

CHAPTER 23A

CONSTRUCTION BOARDS OF APPEALS

Authority

N.J.S.A. 40:55D-53.2a, 52:27D-124 and 52:27D-198.

Source and Effective Date

R.2001 d.195, effective May 16, 2001.
See: 32 N.J.R. 2521(a), 33 N.J.R. 2097(b).

Chapter Expiration Date

In accordance with N.J.S.A. 52:14B-5.1c, Chapter 23A, Construction Boards of Appeals, expires on November 12, 2006. See: 37 N.J.R. 4600(a).

Chapter Historical Note

Chapter 23A, Construction Boards of Appeals, was adopted as R.1996 d.236, effective May 20, 1996 (operative January 1, 1997). See: 27 N.J.R. 4050(a), 28 N.J.R. 2586(a).

Pursuant to Executive Order No. 66(1978), Chapter 23A, Construction Boards of Appeals, was readopted as R.2001 d.195, effective May 16, 2001. See: Source and Effective Date.

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SUBCHAPTER 1. GENERAL PROVISIONS

5:23A-1.1 Title; authority; scope; intent

(a) This chapter, which is promulgated under authority of N.J.S.A. 52:27D-124, 52:17D-198, 40A:14A-43, 40A:14B-76 and 40:55D-53.2a, shall be known as, and may be cited as, the "Rules Governing Construction Boards of Appeals."

(b) This chapter shall govern all aspects of the administration and implementation by construction boards of appeals of the provisions of the State Uniform Construction Code Act (N.J.S.A. 52:27D-119 et seq.), the Uniform Construction Code rules (N.J.A.C. 5:23) and the subcodes incorporated herein by reference, the Uniform Fire Safety Act (N.J.S.A. 52:27D-192 et seq., the Uniform Fire Code (N.J.A.C. 5:70) and associated rules, P.L. 1995, c.54, and P.L. 1999, c.11.

(c) It is the intention of the Department of Community Affairs that these rules facilitate uniformity in procedure and a high level of quality in performance so as to allow construction boards of appeals to properly discharge the duties and functions that have been assigned to them by the Legislature under the State Uniform Construction Code Act, the Uniform Fire Safety Act, P.L. 1995, c.54, and P.L. 1999, c.11.

(d) Unless otherwise specified, all provisions of this chapter are equally applicable to matters arising under any of the statutes or rules listed in (b) above.

(e) Each construction board of appeals shall have authority to adopt and enforce local rules that are not inconsistent with this chapter or with any of the statutes or rules listed in (b) above.

Amended by R.2004 d.36, effective January 20, 2004.
See: 35 N.J.R. 4632(a), 36 N.J.R. 467(a).

In (a), inserted "40A:14A-43, 40A:14B-76" following "52:17D-198,"; in (b), substituted "N.J.A.C. 5:70" for "N.J.A.C. 5:18" and inserted ", and P.L. 1999, c.11" following "c.54"; in (c), inserted ", and P.L. 1999, c.11" following "c.54".

5:23A-1.2 Establishment of construction boards of appeals

(a) The governing body of each county shall, by resolution, establish a construction board of appeals that shall exercise its functions in accordance with this chapter.

(b) The governing body of any municipality that has its own local enforcing agency may, by ordinance, establish a construction board of appeals. Any such board shall exercise its functions in accordance with this chapter.

(c) The governing bodies of two or more municipalities that have established a joint enforcing agency may, pursuant to an interlocal agreement approved by ordinances of all participating municipalities, establish a joint construction board of appeals. Any such board shall exercise its functions in accordance with this chapter.

(d) Copies of all such resolutions, ordinances and interlocal agreements shall be filed by the governing bodies with the Office of Regulatory Affairs of the Division of Codes and Standards.

(e) In any municipality in which a municipal or joint construction board of appeals has been established, the county board of appeals shall only exercise jurisdiction in cases arising under P.L. 1995, c.54 or P.L. 1999, c.11.

(f) A municipality that either establishes or discontinues a municipal construction board of appeals, or either joins or discontinues participation in a joint municipal board, shall give prompt notice of such action to the county governing body, the county construction board of appeals and the Office of Regulatory Affairs of the Division of Codes and Standards.

In the absence of a municipal or joint municipal board having jurisdiction, all appeals from a municipality shall be heard by the county board.

(g) The appointing authority shall annually designate one regular member of the board to serve as chairperson and another regular member of the board to serve as vice-chairperson. The vice-chairperson shall serve as chairperson in the event of the absence or disqualification of the chairperson.

(h) The appointing authority of a county shall appoint a secretary, who need not be a member of the board. In the case of a municipal board, the secretary shall be appointed by the appointing authority of the municipality. In the case of a joint board, the secretary shall be appointed in a manner determined by agreement of the participating municipalities.

Amended by R.2004 d.36, effective January 20, 2004.
See: 35 N.J.R. 4632(a), 36 N.J.R. 467(a).

In (e), inserted "or P.L. 1999, c.11" following "P.L. 1995, c.54".

5:23A-1.3 Membership of construction boards of appeals

(a) Every construction board of appeals shall include five regular members.

1. Regular members shall be appointed for a term of four years by the appointing authority of the county or municipality in question or, in the case of a joint municipal board, by means mutually determined by the governing bodies of such municipalities.

2. For the members first appointed, the appointing authority shall designate the appointees' terms so that one shall be appointed for a term of one year, one for a term of two years, one for a term of three years, and two for a term of four years.

3. Vacancies on the board shall be filled for the unexpired term.

4. Members may be removed by the authority appointing them for cause.

5. A person may serve on more than one construction board of appeals.

6. Unless otherwise provided by county or municipal resolution or ordinance, as the case may be, a board member shall not be required to be a resident of the county or municipality in which the board exercises jurisdiction.

7. No more than two regular members of any board shall be members of the same profession or occupation.

(b) Qualifications for regular members shall be as follows:

1. At least one regular member shall be as qualified as a plumbing subcode official;

2. At least one regular member shall be as qualified as an electrical subcode official;

3. At least one regular member shall be a registered architect, or a licensed professional engineer with building construction experience, or other person as qualified as a building subcode official;

4. At least one regular member shall be as qualified as a fire protection subcode official; and

5. At least one regular member shall be certified as a fire official.

(c) The requirements of (b) above shall not be construed as requiring that there be a separate regular member in each of the qualification categories set forth in (b)1 through 5. One regular member may satisfy these requirements with regard to more than one such qualification category.

(d) A construction board of appeals shall also include at least five alternate members.

1. Alternate members shall be appointed to staggered terms, in the same manner as the initial appointment of regular members.

2. Alternate members shall be so chosen so that there will be at least one alternate member in each qualification category set forth in (b)1 through 5 above.

3. When a regular member of the board is absent, the alternate member in the same qualification category shall serve in that regular member's place; provided, however, that any alternate member who is as qualified as an elevator subcode official shall serve in the place of any absent regular member in any case involving the elevator safety subcode, if there is no other regular member of the board present who is as qualified as an elevator subcode official.

4. If a regular member who is not in one of the qualification categories set forth in (b)1 through 5 above is absent, or if a regular member and an alternate member who are both in the same qualification category are absent and the appeal does not involve that qualification category, or if another regular member is present who meets the requirements of the same qualification category as does the regular member who is absent, the chairperson of the board shall determine which alternate member shall vote in the place of the absent regular member.

5. Alternate members shall have the right to participate in all board deliberations, but shall not vote unless serving in the place of a regular member.

(e) Each county construction board of appeals shall also include two special members, one of whom shall be a licensed professional engineer with municipal site improvement construction experience and one of whom shall be a builder. The special members shall be appointed for four-year terms and shall serve as additional members of the board only in cases involving appeals of municipal or municipal utilities authority or sewerage authority fees pursuant to P.L. 1995, c.54 or P.L. 1999, c.11.

(f) The failure of a party to appear or to present evidence shall not result automatically in a decision in favor of the other party.

(g) The board may reduce a penalty that is under appeal if it is clearly excessive or may void it if it is found not to be authorized by statute or by rule. The board shall specifically explain its reasoning in any case in which it reduces a penalty that is already below the maximum permitted and shall explain why the reduction is not likely to impede the deterrence of future violations. In determining whether to reduce a penalty, the board shall consider the extra costs required of the local enforcing agency due to the actions or inaction of the appellant regarding compliance. A valid penalty shall not be totally abated if the local enforcing agency demonstrates the lack of a good faith compliance effort on the part of the applicant prior to the imposition of the penalty.

1. A penalty may not be reduced except to the extent that it is clearly excessive. Any determination as to whether a penalty is excessive shall take into account the maximum amount of penalty that might have been imposed for the particular violation. No reduction in the amount of a penalty may be made final unless the violation either has been abated by the time of the hearing or shall have been abated within 30 days thereafter.

2. On an appeal of a penalty, the penalty as originally assessed by the enforcing agency, unless unauthorized by statute or by rule, shall be automatically reinstated if the violation remains unabated after 30 days following receipt by the applicant of the decision, unless an extension of time for abatement of the violation has been granted by the enforcing agency. The board shall inform the appellant of these facts.

3. On an appeal of a penalty, the appellant may not offer argument that the violation(s) for which the penalty was issued did not exist, and the board shall accept the existence of the violation(s) as having been proven, provided that a notice of the underlying violation has been served and either no timely appeal was filed or the violation notice was sustained on appeal.

(h) On an appeal from a failure or refusal to issue a permit, the board may deny the appeal and return the matter to the enforcing agency for appropriate action or may direct the enforcing agency to grant the permit if the appellant is so entitled in accordance with the code. If the board determines to direct that the permit be granted, the enforcing agency shall provide the board with any recommendations that it may have as to conditions or limitations. The board shall either direct that these conditions or limitations be included or provide specific reasons for not doing so.

(i) On an appeal relating to a variation or variance, as the case may be, the board may grant the variation or variance and shall impose such conditions as may be appropriate to

comply with the intent and purpose of the applicable code. No variation or variance shall be granted absent proof that the applicant submitted the necessary application to the local enforcing agency and either the application was denied or no action was taken within the time allowed by the applicable rule (20 business days in Uniform Construction Code cases and 30 days in Uniform Fire Code cases).

1. In Uniform Construction Code cases, the board shall be bound by the provisions of N.J.A.C. 5:23-2.9.

2. In Uniform Fire Code cases, the board shall be bound by the provisions of N.J.A.C. 5:70-2.14.

(j) A written decision shall contain the following:

1. A statement of the date the appellant received the notice, order, decision, informational copy of a voucher or municipal statement of activity against a deposit or escrow account being appealed, the date the appeal was filed, the appearances or absences of the parties and the board members participating;

2. A statement of pertinent facts, as follows:

i. In a Uniform Construction Code or Uniform Fire Code case, the statement shall include the type of use, the nature of the violation cited and of the action appealed, the basis of the appeal and the basis for the notice, order or decision. A copy of the local enforcing agency's notice, order or decision shall be appended to the decision, unless to do so would be unduly burdensome, in which case the omission shall be explained.

ii. In a P.L. 1995, c.54 or P.L. 1999, c.11 case, the statement shall include the nature of the service rendered to the municipality, municipal utilities authority or sewerage authority, the identification of the approving authority, the identification of the professional who rendered the service, the amount of time spent by the professional or other persons in rendering the service, the amount charged for the service, the amount of that charge that is in dispute and the basis of the dispute. A copy of the professional's voucher or the municipal or municipal utilities authority or sewerage authority statement of activity against the deposit or escrow account, whichever is applicable, shall be appended to the decision.

3. A statement of the names and areas of expertise of any expert witnesses, the party on behalf of which each expert witness testified and whether any materials not in the record were used by the expert witness. If so, the decision shall include copies or descriptions of such materials.

4. In any case involving a penalty, the board shall state the maximum permissible penalty applicable and explain the reason for any reduction.

5. The decision shall include the board's analysis of the case, including its understanding of the code provisions or other provisions of law applicable to the case.

i. If, in a Uniform Construction Code or Uniform Fire Code case, the board determines to reverse or modify the action taken by a local enforcing agency, or to direct that action be taken by a local enforcing agency, it shall provide a specific and detailed explanation of the basis for its action, including reference to any technical code provisions relied upon.

ii. In any case arising under P.L. 1995, c.54 or P.L. 1999, c.11, the board shall provide a specific and detailed explanation of its basis for a determination that a disputed charge either is or is not valid and of its basis for any modification of any charge.

6. There shall be a statement of disposition containing the board's determination.

Administrative correction.

See: 35 N.J.R. 219(d).

Amended by R.2004 d.36, effective January 20, 2004.

See: 35 N.J.R. 4632(a), 36 N.J.R. 467(a).

Inserted references to P.L. 1999, c.11 and municipal utilities authority or sewerage authority throughout.

Case Notes

Chairman of county construction board of appeals had judicial immunity from civil rights claim for allegedly causing board to not consider landowners' appeal from county construction officer's decision. *Akins v. Deptford Tp.*, D.N.J.1993, 813 F.Supp. 1098, affirmed 995 F.2d 215, certiorari denied 114 S.Ct. 478, 126 L.Ed.2d 429, affirmed 17 F.3d 1428.

Clerk of county construction board of appeals had judicial immunity from civil rights liability for alleged intentional failure to file landowners' appeal from county construction officer's decision. *Akins v. Deptford Tp.*, D.N.J.1993, 813 F.Supp. 1098, affirmed 995 F.2d 215, certiorari denied 114 S.Ct. 478, 126 L.Ed.2d 429, affirmed 17 F.3d 1428.

Due process was not violated by failure of county construction board of appeals to accept and process appeal from decision of county construction officer. *Akins v. Deptford Tp.*, D.N.J.1993, 813 F.Supp. 1098, affirmed 995 F.2d 215, certiorari denied 114 S.Ct. 478, 126 L.Ed.2d 429, affirmed 17 F.3d 1428.

Regulation valid permitting appeal of board decision; Law Division proper forum to review action of administrative body with single locality authority; scope of proceedings; decision standards. *Bell v. Twp. of Bass River*, 196 N.J.Super. 304, 482 A.2d 208 (Law Div.1984).