or records shall be in writing; shall specify the particular document or record, or part thereof, desired to be produced; and shall state the reasons why the production thereof is believed to be material and relevant to the issues involved.
- (c) Who May Issue A Subpoena. A subpoena may be issued by the chairperson of the Board or the presiding officer. No subpoena shall be issued unless the party requesting the subpoena has complied with section 3-9 of these rules and gives the name and address of the desired witness. Signed and sealed blank subpoenas will not be issued to anyone. The name and address of the witness shall be inserted in the original subpoena, a copy of which shall be filed in the proceeding. The subpoena shall show at whose instance the subpoena is issued.
- (d) Fees and Mileage. Any witness summoned shall be paid the same fees and mileage as are paid to witnesses in the circuit court of the State of Hawaii, and such fees and mileage shall be paid by the party at whose request the witness appears.
- (e) Oath. Each witness shall be placed under oath or affirmation prior to testifying.

3-10 Consolidation.

The Board, upon its own initiative or upon motion, may consolidate for hearing or for other purposes, or may contemporaneously consider, two or more proceedings which involve substantially the same parties or issues which are the same or closely related if the Board finds that such consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.

3-11 Substitution of Parties.

Upon motion and for good cause shown, the Board may order the substitution of a party, except that in the case of death of a party, substitution may be ordered without the filing of a motion.

3-12 Motions.

- (a) Timing. Motions may be made before, during, or after a hearing.
- (b) Form; Contents. Any motion, other than one made during a hearing, shall be made in writing to the Board and shall state the relief sought and shall be accompanied by an affidavit or legal memorandum setting forth the grounds upon which the motion is based.
- (c) Service of Motions. The moving party shall serve a copy of all motion papers on all other parties and shall file with the Board the original with proof of service.
- (d) Memorandum in Opposition. A memorandum in opposition or counter affidavit shall be served on all parties and the original and proof of service shall be filed with the Board within seven days after being served with the motion. The chairperson of the Board may order the memorandum in opposition to be filed earlier than the seven-day period.
- (e) Waiver. Failure to serve or file a memorandum in opposition to a motion or failure to appear at the hearing may be deemed a waiver of objection to the granting or denial of the motion. A party who does not oppose the motion shall notify the chairperson and opposing counsel or party promptly.

3-13 Evidence.

- (a) Form and Admissibility. The Board shall not be bound by the rules relating to the admission or rejection of evidence, but may exercise its own discretion in such matter with a view to doing substantial justice.
- (b) Ruling. The presiding officer shall rule on the admissibility of all evidence. Such rulings may be reviewed by the Board in determining the matter of the merits.
- (c) Objections and Exceptions. When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary and need not be taken.
- (d) Offer of Proof. An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.
- (e) Prepared Testimony. With the approval of the presiding officer, a witness may read into the record his testimony on direct examination. Before any prepared testimony is read, unless excused by the presiding officer, the witness shall deliver copies thereof to the presiding officer and all counsel or parties. Admissibility shall be subject to the rules governing oral testimony. If the presiding officer deems that substantial saving in time will result, a copy of the

prepared testimony may be received in evidence without reading, provided that copies thereof shall have been served upon all parties and the Board fifteen days before the hearing or such prior service is waived, to permit proper cross examination of the witness on matters contained in the prepared testimony.

- (f) Documentary Evidence. If relevant and material matter offered in evidence is embraced in a document containing other matters, the party offering it shall designate specifically the matter so offered. If other matter in the document would unnecessarily encumber the record, the document will not be received in evidence, but at the discretion of the presiding officer, the relevant and material matter may be read into the record or copies thereof received as an exhibit. Other parties shall be afforded an opportunity to examine the document and to offer in evidence other portions thereof believed material and relevant.
- (g) Exhibits.
 - (1) Form; Size. Exhibits shall be legible and may be prepared on paper not exceeding 8-1/2" x 11" in size or bound or folded to the respective approximate size, where practical. Wherever practicable, sheets of each exhibit shall be numbered and data and other figures shall be set forth in tabular form.
 - (2) Copies. When exhibits are offered in evidence, the original and ten copies shall be furnished to the presiding officer with a copy to each party to the proceeding other than the Board, unless such copies have been previously furnished, or the presiding officer directs otherwise.
 - (3) Time for submission. No later than 30 days following the filing of the appeal, appellant shall submit all its exhibits to be used in the hearing.
 - (4) Responding parties shall have the opportunity to provide exhibits in response to those submitted by the appellant, 10 days after the exhibits are filed by appellant.
 - (5) Upon request, the chairman may allow filings of exhibits beyond the deadlines set herein for good cause shown.
- (h) Board Records. If any matter contained in a document on file as a public record with the Board is offered in evidence, unless directed otherwise by the presiding officer, such document need not be produced as an exhibit, but may be received in evidence by reference, provided that the particular portions of such document are specifically identified and otherwise competent, relevant, and material. If testimony in any proceeding, other than the one being heard, is offered in evidence, a copy of the testimony shall be presented as an exhibit, unless otherwise ordered by the presiding officer. In appeals from decisions made under the Zoning chapter of the Code, the entire record or file from the Director shall be part of the record on appeal and shall be reviewed by the Board in the appeal.
- (i) Official Notice of Facts. Official notice may be taken of such matters as may be judicially noticed by the courts of the State of Hawaii. Official notice may also be taken of generally recognized technical or scientific facts within the Board's

specialized knowledge when parties are given notice either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.

- (j) Additional Evidence. At the hearing, the presiding officer may require the production of further evidence upon any issue.

Upon agreement of the parties, the presiding officer may authorize the filing of specific documentary evidence as a part of the record within a fixed time after submission, reserving an exhibit number therefor.

3-14 Briefs.

The presiding officer may fix the time for the filing of briefs. Exhibits may be reproduced in an appendix to a brief. A brief of more than twenty pages shall contain a subject index and table of authorities. Requests for extension of time to file briefs must be made to the Board in writing, and a copy thereof served upon or mailed to the other parties to the proceeding. Ordinarily, when a matter is to be submitted on concurrent briefs, extensions will not be granted unless a stipulation is filed with the Board.

3-15 Oral Arguments.

The Board or the presiding officer may direct or permit the presentation of oral argument with appellant or applicant opening and concluding the argument. Not more than one hour on each side of the proceeding will be allowed for argument without special leave of the Board. If more than one party is participating on a side of the proceeding, the parties so concerned shall divide the hour for that side.

3-16 Close of Hearing.

At the end of the presentation of the evidence, submission of briefs and oral arguments, if any, the Board or the hearing officer shall close the hearing.

3-17 Time Limit for Board's Decision.

The Board shall render its decision, order, or ruling within a period of not more than ninety days after the close of the hearing, unless a longer period of time is agreed upon by all parties.

3-18 Issuance of Decisions and Orders.

A proceeding shall stand submitted for decision by the Board after the taking of evidence, and the filing of such briefs or the presentation of such oral argument as may have been prescribed by the presiding officer or hearing officer. A party to the proceeding may submit a proposed decision and order which shall include proposed findings of fact. The proposed decision and order and findings of fact shall be served on each party to the proceeding, and each party shall have fifteen days from date of service thereof to submit written comments or objections to the Board. The Board shall render a written decision and order in every contested case, which shall include separate findings of fact and conclusions of law.

3-19 Service of Decisions and Orders.

Decisions and orders shall be served by mailing certified copies thereof to the parties of record. When service is not accomplished by mail, it may be effected by personal delivery of a certified copy thereof. When a party to a proceeding has appeared by a representative, service upon such representative or counsel shall be deemed to be service upon the party.

3-20 Reconsideration of Decision and Order.

The Board shall not reconsider its action in any contested case hearing after the effective date of the Board's decision.

3-21 Appeal from the Board's Decision.

Any party may obtain judicial review of the Board's final decision in the manner set forth in Section 91-14, Hawaii Revised Statutes.

PART 4. POST HEARING PROCEDURES
FOR HEARINGS CONDUCTED BY HEARING OFFICER

4-1 Recommendations of Hearing Officer.

- (a) Submission of Recommendations. Upon completion of taking of the evidence, the hearing officer shall prepare a report, setting forth findings of fact, conclusions of law, and the reasons therefor, and a recommended order and submit the report of the case to the Board.
- (b) Contents of Record. The record shall include the petition, notice of hearing, motions, rulings, orders, transcript of the hearing, stipulations, documentary evidence, proposed findings, or other documents submitted by the parties, objections to the conduct of the hearing and the report of the hearing officer and all other matters placed in evidence.
- (c) Service of Hearing Officer's Report. The hearing officer shall cause a copy of the report to be served upon all parties to the proceedings.

4-2 Exceptions to Hearing Officer's Report and Recommendations.

- (a) File; Form; Copies; Time; Service. Within fifteen days after service of the report and recommendations by the hearing officer, a party may file with the Board any exceptions to the report and a brief or statement in support thereof with the Board. A copy of the exceptions and brief or statement shall be served upon each party to the proceeding.
- (b) Contents of Exceptions. The exceptions shall include:
 - (1) The specific questions of procedure, fact, law, or policy to which exceptions are taken.
 - (2) That part of the hearing officer's report and recommended order to which objections are made.
 - (3) All the grounds for exceptions to a ruling, finding, conclusion or recommendation.
- (c) Waiver of Exceptions. Any exceptions not specifically raised in writing by a party are waived.

4-3 Support of Hearing Officer's Report and Recommendations.

- (a) File; Form; Copies; Time; Service. Within seven days after service of the exceptions taken to the hearing officer's report, a party may file with the Board a brief or statement in support of the hearing officer's recommendations. A copy of the brief or statement in support shall be served upon each party to the proceeding.
- (b) Contents of Support Brief or Statement. The supporting brief or statement shall include:

- (1) The specific points of procedure, fact, law, or policy to which exceptions were taken.
- (2) The facts and reasons why report and recommendations must be affirmed.

4-4 Oral Argument before the Board.

- (a) Party's Request. If a party desires to argue orally before the Board, a written request with reasons therefor shall accompany the exceptions or the support brief or statement filed, and the Board may grant such request.
- (b) Board Direction. The Board may direct oral argument on its own motion.

4-5 Board Action.

- (a) No Exceptions Filed. In the event no statement of exceptions is filed with the Board, the Board may proceed to reverse, modify, or adopt the recommendations of the hearing officer.
- (b) Exceptions and Support Statements Filed. Upon the filing of the exceptions and briefs or statements, the Board may render its decision forthwith upon the record; or if oral argument has been allowed, after oral argument; or may reopen the docket and take further evidence or may make such other disposition of the case that is necessary under the circumstances.

PART 5. RULEMAKING PROCEDURES

5-1 Initiation of Rulemaking Proceedings.

- (a) Motion by Board. The Board may, at any time on its own motion, initiate proceedings for the adoption, amendment, or repeal of any rule of the Board. Procedures to be followed in rulemaking shall be as set forth in these rules and the applicable statutes.
- (b) Petition by Person or Agency. Any interested person or agency may petition the Board for the adoption, amendment, or repeal of any rule of the Board. Petitions for rulemaking filed with the Board will become matters of public record.
 - (1) Form and Content. Petitions for rulemaking shall conform to the requirements of section 2-4 of these rules and shall contain the name, address, and telephone number of each petitioner; the signature of each petitioner; a draft or the substance of the proposed rule or amendment or a designation of the provisions, the repeal of which is desired; a statement of the petitioner's interest in the subject matter; and a statement of the reasons in support of the proposed rule, amendment, or repeal.
 - (2) Board Action. The Board shall, within thirty days after the filing of a petition for rulemaking, either deny the petition or initiate public rulemaking proceedings.
 - (3) Denial of Petition. Any petition that fails in material respect to comply with the requirements of this section or that fails to disclose sufficient reasons to justify the institution of rulemaking proceedings will not be considered by the Board. The Board shall notify the petitioner in writing of such denial, stating the reasons therefor. Denial of a petition shall not operate to prevent the Board from acting, on its own motion, on any matter disclosed in the petition. Petitioner may seek a review of the denial through the circuit court in accordance with Chapter 91, Hawaii Revised Statutes.
 - (4) Acceptance of Petition. If the Board determines that the petition is in order and that it discloses sufficient reasons in support of the proposed rulemaking to justify the institution of rulemaking proceedings, the Board shall conduct the rulemaking proceedings in accordance with sections 5-2 through 5-4 of these rules and the applicable statutes.

5-2 Notice of Public Hearing.

- (a) Publication and Mailing. When, pursuant to a petition therefor or upon its own motion, the Board proposes to adopt, amend, or repeal a rule, a notice of proposed rulemaking shall be published at least once in a newspaper of general circulation in the County, and the notice shall also be mailed to all persons or agencies who have made timely written requests for advance notice of the Board's rulemaking proceedings. All the notices shall be published at least thirty days prior to the date set for the public hearing.

- (b) Form. A notice of the proposed adoption, amendment, or repeal of a rule shall include:
 - (1) A statement of the date, time, and place where the public hearing will be held;
 - (2) Reference to the authority under which the adoption, amendment, or repeal of a rule is proposed;
 - (3) A statement of the substance of the proposed rule.

5-3 Conduct of Hearing.

- (a) Presiding Officer. The public hearing for the adoption, amendment, or repeal of any rule shall be heard before the Board and presided over by the chairperson or vice-chairperson of the Board or, in their absence, by another member designated by the Board. The hearing shall be conducted in such a way as to afford to interested persons and agencies a reasonable opportunity to offer testimony with respect to the matters specified in the notice of hearing and so as to obtain a clear and orderly record. The presiding officer shall have authority to administer oaths or affirmations and to take all other actions necessary for the orderly conduct of the hearing.
- (b) Continuance of Hearing. Each hearing shall be held at the time and place set in the notice of hearing but may at such time and place be continued by the presiding officer from day to day without notice other than the announcement thereof at the hearing or to a later date in accordance with section 5-2 of these rules.
- (c) Order of Proceeding. At the commencement of the hearing, the presiding officer shall read the notice of hearing and shall then outline briefly the procedure to be followed. Testimony shall then be received with respect to the matters specified in the notice of hearing in such order as the presiding officer shall prescribe.
- (d) Submission and Testimony. Each witness shall, before proceeding to testify, state the witness' name, address and whom the witness represents at the hearing, and shall give such information respecting the witness' appearance as the presiding officer may request. The presiding officer shall confine the testimony to the matters for which the hearing has been called but shall not apply the technical rules of evidence. Every witness shall be subject to questioning by the members of the Board or by any other representative of the Board.
- (e) Oral and Written Presentation. Any interested person or agency will be afforded an opportunity to submit data, views, or arguments, orally or in writing, that are relevant to the matters specified in the notice of hearing. The period for filing written comments or recommendations may be extended beyond the hearing date by the presiding officer for good cause. An original and ten copies of any written comments, recommendations, or replies shall be submitted.
- (f) Transcript of the Evidence. Unless otherwise specifically ordered by the Board, testimony given at the public hearing shall not be reported verbatim. All supporting written statements, maps, charts, tabulations, or similar data offered in

evidence at the hearing, and which are deemed by the presiding officer to be authentic and relevant, shall be received in evidence and made a part of the record. Unless the presiding officer finds that the furnishing of copies is impracticable, seven copies of the exhibits shall be submitted.

5-4 Board Action.

The Board will consider all relevant comments and material of record before taking final action in a rulemaking proceeding. Final action shall be taken within sixty days after the final public hearing, or after the expiration of any extension period for submission of written comments or recommendations.

5-5 Emergency Rulemaking.

If the Board finds that an imminent peril to public health or safety requires adoption, amendment, or repeal of a rule upon less than twenty days' notice of hearing and states in writing its reasons for such finding, it may proceed without prior notice or hearing or upon such abbreviated notice and hearing as it finds practicable to adopt an emergency rule. The Board shall make an emergency rule known to persons who will be affected by it by publication at least once in a newspaper of general circulation in the County.

5-6 Filing of Rules.

The Board, upon adopting, amending, or repealing a rule and approval by the Mayor, shall file certified copies of the rule with the County Clerk.

5-7 Taking Effect of Rules.

Each rule adopted, amended, or repealed shall become effective ten days after filing with the County Clerk. If a later effective date is required by statute or specified in the rule, the later date shall be the effective date; provided that no rule shall specify an effective date in excess of thirty days after the filing of the rule with the County Clerk. An emergency rule shall become effective upon filing with the County Clerk for a period not exceeding one-hundred twenty days without renewal unless extended in compliance with Section 91-3(a), Hawaii Revised Statutes.

5-8 Publication of Rules.

The Board shall, as soon as practicable, compile, index, and publish all rules adopted by the Board and remaining in effect. Compilations shall be supplemented as often as necessary and shall be reviewed at least once every ten years.

PART 6. DECLARATORY RULINGS

6-1 Petitions for Declaratory Rulings.

On petition of an interested person or agency, the Board may issue a declaratory order as to the applicability of any statutory provision, ordinance, or of any rule or order of the Board.

- (a) **Form and Contents.** The petition shall conform to the requirements of Section 2-4 of these rules and shall contain the name, address, and telephone number of each petitioner; the signature of each petitioner; a designation of the specific provision, rule, or order in question, together with a statement of the controversy or uncertainty involved; a statement of the petitioner's interest in the subject matter, including the reasons for submission of the petition; a statement of the petitioner's position or contention; and a memorandum of authorities, containing a full discussion of reasons and legal authorities in support of such position or contention.
- (b) **Board Action.** Within sixty days after the submission of a petition for declaratory ruling, the Board shall either deny the petition in writing, stating the reasons for such denial or issue a declaratory order on the matters contained in the petition, or set the matter for hearing, as provided in Section 6-2 of these rules; provided, that if the matter is set for hearing, the Board shall render its findings and decisions within ninety days after the close of the hearing.
- (c) **Dismissal of Petition.** The Board may, without notice or hearing, dismiss a petition for declaratory ruling that fails in material respect to comply with the requirements of Part 6 of these rules.

6-2 Request for Hearing.

The Board may, in its discretion, order that a hearing be held on a declaratory ruling petition. Any petitioner or party in interest who desires a hearing on a petition for a declaratory ruling shall submit a written request for a hearing, setting forth in the request the reasons why the matters alleged in the petition and the supporting material submitted will not permit the fair and expeditious disposition of the petition and, to the extent that such request for a hearing is dependent upon factual assertion, shall attach to the request an affidavit establishing such facts. In the event a hearing is ordered by the Board, the hearing shall be conducted in accordance with Parts 3 and 4 of these rules.

6-3 Declaratory Ruling on Board's Own Motion.

The Board may, on its own motion or upon request but without notice or hearing, issue a declaratory order to terminate a controversy or to remove uncertainty.

6-4 Refusal to Issue Declaratory Order.

The Board may for good cause refuse to issue a declaratory order where:

- (1) The question is speculative or purely hypothetical and does not involve existing facts or facts that can be expected to exist in the near future;

- (2) The petitioner's interest is not of the type that would give the petitioner standing to maintain an action if the petitioner were to seek judicial relief;
- (3) The issuance of the declaratory order may affect the interests of the Board in litigation that is pending or may reasonably be expected to arise; or
- (4) The matter is not within the jurisdiction of the Board.

6-5 Status of Orders.

An order disposing of a petition shall have the same status as other Board orders. An order shall be applicable only to the factual situation described in the petition or set forth in the order. An order shall not be applicable to different factual situations or where additional facts not considered in the order exist.

PART 7. VARIANCES

7-1 Scope.

This part governs the general procedure relating to variances from the Building, Electrical, and Plumbing chapters of the Code.

7-2 Standing to Initiate a Variance.

If strict application of any provision of the Building, Electrical, or Plumbing Codes would result in practical difficulty or unnecessary hardship that would deprive the owner of the reasonable use of the land or building involved, the owner or the owner's representative, including the lessee, may initiate a petition to the Board for a variance.

7-3 Petition; Form and Contents.

The form of a petition for a variance shall conform to Part 2 of these rules and shall include the following:

- (1) The name, address, and telephone number of the owner of the land or building and the name, title, and address of the owner's representative.
- (2) A description of the subject property and the tax map key number of the property.
- (3) Identification of the provision of the Code for which a variance is being sought and a description of the type of variance being requested.
- (4) A statement explaining
 - (A) The special or unusual circumstances or conditions applying to the land or building for which a variance is sought, which circumstances or conditions are peculiar to such land or building and do not apply generally to lands or buildings in the neighborhood or surrounding property.
 - (B) The circumstances or conditions that deprive the owner of the reasonable use of the land or building by the strict application of the particular provision of the Code.
 - (C) How the granting of a variance is necessary for the reasonable use of the land or building.
 - (D) The effects, if any, that the variance will have on other persons or property.
 - (E) The facts indicating that the proposed variance is consistent with the intent and purpose of the applicable chapter of the Code.
- (5) A clear and concise statement of any other relevant facts.

7-4 Filing.

An original and ten copies of the petition shall be filed with the Board.

7-5 Fees.

A petition for a variance shall be accompanied by a filing fee of two hundred dollars payable to the County Director of Finance. The Board shall waive this fee on any petition submitted by a county department or agency.

7-6 Service of Petition.

A copy of the variance petition shall be served by the petitioner on the Chief Engineer.

7-7 Parties to a Variance Proceeding.

The petitioner and the Chief Engineer shall be parties to every variance proceeding.

7-8 Standards for Granting a Variance.

A variance may be granted by the Board only if it finds:

- (1) There are special circumstances or conditions applying to the land or building for which the variance is sought, which circumstances or conditions are peculiar to such land or building and do not apply generally to lands or buildings in the neighborhood or surrounding property, and that the circumstances or conditions are such that the strict application of the provisions of the Code would deprive the petitioner of the reasonable use of the land or building; and
- (2) The granting of the variance is necessary for the reasonable use of the land or building and that the variance granted is the minimum variance that will accomplish this purpose; and
- (3) The granting of the variance will be consistent with the intent and purpose of the particular chapter of the Code and will not be injurious to persons or property or create additional fire hazards, and will not otherwise be detrimental to the public welfare, taking into account the character, use, and type of occupancy and construction of adjoining buildings, buildings on adjoining lots, and the building or land involved.

7-9 Hearing.

- (a) Time Limit for hearing. Upon proper filing of a petition for a variance, the Board shall, within not more than ninety days, conduct a hearing on the petition.
- (b) Conduct of Hearing. Except as otherwise provided in this part, the procedure for hearing a variance petition shall be governed by Parts 3 and 4 of these rules.
- (c) Notice of Hearing. The procedures for providing notice of the hearing are as outlined in Section 3-2, Part 3 of these rules.
- (d) Notice to Surrounding Property Owners. Promptly after the Board's fixing a date for the hearing but not less than twenty days prior to the hearing, if applicable, the applicant/appellant shall mail a notice of the hearing to all property owners within three hundred feet of the affected property. Prior to the date of the hearing, the applicant/appellant shall file with the Board proof of service or of good faith efforts to serve notice of the hearing on the designated property owners. Such proof may consist of certified mail receipts, affidavits, or the like.

- (e) View of the Property. The Board may, on its own motion or on motion of any party, view the land or building for which a variance is sought as a portion of the hearing.
- (f) Impartial Expert. The Board may retain or secure an impartial expert to investigate a variance petition and to testify at the hearing regarding the proposed variance.
- (g) Burden of Proof. The petitioner has the burden of proving the standards prescribed under section 7-8 of these rules.

7-10 Withdrawal of Petition.

A petition for a variance may be withdrawn voluntarily by the petitioner at any time prior to the Board rendering a decision on the variance.

7-11 Proposed Findings of Fact.

Each party to a variance proceeding shall, within thirty days after the close of the hearing, submit a proposed decision and order and findings of fact to the Board, unless specifically waived by the Board or the presiding officer. The proposed decision and order and findings of fact shall also be served on each party to the proceeding, and each party shall have fifteen days from the date of service thereof to submit written comments or objections to the Board.

7-12 Decision.

Within a period of not more than ninety days after the close of the hearing, unless a longer period of time is agreed upon by all the parties, the Board shall render its decision on a variance petition, by either granting the variance or denying the variance. A variance shall only be granted upon four affirmative votes of the Board. If fewer than seven members of the Board vote upon a variance petition and there are fewer than four affirmative votes for the variance petition, the chairperson may defer the petition until a future meeting of the Board for a second and final vote to be taken on the petition.

7-13 Conditions of Variances.

- (a) Imposition of Conditions. In approving a petition for a variance, the Board may impose conditions necessary to uphold the purposes of the Code and this part of these rules and to assure substantial compliance with representations made by the petitioner in seeking the variance. The conditions shall be a part of the Board's decision and shall be filed in accordance with section 7-14 of these rules.
- (b) Monitoring. The Board may require a petitioner to submit periodic reports indicating what progress has been made in complying with any conditions the Board imposes.
- (c) Failure to Comply. The approval granted by the Board on a petition for a variance may be reversed if the parties bound by the conditions attached to the approval fail to comply with the conditions.

- (d) **Applicability.** Conditions, if any, imposed by the Board shall run with the land and shall be binding upon the petitioner and each and every subsequent owner, lessee, sub-lessee, transferee, grantee, assignee, or developer.
- (e) **Modification or Deletion.** On good cause shown by the petitioner or upon the Board's own motion, the Board may act to modify or delete any of the conditions imposed.

7-14 **Filing Procedure for Conditions Imposed by the Board.**

All conditions imposed by the Board in its decision and order and required to be recorded at the Bureau of Conveyances or filed with the Assistant Registrar of the Land Court shall comply with the following procedures:

- (1) The document listing the conditions shall be submitted to the Board for its approval prior to filing with the Bureau of Conveyances or the Assistant Registrar of the Land Court.
- (2) The owner of the property shall record the conditions at the Bureau of Conveyances or with the Assistant Registrar of the Land Court, as the case may be, within thirty days after the receipt of the decision and order requiring same.
- (3) Evidence or recordation shall be by certified copy under the signature of the Assistant Registrar of the Land Court or by the Registrar of Conveyances, as the case may be. The owner of the property shall forward a certified copy to the Board.
- (4) Description of the land shall be sufficiently accurate to identify the land intended to be affected. Registered land shall be identified by lot number, map number, land court application number, and the transfer certificate of title number to be affected.

7-15 **Enforcement of Conditions.**

- (a) **Issuance of Show Cause Order.** Whenever the Board receives a written complaint from the Chief Engineer alleging that there has been a failure to perform according to the conditions imposed in a variance permit, the Board shall issue and serve upon the party bound by the conditions an order to show cause why the variance permit should not be withdrawn or modified.
 - (1) **Method of Service:** The order to show cause shall be given in writing by registered or certified mail with return receipt requested at least forty days before the hearing;
 - (2) **Contents:** The order to show cause shall include:
 - (A) A statement of the date, time, place, and nature of the hearing;
 - (B) A description and tax map key number of the property to be affected;
 - (C) A statement of the legal authority under which the hearing is to be held;

- (D) The specific sections of the Code or rules involved; and
- (E) A statement that any party may retain counsel if the party so desires.

(b) **Conduct of Hearing.** Hearing on an order to show cause shall be conducted in accordance with the Parts 3 and 4 of these rules, and the Chief Engineer shall be a party to the hearing. Any procedure in an order to show cause hearing may be modified or waived by stipulation of the parties and informal disposition may be made in any case by stipulation, agreed settlement, consent order, or default.

7-16 **Appeal.**

Any party to a variance proceeding may obtain judicial review of the proceeding in the manner set forth in Section 91-14, Hawaii Revised Statutes.

7-17 **Reapplication by Petitioner.**

The Board shall not consider any petition for a variance covering substantially the same request for substantially the same land or building as had been previously denied by the Board or withdrawn by the petitioner within one year of the date of such denial or withdrawal unless the petitioner submits significant new data or additional reasons which substantially strengthen the petitioner's position; provided that in no event shall any such new petition be accepted within six months of the date of a previous denial or withdrawal.

PART 8. APPEALS

8-1 Scope.

This part governs the general procedure relating to appeals from the decisions of the Director relating to: (a) the Zoning, Subdivision and Advertising and Sign chapters of the Code; and (b) in other cases where there is no direct appeal to court provided for by statute, Code or rule; and to appeals from the actions of the Chief Engineer relating to the Electrical, Plumbing, Building, and Erosion and Sedimentation Control, and Flood Control chapters of the Code.

8-2 Standing to Appeal.

Any person aggrieved by the decision of the Director in the administration or application of the Zoning, Subdivision, and Advertising and Sign chapters of the Code or in other cases where no direct appeal to court is provided for by statute, Code or Rule, or by the decision of the Chief Engineer in the administration or application of the Electrical, Plumbing, Building, and Erosion and Sedimentation Control, and Flood Control chapters of the Code may appeal the decision to the Board. For purposes of appeals from decisions under the zoning chapter of the Code, "aggrieved person" shall be as defined in Section 25-2-20 of the Code.

8-3 Time Limit for Filing Appeal.

An appeal from the decision of the Director or the Chief Engineer shall be filed within thirty days after the decision.

8-4 General Petition; Form and Contents.

The form of a general petition for an appeal shall conform to Part 2 of these rules and shall include the following:

- (1) The name, address, and telephone number of the appellant and the name, title, and address of the appellant's representative.
- (2) A description of the property involved in the appeal, including the tax map key number of the property, and the appellant's interest in the property.
- (3) A plain statement of the nature of the appeal and the relief requested.
- (4) A statement explaining
 - (A) How the decision appealed from violates the law; or
 - (B) How the decision appealed from is clearly erroneous; or
 - (C) How the decision appealed from was arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

- (5) A clear and concise statement of any other relevant facts.

8-5 Petition from the Denial of Use of Alternate Materials, and Methods of Construction; Form and Contents.

The form of a petition for an appeal from the denial of the use of alternate materials, methods of construction, equipment, devices, fixtures, or appliances shall conform to Part 2 of these rules and shall include the following:

- (1) The name, address, and telephone number of the appellant and the name, title, and address of the appellant's representative.
- (2) A description of the property involved in the appeal, including the tax map key number of the property, and the appellant's interest in the property.
- (3) A plain statement of the nature of the appeal and the relief requested.
- (4) A statement describing the proposed new or alternate material, method of construction, equipment, fixture, device, or appliance and setting forth how it
 - (A) Meets the standards established by the applicable chapter of the Code, and
 - (B) Is safe for its intended use.
- (5) A clear and concise statement of any other relevant facts.

8-6 Filing.

An original and ten copies of the petition shall be filed with the Board.

8-7 Fees.

A petition for an appeal shall be accompanied by a filing fee of two hundred and fifty dollars payable to the County Director of Finance. The Board shall waive this fee on any petition submitted by a county department or agency.

8-8 Service of Petition.

A copy of the petition for appeal shall be served by the appellant upon:

- (1) The Director in an appeal from the Director's decision.
- (2) The Chief Engineer in an appeal from the Chief Engineer's decision.
- (3) All owners of the affected property, as reflected in County Real Property Tax Division records, if the owners are not the appellants.

8-9 Parties to an Appeal.

The appellant and the following shall be parties to an appeal proceeding:

- (1) The Director in an appeal from the Director's decision.
- (2) The Chief Engineer in an appeal from the Chief Engineer's decision.
- (3) All owners of the affected property, as reflected in County Real Property Tax Division records, if the owners are not the appellants.

8-10 Tests.

In appeals involving the use of a new or alternate material, method of construction, equipment, device, fixtures, or appliance, the Board may require that any reasonable test be conducted of the proposed material, method of construction, equipment, device, fixture, or appliance, and the appellant shall pay the entire cost of any such test.

8-11 Hearing.

- (a) Time Limit for Hearing. Upon proper filing of a petition for appeal, the Board shall, within not more than ninety days, conduct a hearing on the appeal.
- (b) Conduct of Hearing. The Board shall hold a full hearing on the appeal in accordance with Chapter 91, Hawaii Revised Statutes, and except as otherwise provided in this part, the procedure for hearing an appeal shall be governed by Parts 3 and 4 of these rules.
- (c) Notice of Hearing. The procedures for providing notice of the hearing are as outlined in Section 3-2, Part 3 of these rules.
- (d) Notice to Surrounding Property Owners. Promptly after the Board's fixing a date for the hearing but not less than twenty days prior to the hearing, if applicable, the applicant/appellant shall mail a notice of the hearing to all property owners within three hundred feet of the affected property; for appeals of decisions made under the Zoning chapter of the Code, said notice shall be given to persons required to be notified under Section 25-2-4 of the Code. Prior to the date of the hearing, the applicant/appellant shall file with the Board proof of service or of good faith efforts to serve notice of the hearing on the designated property owners. Such proof may consist of certified mail receipts, affidavits, or the like.
- (e) View of the Property. Where applicable, the Board may, on its own motion or on motion of any party, view the land or building involved in the appeal as a portion of the hearing.
- (f) Impartial Expert. The Board may retain or secure an impartial expert to investigate an appeal and to testify at the hearing regarding the appeal.

8-12 Withdrawal of Appeal.

A petition for an appeal may be withdrawn voluntarily by the appellant at any time prior to the Board rendering a decision on the appeal; provided, that once an appeal is withdrawn, the appeal shall not be refiled with the Board.

8-13 Proposed Findings of Fact.

Each party to an appeal proceeding shall, within thirty days after the close of the hearing, submit a proposed decision and order and findings of fact to the Board, unless specifically waived by the Board or the presiding officer. The proposed decision and order and findings of fact shall also be served on each party to the proceeding, and each party shall have fifteen days from the date of service thereof to submit written comments or objections to the Board.

8-14 Decision.

Within a period of not more than ninety days after the close of the hearing, unless a longer period of time is agreed upon by the parties, the Board shall render its decision in an appeal proceeding, by either affirming the decision appealed from, or reversing or modifying the decision, or remanding the case to the Director or the Chief Engineer for further proceedings and action. A decision appealed may only be reversed, modified or remanded upon four affirmative votes of the Board. If fewer than seven members of the Board vote upon an appeal and there are fewer than four affirmative votes to reverse, modify or remand the decision appealed, the chairperson may defer the petition until a future meeting of the Board for a second and final vote to be taken on the appeal.

8-15 General Standards for Appeals (Non-Zoning).

A decision appealed from may be reversed or modified or remanded only if the Board finds that the decision is:

- (1) In violation of the Code or other applicable law; or
- (2) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (3) Arbitrary, or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

8-15A General Standards for Appeals (Zoning Code).

In appeals of decisions of the director made under the Zoning chapter of the Code, the Board of Appeals may affirm the decision of the director or it may reverse or modify the decision or remand the decision with appropriate instructions if based upon the preponderance of evidence the board finds that:

- (1) The director erred in its decision; or
- (2) The decision violated the Zoning chapter of the Code or other applicable law; or

- (3) The decision was arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

8-16 Special Standards for Appeals from the Denial of the Use of Alternate Materials and Methods of Construction.

In appeals regarding the use of new or alternate materials, methods of construction, equipment, devices, fixtures, or appliances, the decision appealed from may be reversed or modified or remanded only if the Board finds:

- (1) The new or alternate materials, methods of construction, equipment, devices, fixtures, or appliances meet the standards established by the Code; and
- (2) Permitting the requested use will not jeopardize the safety of persons or property; and
- (3) The requested use will not be contrary to the intent and purpose of the Code.

8-17 Judicial Review.

Any party to an appeal proceeding may obtain judicial review of the proceeding in the manner set forth in Section 91-14, Hawaii Revised Statutes.

Part 9. BUSINESS DEVELOPMENT RELATED APPROVALS
(**REPEALED**, EFFECTIVE – JUNE 9, 2006)