



Special Exceptions, Conditional Uses and Variances

PLANNING SERIES #7



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Comments or inquiries on the subject matter of this publication should be addressed to:

Governor's Center for Local Government Services
Department of Community and Economic Development
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, Pennsylvania 17120-0225

(717) 787-8158
1-888-223-6837
E-mail: ra-dcedclgs@pa.gov

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I. Special Exceptions, Conditional Uses and Variances

Preface

Special Exceptions, Conditional Uses and Variances (Planning Series Publication #7) is one of a series of 10 planning publications produced by the Center as a means to educate both professionals and non-professionals on the ways that planning and land use management are achieved within the commonwealth. The planning publications were first developed in the 1970s and in subsequent editions have been revised to incorporate differences in the overall planning viewpoint, offer up-to-date best practices, and reflect the latest changes in Pennsylvania planning law. Each publication addresses a specific planning or land use method enabled through The Pennsylvania Municipalities Planning Code (MPC), Act 247 of 1968, P.L. 805, as reenacted and amended, 53 P.S. § 10101, et seq., and used by municipalities throughout the commonwealth.

The Center's 10 Planning Series Publications are as follows:

- No. 1 – Local Land Use Controls in Pennsylvania
- No. 2 – The Planning Commission
- No. 3 – The Comprehensive Plan
- No. 4 – Zoning
- No. 5 – Technical Information on Floodplain Management
- No. 6 – The Zoning Hearing Board
- **No. 7 – Special Exceptions, Conditional Uses and Variances**
- No. 8 – Subdivision and Land Development in Pennsylvania
- No. 9 – The Zoning Officer
- No. 10 – Reducing Land Use Barriers to Affordable Housing

The MPC authorizes variances as a means for seeking relief from strict application of the requirements in a zoning ordinance. Additionally, zoning ordinances can provide for certain permitted uses by special exception or conditional use, subject to hearing and express standards and criteria as a way to provide more control in the land use decision-making process in a municipality. The *Special Exceptions, Conditional Uses and Variances* publication is designed to provide an overview of these three planning tools and provide information to:

- Clarify the difference between uses permitted by right and uses permitted by special exception or conditional use;
- Describe the procedure for requesting a special exception or conditional use;
- Outline the procedure for requesting a variance and the criteria to guide a zoning hearing board's decision in granting the variance; and
- Provide a summary of the different types of variances.

II. Introduction

A zoning district provides for certain uses by right, that is subject to requirements in the zoning ordinance and for which the zoning officer issues the zoning permit, but certain other uses are provided by special exception or conditional use. While they are permissible and legitimate uses within the zoning district, special exceptions and conditional uses require a closer examination by the body granting their approval. The prime difference between a special exception and a conditional use is the entity making the decision. Special exceptions are granted by the zoning hearing board. Conditional uses are granted by the governing body of a municipality. Both uses require a public hearing prior to any approval or disapproval.

Special exceptions and conditional uses are usually reserved for those land uses that will have a significant impact on the zoning district or the whole community, or for those uses that necessitate additional safeguards. Common examples of such uses include, but are not limited to, landfills, warehouse and distribution facilities, telecommunications towers, etc. These additional safeguards take the form of specific standards and criteria stated in the zoning ordinance. The applicant for a special exception or conditional use must demonstrate compliance with the specific standards and criteria stated in the zoning ordinance.

A variance is a means to obtain relief from the strict application of the requirements of the zoning ordinance to fit the land it regulates. It enables a property owner to use his or her land which, due to specific location, topography, size, or shape, otherwise would not be suitable for development under the strict interpretation of the zoning ordinance. The zoning hearing board has exclusive authority to grant a variance.

III. Statutory Overview of Authority

Article VI of the Pennsylvania Municipalities Planning Code (MPC), Act 247 of 1968, P.L. 805, as reenacted and amended, 53 P.S. § 10101, et seq., provides enabling authority and procedural requirements pertaining to zoning. Specific provisions allow the governing body to legislatively (through the zoning ordinance) provide for uses as a special exception or conditional use. Specific provisions also provide a mechanism (a variance) for relief from the requirements of a zoning ordinance. Section 603 (c) of the MPC states that a zoning ordinance may contain:

1. Provisions for special exceptions and variances administered by the zoning hearing board, which provisions shall be in accordance with [the MPC].
2. Provisions for conditional uses to be allowed or denied by the governing body pursuant to public notice and hearing and recommendations by the planning agency and pursuant to express standards and criteria set forth in the zoning ordinance. In allowing a conditional use, the governing body may attach such reasonable conditions and safeguards, other than those related to off-site transportation improvements, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance.

IV. Special Exceptions and Conditional Uses Compared with Uses Permitted by Right

A use permitted by right is a use expressly permitted in a zoning ordinance for which the zoning officer has authority to determine conformance with ordinance requirements and approve and issue a zoning permit. A use permitted by special exception or conditional use is also expressly permitted in a zoning ordinance, but subject to a hearing and decision of the zoning hearing board (special exception) or governing body (conditional use) respectively. The function of these boards is to determine whether the special exception or conditional use application is consistent with the public interest as expressed in specific standards and criteria established in the zoning ordinance.

Why Include Conditional Uses and Special Exceptions

Conditional uses and special exceptions exist because choosing uses to be permitted by right and prohibited for each zone is too narrow for sound planning. Certain uses or activities that might logically be located in certain districts may need to be carefully sited or controlled. Designation as a conditional use or special exception allows the opportunity to thoroughly examine the proposed land use to determine compliance with the objective standards and criteria, to assure that the public interest is not violated, and to attach any reasonable conditions or safeguards necessary to implement the purpose of the ordinance. By contrast, if the use is permitted by right, the zoning officer would not have the authority to require any reasonable conditions and safeguards, and the affected public would not have the opportunity to be heard on the application.

Need for Specific Standards and Criteria – Conditional Use and Special Exception

The MPC requires that the conditional use and special exception be evaluated pursuant to express standards and criteria. The applicant for a conditional use or special exception bears the burden of proof and must show that the proposed use meets the categorical definition as a use permitted by conditional use or special exception and that the specific standards and criteria contained in the zoning ordinance will be met.

Specific standards and criteria are objective and measurable. As described by the Commonwealth Court in *Bray v. Zoning Hearing Board of Adjustment*, 410 A.2d 989 (Pa. Cmwlth. 1978), acceptable specific standards and criteria include:

1. The kind of use (or area, bulk, parking, or other approval) – i.e., the threshold definition of what is authorized as a special exception [or conditional use];
2. Specific requirements or standards applicable to the special exception [or conditional use] – e.g., special setbacks, size limits; and
3. Specific requirements applicable to such kind of use even when not a special exception [or conditional use] – e.g., setback limits or size minimums, or parking requirements applicable to that type of use whenever allowed, as a permitted use or otherwise.

Except as to a standard or criteria for the proposed conditional use or special exception use expressly specified in the zoning ordinance, an applicant is not required to present the particular details of the design of the development – such as would be shown on a land development plan – at the conditional use approval stage. In reThompson, 896 A.2d 659 (Pa. Cmwlth. 2006); K. Hovnanian Pa. Acquisitions LLC v. Newtown Twp. Bd. of Supervisors, 954 A.2d 718 (Pa. Cmwlth. 2007).

The courts have advised that the applicant has no burden of proof for general, non-specific or non-objective standards, such as “compatibility with the neighborhood” or “in harmony with the general purpose of the ordinance.” Those objecting to the application bear the burden of proof, and must prove with credible and particularized evidence that the proposed use will not comply with a non-specific, non-objective standard. As to such general standards, the courts have explained that it would be unfair to burden the applicant with proving conformity with a policy and would enable the zoning hearing board to assume a legislative role.

The application for conditional use or special exception must be granted where the applicant demonstrates compliance with the specific standards and criteria set forth in the zoning ordinance, unless an objector presents sufficient evidence that the use would be detrimental to public health, safety, or general welfare. The mere possibility of an adverse impact is not enough. The objector must show that there is a high probability that the proposed use will generate a harm greater than normally generated by that type of use. For example, an objector cannot simply claim anticipated traffic increases by a proposed retail facility; it must prove that the traffic increases are substantially different from those normally attendant to the retail facility and will pose a substantial threat to public health, safety, and welfare.

Pennsylvania courts have advised that the mere fact that a proposed use would contribute to projected traffic congestion primarily generated by other sources is not a sufficient basis for denying either a special exception or a conditional use.

Only if the objectors raise and offer sufficient evidence on specific issues concerning health, safety, and general welfare will the burden of proof continue to be with the applicant to show that the intended use would not violate the health, safety and general welfare of the community with relation to such objections.

V. Conditional Uses

A conditional use is a use that is appropriate, in terms of the public health, safety, and welfare, for the zoning district in which it is permitted, but is subject to specific standards and more detailed and formal review. The MPC authorizes a governing body to hear and decide upon an application for conditional use in accordance with the standards contained in the zoning ordinance, provided generally that the specific application of the use would not prove injurious to the public interest. Section 909.1(b) (3) of the MPC gives exclusive power to the governing body to render a final adjudication on an application for conditional use.

The MPC describes the decision made by the governing body on a conditional use application as an adjudication. In considering the conditional use application, the governing body is acting as a quasi-judicial body and cannot advocate a particular position. In this situation, the planning agency could become party to the hearing to testify before the governing body to promote a given viewpoint or position on the application.

As with special exceptions, the governing body may choose to permit certain land uses in the zoning ordinance as conditional uses if they are deemed to have a significant impact on the zoning district or the whole community, or for those uses that necessitate additional safeguards. Conditional uses should be specifically listed under the applicable zoning districts the ordinance must specify, and to use land for any of these purposes, a conditional use application would have to be filed. The governing body would then have the opportunity to thoroughly examine the proposal and to impose any reasonable safeguards necessary to implement the purposes of the ordinance and to protect the public's general welfare.

The Pennsylvania Land Use Law Library provides further insights to certain legal cases related to conditional uses. These may be viewed at www.landuselawinpa.com/court/ruling_conditional_uses.shtml.

Procedure for Conditional Uses

As previously noted, although a decision on the conditional use is made by the governing body and the decision on a special exception is made by the zoning hearing board, the procedures for both are generally consistent. Both require a hearing subject to public notice followed by a written decision.

Section 603(c) (2) of the MPC authorizes a governing body to allow or deny a conditional use application following a hearing and recommendations by the planning agency. Before conducting a hearing, the governing body must give public notice of the hearing. "Public notice" required by the MPC for a conditional use application hearing is stricter than notice required by the Sunshine Act. The public notice must be published once each week for two successive weeks in a newspaper of general circulation in the municipality, no earlier than 30 days and no fewer than seven days before the hearing.

Section 1909 of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1501 et seq. provides that "successive weeks" means calendar weeks. It further provides that while publication upon any day of such weeks is sufficient, at least five days shall elapse between each publication. Section 1908 of the Statutory Construction Act further provides that the five-day interval should be computed excluding the first day and including the last day of the five-day period.

In addition to the published notice, the municipality must give written notice of the hearing to the applicant, the zoning officer, any person designated by the zoning ordinance to receive such notice, and any person who has made timely request for the notice. Notice shall also be conspicuously posted on the affected tract of land at least one week prior to the hearing.

While the MPC does not define or establish guidelines for "conspicuous posting" of the required written notice, the clear intent of the provision is that the posted notice generally apprise the public of the requested relief or action. Relevant considerations to posting would include its location along a point along the property's frontage abutting a road and size, color, or format that would garner the attention of the pedestrian or traveling public, as circumstances dictate.

All the notices must state the time and place of the hearing and the matter to be considered at the hearing.

A written decision (or written findings if no decision is called for) is required. When the application is contested or denied, Section 913.2(b) (1) of the MPC requires that the decision shall include findings of fact or conclusions based thereon, together with any reasons thereof. The MPC specifically requires that any conclusions shall reference the provisions of the MPC or the zoning ordinance relied on and the reasons why the conclusion is deemed appropriate in light of the facts found.

The written decision must be issued within 45 days of the last hearing on the conditional use application, unless an applicant has agreed in writing or on the record to an extension of time. The written notice must be delivered to the applicant personally or mailed to him or her not later than the day following its date of issuance. Brief notice of the decision or findings and a statement of the place at which the full decision or findings may be examined must also be provided by mail or otherwise to any other person who has filed their name and address with the governing body not later than the last day of the hearing.

In addition to the foregoing procedures, it would be prudent for the governing body adjudicating the conditional use application to follow the basic hearing requirements outlined for a zoning hearing board in Section 908 of the MPC, including the requirements for recognition of parties, receipt of evidence and argument, limitation on communications and the receipt of information outside of the hearing, and stenographic recording of the proceedings.

VI. Special Exceptions

A special exception is a use that is appropriate, in terms of the public health, safety, and welfare, for the zoning district in which it is permitted, but is subject to specific standards and criteria and more detailed and formal review. The MPC authorizes a zoning hearing board to hear and decide upon an application for special exception in accordance with the standards and criteria contained in the zoning ordinance, provided generally that the proposed use would not prove injurious to the public interest.

It is important to recognize that the term special exception is a misnomer. A use identified as a “special exception” is neither special nor an exception. It is not a deviation from the zoning ordinance, but a permitted use explicitly listed in the ordinance. For example, a retail use may be a permitted use in a commercial zoning district and subject to requirements applied by the zoning officer when granting the zoning permit, while in the same district a big-box store may be a special exception reviewed and approved by the zoning hearing board if in conformance with the express standards and criteria for such use and otherwise not injurious to the public health, safety, and welfare. A zoning hearing board does not have authority to grant a special exception for a use that is not explicitly listed in the zoning ordinance as a use permitted by special exception.

Function of the Zoning Hearing Board

Section 912.1 of the MPC states the zoning hearing board’s functions with respect to special exceptions:

Where the governing body, in the zoning ordinance, has stated special exceptions to be granted or denied by the board pursuant to express standards and criteria, the board shall hear and decide requests for such special exceptions in accordance with such standards and criteria. In granting a special exception, the board may attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance.

See *Planning Series #6: The Zoning Hearing Board*, for additional information on the functions of a zoning hearing board.

Procedure for Special Exceptions

Although a decision on the conditional use is made by the governing body and the decision on a special exception is made by the zoning hearing board, the procedures for both are generally consistent. Both require a hearing subject to public notice followed by a written decision.

Section 603(c) (2) of the MPC authorizes a zoning hearing board to allow or deny a special exception conditional use application following a hearing. Before conducting the hearing, the zoning hearing board must give public notice of the hearing. Following the hearing, the zoning hearing board must issue a written decision.

The zoning hearing board’s hearing procedures for special exceptions are more fully discussed in the *Planning Series #6: The Zoning Hearing Board*.

VII. Conditions – Special Exception and Conditional Use

The MPC permits the attachment of reasonable conditions and safeguards with the grant of a special exception or conditional use. The authority to attach reasonable conditions and safeguards with the grant of a special exception or conditional use is not carte blanche, nor is it a license to impose barriers to frustrate an applicant that has met the specific criteria stated within the zoning ordinance. To the contrary, the power to impose conditions must be reasonably related to a valid public interest established in the record of the application. Rather than denying a special exception or conditional use application because of some adverse effect, it is preferable to ameliorate or reduce that harmful impact to an acceptable level by imposing conditions. See Ryan, Pennsylvania Zoning Law and Practice, at chapter 5.2.7.

A condition may not be used to secure a promise or oral assurance of intent by the applicant to meet his burden of showing that the use he seeks is allowed and that he has demonstrated compliance with the objective criteria for the proposed use. *Council Rock School District v. Wrightstown Twp. Zoning Hearing Bd.*, 709 A.2d 453 (Pa. Cmwlth. 1998).

Section 603(c)(2) of the MPC provides that in granting a conditional use a governing body “may attach such reasonable conditions and safeguards, other than those related to off-site transportation or road improvements.” Additionally, the Commonwealth Court concluded in two cases that a condition for off-site road improvements is prohibited by operation of Section 503-A (b) of the MPC.

A condition cannot be personalized or tied to a particular person or owner. However, if a condition is imposed and the developer does not contest or appeal from the condition, he is bound by it. Any condition that the developer **willingly** accepts (by making a voluntary offer of the condition or by agreement with the municipality’s proposal) is a lawful condition. The condition should be clearly stated in the record, as should the developer’s acceptance of the condition.

VIII. Subdivision and Land Development

Whenever a subdivision or land development proposes a use permitted as a special exception or conditional use, the zoning approval for the special exception or conditional use should be obtained first. The applicant can be spared the expenditure of substantial sums to prepare the preliminary subdivision plan in the event the zoning (special exception or conditional use) application is denied. However, once the developer has filed the zoning application for the special exception or conditional use, no intervening change or amendment to the zoning, subdivision, or other governing ordinance may adversely affect the development plan.

The MPC protects vested rights of a developer who obtains a special exception or conditional use approval in order to proceed with a subdivision or land development. Section 917 of the MPC provides that, following special exception or conditional use approval, the developer is entitled to at least six months in which to submit the subdivision or land development plan free of any intervening zoning changes (changes to a zoning ordinance or map enacted subsequent to the filing of the special exception application).

IX. Variances

A variance serves as a relief valve from the strict application of the requirements of the zoning ordinance to a particular property.

An application for variance seeks permission to do something which is not in conformance with the requirement of the zoning ordinance. The application for variance is decided by the zoning hearing board.

It is generally acknowledged that zoning cannot be rigidly applied without creating hardship for some properties and land. Therefore, the MPC authorizes variances as the means for developers or landowners to seek relief from strict compliance with the zoning ordinance's criteria and standards based on their particular land use situation. Variance requests are heard and decided by the zoning hearing board where it is asserted that the provisions of the zoning ordinance inflict "unnecessary hardship" on the applicant. Variances may be granted by the zoning hearing board provided that all of the relevant findings set forth in Section 910.2 of the MPC are met. In granting any variance, the zoning hearing board may attach reasonable conditions and safeguards as it deems necessary for the health, safety, and welfare of the municipality.

Requirements for a Variance

The zoning hearing board hears requests for variances where it is alleged that the provisions of the zoning ordinance, if strictly applied, would cause unnecessary hardship. The zoning hearing board may, by rule, prescribe the form of application and may require preliminary application to the zoning officer.

Although a zoning ordinance is to be liberally construed to allow for the broadest use of land, an applicant for a variance bears a heavy legal burden. Section 910.2 of the MPC sets forth the criteria that must be met for the grant of a variance. The zoning hearing board may grant a variance provided that it has made the following findings where relevant in a given case:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;

The physical circumstances or conditions that necessitate a variance must be unique to the property for which application has been made. A physical circumstance or condition general to the zoning district as a whole or in a portion of the zoning district in which the property is located does not warrant the grant of a variance. A variance is not appropriate merely because the zoning ordinance is in conflict with the landowner's desired use of the land.

The circumstances or conditions that necessitate a variance must be physical in nature. For improved property, unnecessary hardship unique to the property exists if the property cannot be conformed to a permitted purpose without extensive demolition or reconstruction. *Goldstein v. Zoning Hearing Bd. of Lower Merion*, 19 A.3d 565 (Pa. Cmwlth. 2009).

Except as noted in the discussions of types of variances below, financial conditions (economic hardship) may not be considered.

2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;

3. That such unnecessary hardship has not been created by the applicant;
4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to public welfare; and
5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

In granting a variance, the zoning hearing board may not disregard the language of the zoning ordinance under the pretext of pursuing the spirit of the intended regulation.

In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purpose of the MPC and the zoning ordinance.

It is important to note that the zoning hearing board may base its variance decision on only these five findings, and the municipality may not establish additional criteria. Furthermore, it is important to note that a variance is appropriate only where the property, not the person, is subject to hardship.

Types of Variances

Dimensional Variance

The most common type of variance is a dimensional variance. A dimensional variance seeks relief from requirements in the zoning ordinance that regulate lot size, lot depth or width, setbacks and yards, building heights and lot occupancy, impervious surface, and parking, among others. A dimensional variance allows an adjustment of the strict application of the requirement of the zoning ordinance to a specific property. Because it is an adjustment to the requirement, the variance should be the minimum relief to alleviate the unnecessary hardship which is peculiar or unique to the property provided the variance is not injurious to the public interest.

The Pennsylvania Supreme Court in *Hertzberg v. Zoning Hearing Board of Adjustment of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1998), announced that in an application for dimensional variance the requirement that the applicant demonstrate the MPC requirement for “unnecessary hardship” could be shown with a lesser quantum of proof. In the case of a dimensional variance, the Supreme Court authorized a zoning hearing board to apply a relaxed standard under which it “may consider multiple factors, including the economic detriment to the applicant if the variance [is] denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements, and the characteristics of the surrounding neighborhood.” Subsequently the courts have forewarned that *Hertzberg* only eased the requirements for the grant of a dimensional variance, but did not remove them. An applicant must still show unnecessary hardship and meet the other criteria for the grant of a variance set forth in Section 910.2 of the MPC. Additionally, the courts have advised that a landowner’s desire to increase profitability or maximize development potential does not establish unnecessary hardship even under the relaxed standard set forth in *Hertzberg*.

De Minimis Variance

A de minimis variance is a minimal or minor deviation from dimensional requirements of the zoning ordinance. A de minimis variance does not require proof of unnecessary hardship. Courts have determined that the grant of a de minimis variance requires two findings:

1. That only a minor deviation from the dimensional requirement of a zoning ordinance is sought; and
2. That rigid compliance with the zoning ordinance is not necessary to protect the public policy concerns inherent in the zoning ordinance.

See *Appletree Land Dev. v. Zoning Hearing Bd.*, 834 A.2d 1214 (Pa. Cmwlth. 2002). A de minimis variance is only available for a dimensional variance; it is not applicable to a use variance.

An example of a de minimis variance is a deviation of 15 square feet from a minimum lot size requirement of one acre, resulting in a lot 0.999 acres in size.

Use Variance

A use variance requests permission to use property in a manner prohibited by the zoning ordinance (e.g., a commercial garage in a single family residential zone).

An applicant for grant of a use variance must satisfy the criteria for the grant of a variance set forth in Section 910.2 of the MPC (stated above). In addition, the courts have determined that an applicant for use variance must establish that an unnecessary hardship attends the property that is the subject of the variance by providing evidence that:

1. The physical conditions of the property are such that it cannot be used for a permitted purpose; or
2. The property can be conformed for a permitted use only at a prohibitive expense; or
3. The property is valueless for any purpose permitted by the zoning ordinance.

See, for example, *Oxford Corp. v. Zoning Hearing Bd.*, 34 A.3d 286 (Pa. Cmwlth. 2010). Even if the applicant's property value is depressed for residential use because of traffic conditions or the existence of some commercial use across the street, such conditions have been held not to constitute a hardship when the entire neighborhood is affected in addition to the applicant's property.

Hybrid Variance

The courts recently have described a variance from a requirement in the zoning ordinance that contains both dimensional and use elements as a "hybrid variance." See *PohligBuilders, LLC v. Zoning Hearing Bd.*, 25 A.3d 1260 (Pa. Cmwlth. 2011) (variance from a provision that limits construction in an area containing steep slopes is a hybrid, neither a dimensional variance nor a use variance). An applicant for grant of a hybrid variance must satisfy the criteria for the grant of a variance set forth in Section 910.2 of the MPC (stated above) subject to the relaxed quantum of proof unnecessary hardship under *Hertzberg*.

Because the recognition of a hybrid variance is of such recent vintage, zoning officers and zoning hearing boards should consult with their solicitor when considering this type of a variance.

Validity Variance

A validity variance prevents the operation of a municipal regulation that effectively denies all use of a particular property.

The applicant for a validity variance must establish that:

1. The effect of the regulations complained of are unique to the applicant's property and are not merely a difficulty common to other lands in the neighborhood; and
2. The regulation deprives the owner of the use of the property.

The applicant bears the burden of proof on both elements.

A validity variance is appropriate when a property owner shows that "the land has no value or only distressed value as a result of the regulation." This includes proof that either (i) the physical features of the property are such that it cannot be used for a permitted purpose; (ii) the property can be conformed for a permitted use only at a prohibitive expense; or (iii) that the property has no value for any purpose permitted by the zoning ordinance. The test for a validity variance is not whether the owner could make more profit from this proposed use, but whether the zoning allows a reasonable use, thereby avoiding confiscation. The grant of a validity variance permits the proposed use of the property, if reasonable.

A validity variance seeks relief for particular property. It does not challenge the constitutionality of the zoning ordinance as does a substantive validity challenge filed with the zoning hearing board or a curative amendment application to the governing board.

Variance by Estoppel

The Pennsylvania Courts have established the possibility of granting relief for the continuation of an unlawful use under the theory of a variance by estoppel. The landowner primarily bases claim to a variance by estoppel on municipal inaction that has amounted to active acquiescence in an unlawful use.

A variance by estoppel is different from a claim to a vested right. While a variance by estoppel claims a right resulting from municipal inaction, a claim for a vested right relies on municipal action in the form of an issued permit.

For this type of variance application, the MPC provides no guidance. Judicial decisions provide the criteria for the zoning hearing board to apply when adjudicating a request for a variance by estoppel. The four factors are:

1. A long period of municipal failure to enforce the law, wherein the municipality knew or should have known of the violation, in conjunction with some form of active acquiescence by the municipality in the illegal use;
2. The landowner acted in good faith and relied innocently upon the validity of the use throughout the proceedings;
3. The landowner has made substantial expenditures in reliance upon his belief that his use was permitted; and
4. The denial of the variance would impose an unnecessary hardship on the applicant, such as the cost to demolish an existing building.

The applicant bears the burden of proving each of these factors and must do so by clear, precise, and unequivocal evidence.

Variations vs. Rezoning or Zoning Ordinance Text Amendment

It is appropriate for a zoning hearing board to grant a variance to remedy a hardship which is unique to the particular property. As an example, if a lot is too small to be used as zoned, then a variance may be granted to permit a reasonable use of the property without need to rezone the land.

On the other hand, it is not appropriate for a zoning hearing board to grant a variance without finding a hardship meeting the criteria of the MPC or the courts. If a board, without the presence of a hardship, grants a variance to allow a use not permitted for the property by the zoning ordinance, or to allow a building according to dimensions different than those required in the zoning ordinance, it is effectively changing the zoning ordinance. Only the governing body, not the zoning hearing board, has authority to change or amend the zoning ordinance.

Where there is a significant request for a variance, or repeated requests for similar variances, it may be indicative of a need for amendment of the zoning ordinance to accommodate such uses or development opportunities without variances. The zoning hearing board should monitor variance applications and report to the municipal planning agency and governing body of any need to consider amendments.

Procedure for Variance

The zoning hearing board must hold a hearing on the application for variance, subject to public notice, and issue a written decision. The zoning hearing board's hearing procedures are more fully discussed in the *Planning Series #6: The Zoning Hearing Board*.

X. Core Elements – Special Exception, Conditional Use, Variance

Applicant

Section 913.3 of the MPC specifies who may file an application for variance or special exception. An application for a variance or special exception may be submitted by any landowner or any tenant with the permission of such landowner. Although the MPC does not specify who may file an application for conditional use, the MPC definitions of applicant and landowner likewise apply.

Section 107(a) of the MPC defines “landowner” to include:

- **The legal owner(s) of land**
- **The beneficial owner(s) of land, including the holder of an option or contract to purchase (whether or not such option or contract is subject to any condition)**
- **A lessee, if authorized under the lease to exercise the rights of the landowner**
- **A person having a proprietary interest in land**

Parties and Standing

Section 908(3) of the MPC specifies that, in addition to the applicant “parties to the hearing shall be the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person (including civic or community organizations) permitted to appear” by the zoning hearing board or governing body. The zoning hearing board and governing body are authorized to require that all persons who wish to be considered as parties enter an appearance in writing on a form provided by the zoning hearing board or governing body for that purpose. However, the form functions simply as a means to indicate to the zoning hearing board or governing body one’s interest in being considered as a party; it does not guarantee party status.

The zoning hearing board and governing body decide who may participate in the hearing before it as a party, subject to the provisions of Section 908(3) of the MPC, and formally acknowledge such parties for the record. Standing to participate as a party may be challenged by the applicant. Such challenges should be raised at the time the person is seeking party standing.

Where the MPC permits standing to any person “affected” by the application, this provision requires the zoning hearing board or governing body to consider if a person claiming party status is “affected” by the matter before it. The courts have determined that a claim based purely on taxpayer status is not sufficient to establish standing as a “person affected by the application.” By contrast, a person whose property, residence, or business abuts the property that is the subject of the appeal is affected and has standing. However, as the distance between the property of the individual seeking affected party status and the property that is the subject of the proceeding increases, standing becomes less certain.

Standing to participate as an affected person is not foreclosed merely because the affected person’s property is located in another municipality.

Party Rights

A party has the right to be represented by counsel. A party must be given the opportunity to respond, present evidence (through oral testimony of witnesses and exhibits), and cross-examine adverse witnesses on all relevant issues.

Evidence

All testimony must be received under oath or affirmation.

Unsworn statements offered during the course of the hearing or upon the close of the record of the hearing do not constitute legal evidence of record. The zoning hearing board or governing body may not consider unsworn statements when making its findings and decision. Unsworn statements also are not part of the record in the event of an appeal taken from the decision.

Formal rules of evidence do not apply in hearings conducted on applications for variance, special exception, or conditional use. Section 908(6) of the MPC authorizes the zoning hearing board or governing body to exclude any such irrelevant, immaterial, or unduly repetitious evidence that may be heard during the course of the public hearing. Hearsay evidence – such as testimony about something the witness states was reported to him or her by another who first-hand heard or saw it – if not objected to, may be given its natural probative value.

Section 908(8) of the MPC limits communications and the receipt of information outside the context of the hearing once an application has been submitted. The MPC prohibits direct or indirect communications with any party in connection with any issue involved in the application except upon notice and opportunity for all parties to participate. Likewise, the MPC prohibits taking notice of any communication, report, or staff memoranda (excluding solicitor advice) unless all parties are afforded an opportunity to contest the material. Finally, the MPC prohibits inspection of the property that is the subject of the application with any party unless all parties are given an opportunity to participate in the inspection.

The zoning hearing board or governing body is charged with the duty to make such findings of fact as are necessary to make its decision on an appeal or application. The zoning hearing board and governing body also are cloaked with the authority to make determinations as to the weight to be given to the evidence and to the credibility of a witness, testimony, or exhibit. As fact finder, the zoning hearing board has the power to reject even uncontradicted testimony if the board finds that testimony to be lacking in credibility.

Hearing

Section 908(1.2) of the MPC establishes detailed time requirements for conducting a hearing by the zoning hearing board on an application for variance or special exception. Section 913.2(b)(2) of the MPC, by cross-reference, imposes the same requirements upon the governing body when hearing an application for conditional use. The MPC requires that the first hearing on the application be commenced within 60 days of the date of receipt of the application. It further requires that a subsequent hearing be held within 45 days of a prior hearing. An applicant is provided 100 days to complete the presentation of his proceeding and, upon request, provided a minimum of seven hours of hearing within the 100 days. Party opponents to the application have 100 days to complete the presentation of their case in opposition. If an applicant requests and is granted additional hearings, the party opponents must be granted an equal number of additional hearings. As with all procedural requirements, the applicant may waive his procedural rights in writing. Failure of the municipality to conform to these procedural requirements may give rise to a deemed decision approving of the application.

An application may first be administratively reviewed for completeness before accepted. The 60-day requirement for commencement of a hearing on the application does not begin to run until the application is accepted as complete. It is strongly advised that the municipality intending to conduct completeness reviews on applications make such procedures known as part of the application form and/or in the zoning ordinance itself.

Hearing Officer

Instead of conducting the public hearing itself, the zoning hearing board or governing body may appoint a member of the board or an independent attorney as a hearing officer charged with conducting the hearing. Whether the zoning hearing board, governing body, or a hearing officer conducts the hearing, the findings and decision must be made by the zoning hearing board or governing body. However, the applicant may, prior to decision, agree to waive the decision or findings by the zoning hearing board or governing body and accept the decision or findings of the hearing officer as final.

Stenographic Record

Section 908(7) of the MPC explicitly requires a *stenographic* record of the hearing on a variance and special exception in order for the courts to have a complete and accurate record in the event of an appeal. Court rulings indicate that transcripts should conform to the transcripts prepared for civil trials. Minutes, notes, and tapes of the hearing are not legally sufficient.

While the MPC does not specifically require a stenographic record for a conditional use hearing, the MPC characterizes the proceedings as adjudicative, and a stenographic record would be prudent. Without a stenographic transcript, the municipality runs the risk that the court will return (remand) the case to the zoning board or governing body for a rehearing.

Mediation

Section 908.1 of the MPC authorizes the use of mediation as an *aid* to completing proceedings for variance, special exception, and conditional use, that is as a means to resolve one or more matters in dispute. Mediation may only supplement the procedures otherwise required by the MPC; mediation may not substitute for the required procedures. The use of mediation is wholly voluntary.

Decision

Following the close of the evidentiary record (the hearing), a zoning hearing board or governing body is permitted, but not required, to enter into executive session to deliberate on an application. A zoning hearing board or governing body must reenter open session to consider a motion for a proposed action on the application and to vote on the motion. The result is a verbal decision.

However, a zoning hearing board and governing body are required to issue a written decision on an application. Where no decision is called for, the zoning hearing board or governing body must issue only written findings. An appeal to the courts is taken in the form of a land use appeal from the written decision.

Findings of Fact and Conclusions

Section 908(9) of the MPC requires that, where an application is contested (objected to by a party) or denied, the written decision of the zoning hearing board or governing body must be accompanied by findings of fact, the conclusions based on these facts, and the reasons that such conclusions were reached.

The MPC does not specifically require a decision granting an uncontested application to be accompanied by findings of fact or written decision. However, it would be prudent for a zoning hearing board or governing body to do so to document its action.

Section 908(9) of the MPC also requires that any conclusions based on the MPC or any ordinance, rule, or regulation “contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found.”

Timeliness of Findings and Decision

A written decision or, when no decision is called for, written findings must be issued within 45 days of the last hearing.

The last hearing refers to the hearing at which the evidentiary record (receipt of testimony and offer of exhibits) has been closed. The close of the hearing is not extended by an opportunity for parties to make oral or written argument after the close of the hearing.

However, where the hearing officer conducts the hearing, and there has been no stipulation that his or her decision or findings are final, the zoning hearing board or governing body must make the hearing officer’s report and recommendations available to the parties within 45 days. The zoning hearing board or governing body then has 30 days after issuance of the hearing officer’s report to issue the written decision.

The applicant may offer to extend the time period for the issuance of the written decision.

Deemed Decision of Approval

Failure to comply with certain procedural requirements of the MPC will result in a decision “deemed to have been rendered in favor of the applicant.” This is often referred to as a “deemed decision” or “deemed approval.” Persons aggrieved by the deemed decision may file an appeal. However, in the case of a deemed decision on a conditional use application, the municipality is not permitted to file an appeal.

Such deemed decision occurs when:

1. The zoning hearing board or governing body fails to hold a public hearing on an application within 60 days of the filing of the application;
2. The zoning hearing board or governing body fails to conduct or complete the required hearings as specified by Section 908(1.2) of the MPC; or
3. A written decision is not issued within the required time period specified by Section 908(g) of the MPC or within the period extended in writing or on the record by the applicant.

The purpose of the harsh legislative provision for a deemed approval is to assure timely public hearing and decisions on an application and to minimize dilatory conduct by the zoning hearing board or governing body.

A protestant or person affected by an opposing application is not considered an applicant and enjoys no rights to a deemed decision.

A deemed approval is not self-enforcing. When a deemed approval occurs, the zoning hearing board or governing body must publish public notice of the deemed approval within 10 days from the last day the zoning hearing board or governing body could have met to issue a decision. Where the zoning hearing board or governing body fails to provide this public notice, the applicant may do so. This publication of public notice of the claim for a deemed approval triggers the start of the appeal period by a person aggrieved by the decision.

Notice of Decision

Section 908(10) of the MPC requires that a copy of the final decision, or where no decision is called for, of the findings of fact issued by the zoning hearing board or governing body must be delivered to the applicant personally or must be mailed to him not later than the day after the date of the decision.

To all other persons (including a party) who have filed their name and address with the zoning hearing board or governing body not later than the last day of the hearing, the zoning hearing board or governing body must provide by mail or hand delivery a brief notice of the decision or findings with a statement of the place at which the full decision or findings may be examined.

XI. Conflict of Interest

In hearing variances, special exceptions, and conditional uses, the zoning hearing board and governing body grant applications and also function in a quasi-judicial capacity. In the course of hearings on a variance, special exception, or conditional use, conflict of interest issues may arise from two sources: (i) financial conflicts of interest governed by Section 1103(a) of The Public Official and Employee Ethics Act, 65 Pa.C.S. § 1101 et seq. (Ethics Act) or (ii) conflicts of interest under principles of due process, that is the right to be heard by a fair and impartial tribunal. A member of a zoning hearing board or governing body presented with a conflict of interest under the Ethics Act must recuse himself or herself from the proceeding. A member of a zoning hearing board or governing body must recuse himself or herself where the record demonstrates his or her bias, prejudice, capricious disbelief, or prejudgment. However, opinions formed by an individual member of the municipal board “on the basis of facts introduced or events occurring in the course of the current proceedings... do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus... remarks during the course of a [hearing] that are critical or disapproving of, or even holistic to, [the applicant, parties] ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial [outside of the hearing] source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment possible.”

XII. Appeals to Court

Article X-A of the MPC governs all matters of appeal taken from a decision of the zoning hearing board or governing body. Section 1001-A of the MPC mandates that the filing of a land use appeal is the exclusive means for securing review of the zoning hearing board or governing body's decision. Section 1002-A of the MPC further mandates that a land use appeal must be brought within 30 days after the issuance of the decision by the zoning hearing board or governing body. Upon expiration of the 30-day period, the court is without jurisdiction to hear the land use appeal.

Land use appeals are filed with the county court of common pleas. In hearing such land use appeals, the court of common pleas is not functioning as a trial court, but as a court of appeal. As an appellate court, the court of common pleas will not disturb the findings of fact and credibility findings made by the zoning hearing board or governing body. Rather, the court is limited to determining whether there has been a constitutional violation, an error of law, or an abuse of discretion by the zoning hearing board's or governing body's decision.

However, a party may request the county court of common pleas to receive additional evidence. The decision to hear additional evidence rests with the discretion of the court of common pleas. Where the court of common pleas hears additional evidence, it is then empowered to make its own findings of fact and conclusions of law.

Upon the filing of a timely land use appeal, Section 1003-A of the MPC requires the court to issue, by registered or certified mail, the copy of the land use appeal notice together with a writ of certiorari commanding the zoning hearing board to certify its entire record of the matter that is the subject of the appeal to the court within 20 days after the receipt of the writ.

Appeal from the decision of the county court of common pleas must be taken to the Commonwealth Court of Pennsylvania. Such appeal must be filed within 30 days of the date of the decision of the county court of common pleas.

Expiration of Approvals of Conditional Uses and Special Exceptions and Grants of Variance

A zoning ordinance may contain a provision that provides that the approval of a special exception or conditional use or grant of a variance will automatically expire within a reasonable period of time if a building permit has not been obtained and/or development has not commenced. A decision of the Commonwealth Court suggests that where a later amendment to the zoning ordinance limits the life of a prior-granted special exception, such provision will apply to the granted special exception if (i) the amendment contains no substantive change regarding the use of the land, (ii) the amendment imposes a reasonable time limit, and (iii) the amendment is applied so that the full time limit is allowed from the date of the enactment of the amendment. *Pyle v. Municipality of Penn Hills* 517 A.2d 583 (Pa. Cwmlth.1986). Provision should be made for the grant of an extension of time for good reason.

XIII. Enforcement of Conditions

If a landowner violates a condition attached to grant of a special exception, conditional use, or variance, it is in essence a violation of the zoning ordinance. The zoning hearing board has no enforcement powers. It exists solely as an adjudicative body to review matters brought to it under the respective provisions of the MPC and cannot act as an enforcement officer even in respect to violation of one of its own previously issued approvals or conditions. Likewise, the governing body has no enforcement powers as it is an adjudicative body when considering the conditional use application.

The zoning officer has the authority to enforce a condition through an enforcement notice. The landowner would then be entitled to file a timely appeal with the zoning hearing board under Section 909.1(a)(3) of the MPC to decide whether the landowner had in fact violated a condition. If the violation of the condition has not been corrected or abated, and no appeal has been taken from the enforcement notice, a municipality may institute any appropriate action or proceeding to prevent, restrain, correct, or abate the violation.

XIV. Administrative Fees

The governing body may set reasonable administrative fees for application for variance, special exception, and conditional use. The MPC authorizes these fees to include (i) compensation for the secretary and members of the zoning hearing board, (ii) notice and advertising costs, (iii) necessary administrative overhead connected with the hearing, and (iv) one half of the cost of the stenographer's appearance fee. However, fees should be reasonable and structured to recover the municipality's expenses. A municipality cannot use its powers to charge administrative fees for the purpose of raising general revenues or to frustrate or prevent zoning applications.

The MPC prohibits a municipality from imposing the following administrative fees: (i) the legal expenses of the zoning hearing board, (ii) expenses for the engineering, architectural, or other technical consultants or expert witness costs, and (iii) transcriptions.

XV. Conclusion

Special exceptions, conditional uses, and variances are important elements of a community's zoning ordinance, and a thorough knowledge of each is indispensable to the proper functioning of the ordinance. The preceding pages have tried to explain these terms and eliminate some of the misconceptions and misunderstandings associated with each.

XVI. Planning Assistance from DCED

DCED's Governor's Center for Local Government Services (Center) provides a full range of technical and financial services to all of Pennsylvania's local governments. The Center is the principal state agency responsible for helping with planning and land use matters discussed in this publication.

Local government officials, planners, and other interested individuals have several sources of assistance from the Center:

- **Toll-free telephone number** – 888-223-6837. Callers will be connected with staff that has knowledge of planning, land use, zoning, subdivision and land development, and the PA Municipalities Planning Code.
- **Website** – www.newPA.com/local-government. There are helpful pages under Community Planning, plus information on the topics listed below.
- **Publications** – www.newPA.com/local-government/publications. This and the other nine Planning Series publications listed in the Preface can be downloaded and printed for free, or hard copies can be purchased at cost. The website also has publications with suggested provisions for floodplain management ordinances, plus publications on many topics from fiscal management to intergovernmental cooperation to open meetings.
- **Training** – <https://palocalgovtraining.org>. DCED provides funding for local government training programs via the PA Local Government Training Partnership. There are training courses, videos, and online instruction on a variety of topics, including planning and land use, plus ten fact sheets on planning and land use topics.
- **Land use law library** – www.landuselawinpa.com. DCED and the PA Local Government Training Partnership maintain an online library of significant court cases on zoning, subdivision and land development, and other land use topics.
- **Planning and land use eLibrary** – <http://elibrary.pacounties.org>. DCED and the County Commissioners Association of Pennsylvania maintain an online library of comprehensive plans, zoning ordinances, and subdivision and land development ordinances in effect in Pennsylvania counties, cities, boroughs, and townships.
- **Financial assistance** – www.newPA.com/find-and-apply-for-funding. Currently DCED provides funding for local government planning through the Municipal Assistance Program. MAP offers up to 50 percent grants for costs of undertaking comprehensive plans, zoning ordinances, subdivision and land development ordinances, and more.

XVII. Other Planning Assistance

Assistance and training on planning and land use are available from other sources:

- **County planning agencies** – Pennsylvania counties have a long tradition of being a source of capacity and expertise in planning and land use. Currently, every county has a planning commission, department, or both, or other agency like a development department that handles planning matters. Every county has staff involved in planning. Many county planning agencies offer assistance to local governments in their counties.
- **American Planning Association (APA)** – The Pennsylvania Chapter has an annual conference with many speakers and sessions on topics from local to national interest, plus training workshops and other educational events and information: <http://planningpa.org>. The national organization has an annual conference, publications, and a variety of audio, web, and e-learning resources: <https://www.planning.org>.
- **Local government associations** – In addition to programs through the PA Local Government Training Partnership, Pennsylvania's statewide associations representing different categories of local governments also offer annual conferences and training programs, including planning and land use, to their member local governments.
- **Penn State Extension** – Statewide Extension programming includes courses, webinars, and publications on community issues including planning and land use. Within that is the Pennsylvania Municipal Planning Education Institute which offers training programs on planning, zoning, and subdivision and land development: <http://extension.psu.edu/community>.
- **Universities and colleges** – Several Pennsylvania universities and colleges offer degree programs in planning. Others offer planning-related courses in geography or design degrees. Many have a community service objective and assist community groups and local governments with faculty and/or student service projects.

Appendix I: Pertinent MPC and Sunshine Act Definitions

Selected MPC Definitions

Section 107 (A)

Conditional use – a use permitted in a particular zoning district pursuant to the provisions in Article VI.

Public hearing – a formal meeting held pursuant to public notice by the governing body or planning agency, intended to inform and obtain public comment, prior to taking action in accordance with this act.

Public meeting – a forum held pursuant to notice under the act of July 3, 1986 (P.L. 388, No. 84), known as the Sunshine Act.

Public notice – notice published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall state the time and place of the hearing and the particular nature of the matter to be considered at the hearing. The first publication shall not be more than 30 days and the second publication shall not be less than seven days from the date of the hearing.

Special exception – a use permitted in a particular zoning district pursuant to the provisions of Articles VI and IX.

Variance – relief granted pursuant to the provisions of Articles VI and IX.

Section 107 (B)

The following words and phrases when used in Articles IX and X-A shall have the meanings given to them in this subsection unless the context clearly indicates otherwise:

Board – any body granted jurisdiction under a land use ordinance or under this act to render final adjudications.

Decision – final adjudication of any board or other body granted jurisdiction under any land use ordinance or this act to do so, either by reason of the grant of exclusive jurisdiction or by reason of appeals from determinations. All decisions shall be appealable to the court of common pleas of the county and judicial district wherein the municipality lies.

Determination – final action by an officer, body or agency charged with the administration of any land use ordinance or applications thereunder, except the following:

1. the governing body;
2. the zoning hearing board; or
3. the planning agency, only if and to the extent the planning agency is charged with final decision on preliminary or final plans under the subdivision and land development ordinance or planned residential development provisions.

Determinations shall be appealable only to the boards designated as having jurisdiction for such appeal.

Hearing – an administrative proceeding conducted by a board pursuant to Section 909.1.

Land use ordinance – any ordinance or map adopted pursuant to the authority granted in Articles IV, V, VI, and VII.

Report – any letter, review, memorandum, compilation, or similar writing made by any body, board, officer, or consultant other than a solicitor to any other body, board, officer or consultant for the purpose of assisting the recipient of such report in the rendering of any decision or determination. All reports shall be deemed recommendatory and advisory only and shall not be binding upon the recipient, board, officer, body, or agency, nor shall any appeal lie therefrom. Any report used, received, or considered by the body, board, officer, or agency rendering a determination or decision shall be made available for inspection to the applicant and all other parties to any proceeding upon request, and copies thereof shall be provided at cost of reproduction.

Selected Definitions from the Sunshine Act

Deliberation – the discussion of agency business held for the purpose of making a decision.

Meeting – any prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action.

Official action –

1. Recommendations made by an agency pursuant to statute, ordinance or executive order.
2. The establishment of policy by an agency.
3. The decisions on agency business made by an agency.
4. The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report, or order.

Special meeting – a meeting scheduled by an agency after the agency's regular schedule of meetings has been established.

**Pennsylvania Department of Community & Economic Development
Governor's Center for Local Government Services**

Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

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