

(c) Except as otherwise provided in (d) below, when there are not five regular and/or alternate members present to consider an appeal, or if five regular and/or alternate members are present but a code discipline that is involved in a construction code case is not represented, or if no regular or alternate member who is certified as a fire official is present to hear a fire code case, or if either of the special members, or an alternate meeting the same qualifications requirement, is not present in a case arising under P.L. 1995, c.54, either party shall be entitled to have the hearing adjourned. If neither party requests an adjournment, the case may be heard by the board if a quorum is present.

1. In a case involving the elevator safety subcode, a party shall only have a right to an adjournment due to the absence of a board member having elevator subcode qualification if there is at least one regular or alternate member of the board who has such qualification.

(d) No adjournment shall be granted without the consent of the local enforcing agency having jurisdiction in any case involving issues of life safety in an occupied building. If, in any such case, a quorum is not present, or a quorum is present but does not include either a representative of any construction code discipline that is required to be represented on the board and is involved in the case or a certified fire official, as the case may be, the case shall not be heard and the appeal shall be deemed to have been denied.

(e) At the beginning of each hearing, the chairperson, or the person presiding in his or her absence, shall state for the record the statute under which the appeal is being brought, the nature and date of the action appealed from, the date the appeal was filed and the basis of the appeal. Thereafter, the matter shall proceed with the representative of the enforcing agency, the municipality or the professional hired by the municipality or municipal agency, as the case may be, explaining the basis for the action, ruling, order, notice or fee, as the case may be. The appellant, or his or her representative, shall then present the basis for his or her disagreement.

1. Both parties shall be allowed to present witnesses and offer evidence and to examine and cross-examine witnesses, consistent with principles of due process and fairness. Motions and objections may be filed in writing without the necessity of an appearance by the party, but written testimony not subject to cross-examination shall not be allowed; provided, however, that any writings that would be admissible in a court of law shall not be deemed to be included within the prohibition of "written testimony." Any board member may question any witness at the conclusion of that witness' questioning by the parties.

2. A board member shall not visit a site for any reason having to do with a matter before the board without prior notice to the other members of the board and to the parties. No such visit shall be made in the company of a representative of one party unless a representative of the other party is present. Any member who has visited a

site subsequent to the filing of the appeal shall disclose that fact on the record prior to a party's presentation and shall be subject to questions from either party or any board member pertaining to the visit.

3. Neither the board nor any individual member shall discuss any case with either party, including the representative of a party, without the other party, or the representative of the other party, being present; provided, however, that this prohibition shall not apply to statements made on the record in a hearing of which the other party was given notice and the opportunity to participate.

(f) In all cases, the board shall have the power to administer oaths and to issue subpoenas to compel the attendance of witnesses and the production of relevant evidence. The provisions of the "County and Municipal Investigations Law," P.L. 1953, c.38 (N.J.S.A. 2A:67A-1 et seq.) shall apply.

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.

Board of Review procedures in permit denial reviews. *Bell v. Twp. of Bass River*, 196 N.J.Super. 304, 482 A.2d 208 (Law Div.1984).

5:23A-2.3 Board decisions

(a) Except as otherwise provided in (b) below, the construction board of appeals shall hear any appeal, render a decision thereon, and file its decision with a statement of the reasons therefor with the enforcing agency or, in the case of a matter arising under P.L. 1995, c.54, with the municipality or approving authority, not later than 10 business days following the submission of the appeal. In any case involving an appeal from an action, decision, notice or order of a local enforcing agency, the decision shall either affirm, reverse or modify the action, decision, notice or order of the enforcing agency or remand the matter to the enforcing agency for further action. In the case of any reversal, modification or remand, the board shall include in its statement of reasons the specific details of the nature and extent of the board's disagreement with the enforcing agency.

1. The board shall provide copies of the decision, by certified or registered mail, to the applicant and to any

other parties entitled to notice pursuant to N.J.A.C. 5:23A-2.1(c).

2. Copies of decisions shall be filed with the Department of Community Affairs within 10 business days of the issuance of the decision as follows:

i. In cases arising under the State Uniform Construction Code Act or under P.L. 1995, c.54, with the Bureau of Regulatory Affairs of the Division of Codes and Standards; and

ii. In cases arising under the Uniform Fire Safety Act, with the Division of Fire Safety.

3. Copies of all board decisions shall be deemed to be public records and shall be available for public inspection at the offices of both the board and of any local enforcing agency or other governmental agency that is a party to a case.

(b) With the consent of the applicant, the period of time for the board to issue its decision may be extended beyond 10 business days; provided, however, that in any case involving issues affecting life safety in an occupied building, any such extension shall also require the consent of the local enforcing agency.

1. In any case involving the appeal of a fire code imminent hazard order issued pursuant to N.J.S.A. 52:27D-208, the hearing shall be held, and the decision issued, within 48 hours of the receipt by the board of the request; provided, however, that if the hearing is not scheduled to be held within that 48 hour period, the board secretary shall promptly so notify the applicant so that he or she may apply to the Department for an administrative hearing, as provided in N.J.S.A. 52:27D-208.

(c) Failure by the board to hear an appeal and render and file a decision thereon within the time limits prescribed in this section shall be deemed to be a denial of the appeal.

(d) Any party, including any enforcing agency, may appeal from a decision of a construction board of appeals to the Law Division of the Superior Court within the time allowed by the rules of court.

1. The local enforcing agency shall immediately comply with the ruling of the construction board of appeals unless a stay is obtained either from the board or from the Superior Court.

(e) In all cases, decisions shall be based upon applicable statutory, rule and code provisions and upon the evidence presented and accepted by the board.

1. Decisions shall be consistent with the intent of the applicable statutes and rules. In matters arising under the State Uniform Construction Code Act, the board shall be bound by interpretations and bulletins issued by the Department of Community Affairs pursuant to N.J.A.C. 5:23-3.9. Copies of all such interpretations and bulletins shall be provided to all boards and enforcing agencies by the Department.

(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).

(j) In Uniform Construction Code cases, the board shall be bound by the provisions of N.J.A.C. 5:23-2.9. In Uniform Fire Code cases, the board shall be bound by the provisions of N.J.A.C. 5:18-2.14.

(k) 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 the 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 case, the statement shall include the nature of the service rendered to the municipality, the identification of the approving authority, the identification of the professional who rendered the service, the amount of time spent by the professional and 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 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 of 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, 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.

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).