**Rationale for amendments:**

**Response to changes in Chapter 101**

**Rectify code and BOA rules of procedure and state code**

**Introduce pre-review by PC**

**Process improvements**

**Weird language and internal inconsistencies; restrict to chpts 101 & 185**

**ARTICLE X Board of Adjustment**

[**§ 185-64 Organization**](http://ecode360.com/8864590#8864589)

1. **Creation and Purpose.** As per Title 22 Del C. §321, the Town of Dewey Beach created a Board of Adjustment by Ord. \_\_\_\_ on \_\_\_\_\_\_\_\_\_. Under the rules and regulations of this Article of the Town’s Zoning Code the Board of Adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make exceptions to the terms of the Town’s zoning and flood loss reduction regulations provided such exceptions are in harmony with the general purpose and intent of the Code and in accordance with general or specific rules contained therein.
2. **Composition.** The Board of Adjustment shall be comprised of not less than 3 nor more than 5 members who shall have knowledge of the problems of urban and rural development and who, at the time of appointment and throughout the term of office, shall not be candidates for nor members of the legislative body (i.e., Mayor and Town Commissioners) nor employees of the Town nor contractors for the Town. At least 3 members of the Board of Adjustment shall be residents of the Town of Dewey Beach.
3. **Appointment and Terms.** The Mayor of the Town of Dewey Beach shall appoint each members of the Board of Adjustment, and all such appointments shall be confirmed by a majority vote of the elected members of the legislative body. All appointments shall be for a term of 3 years, provided that such terms ensure that the term of at least 1 member shall expire each year. If not, an appointment for a term shorter than 3 years shall be made. A member of the Board of Adjustment may be reappointed for no more than one additional term .
4. **Officers.** The Board of Adjustment shall elect from amongst its members a chairperson and a secretary. The chairperson shall be a resident of Dewey Beach. In the temporary absence of the chairperson, the Board of Adjustment shall designate an acting chairperson according to its rules of procedure.
5. **Removal from Office.** Any member of the Board of Adjustment may be removed from office by the Town’s legislative body for cause after a public hearing by a majority vote of all the elected members of the legislative body.
6. **Filling a Vacancy.** A vacancy occurring otherwise than by the expiration of term shall be filled for the remainder of the unexpired term in the same manner as an original appointment.

[**§ 185-65 Rules and Procedures.**](http://ecode360.com/8864590#8864590) **Application; stay of activity; hearing; notice; record**

1. **Rules of Procedure.** The Board of Adjustment shall establish rules for the conduct of its affairs and may, from time to time amend such rules of procedure.

1. **Meetings.** Meetings of the Board of Adjustment shall be at the call of the chairperson or, in the chairperson’s absence, the acting chairperson.
	1. All meetings of the Board of Adjustment shall be open to the public, except for Executive Sessions as authorized by the Delaware Freedom of Information Act.
	2. Upon receiving an application or request the Board of Adjustment shall schedule a public hearing to occur within 60 calendar days following receipt of complete application or request and give proper notice thereof to the parties in interest and to the public.
	3. For the conduct of any hearing, a quorum shall not be less than three resident members of the Board of Adjustment.
	4. An affirmative vote of a majority of the members of the Board of Adjustment present, but not less than two, shall be required to overrule any decision, ruling or determination of any official charged with enforcement of this Chapter, or to approve any special exception or grant any variance as described herein.
	5. The Board of Adjustment shall have the power to issue subpoenas for the attendance of witnesses and the production of records and may administer oaths and take sworn testimony.
	6. At any hearing, any party may appear in person or by agent or by attorney.
	7. The Board of Adjustment shall provide adequate time during each hearing for presentation of the Town’s rationale for its decision or interpretation of the relevant code or regulation, the applicant’s evidence, statements from members of the public both in support of the application and opposed thereto, and rebuttal and closing statements from representatives of the Town and the applicant.
	8. The Board of Adjustment shall keep minutes of its proceedings and other official actions. At a minimum such minutes shall record the vote of each member upon each motion or, if absent or failing to vote indicating such fact. In addition, the Board of Adjustment shall record its proceedings as part of the record of its proceedings and so that a verbatim transcript of all hearings and deliberations may be prepared in the event an appeal is filed.
	9. The Board of Adjustment shall establish and maintain a complete record of each application coming before it, including all relevant materials, correspondence maps, and diagrams provided by the applicant, Town employees and Planning Commission, expert witnesses, and members of the public, all of which shall be kept on file in Town Hall and shall be a public record.
	10. The Board of Adjustment shall not be required to decide any proceeding immediately following the close of a scheduled hearing, but may table action in order to consult with legal counsel, review the meeting record, seek additional information or take matters under further deliberation.
	11. The Board of Adjustment shall decide each issue before it within 30 calendar days of the conclusion of its hearing(s) on such matters, except that a 30 calendar day extension shall be allowed for good cause shown.
	12. The Board of Adjustment shall file it decision with the Town Manager. Only a written decision ratified by a majority vote of the participating members of the Board of Adjustment shall qualify as its decision on any such matter. The Town Manager shall send all parties of record a copy of such written and ratified decision by first class mail within 5 working days of receiving such decision.
2. **Applicant.** Applications for relief from a decision of the Town Building Official, other Town official or Planning Commission (“appeal”) may be made by any person affected by any decision of the Building Official, other Town official, or Planning Commission. A request for approval of a special exception or a request for granting of a variance may be made by any Town property owner.
3. **Submission.** Such appeal applications shall be made to the Town Manager within 30 calendar days after the effective date of the decision being appealed. Appeals and requests as described herein shall be made on such forms and in accordance with such rules as then currently adopted by the Board of Adjustment and include all required supporting materials, including relevant correspondence, maps and diagrams. At a minimum, such applications shall contain the following information: Name, address, and telephone number of the applicant; legal description of the property; parcel map; description of the existing use; description of the proposed use; location of the floodplain; and description of the reason for the appeal, or reason for and description of the special exception requested, or reason for and description of the variance sought.
4. **Record.** Upon receipt of any appeal or request as described herein the Town Manager shall create a file and make all relevant materials readily available for inspection by the public in Town Hall and on the Town web site. This file shall be promptly updated as new materials become available, for example from the Building Official, additional submissions by the applicant, public input and relevant Board of Adjustment actions.
5. **Preliminary Screening.** The application of appeal or request shall be transmitted promptly to the Secretary of the Board of Adjustment who shall verify the application is complete or identify additional items required for the application to be verified complete.
6. **Town Input.** In the instance of an appeal, the Building Official, other Town official, and/or Planning Commission Chair shall promptly transmit to the Town Manager all documents constituting the record upon which the decision or action being appealed was based, including all relevant electronic documents, for incorporation into the record. In the instance of a request for a special exception or variance the Building Official, other Town official and/or Planning Commission Chair shall promptly transmit relevant interpretations of the code and how approval of such a request might impact the code and neighboring property.
7. **Fixing a Date.** Upon receipt of a complete application the Secretary of the Board of Adjustment shall place the matter on the Board of Adjustment’s docket, advertise a public hearing thereon, and give written notice of such hearing to the parties in interest.
8. **Noticing.** Public notice of any such hearing shall include publication of the details of the appeal/request in a newspaper of general circulation in the Town, posting of such details outside Town Hall and the Life Saving Museum, and posting in a conspicuous location on the Town’s web site at least 15 days prior to the hearing. Further, at least 15 days’ notice of the details of such hearing shall be sent to all Town property owners whose boundaries are within 200 feet of the boundaries of the property which is the subject of the hearing. Such notice shall be sent by first class United States Mail to the last known address to which the Town’s tax bills are sent.
9. **Planning Commission report.** Prior to any hearing before the Board of Adjustment, the Planning Commission shall hold a public hearing to review such an application for appeal or request for a special exception variance from the requirements of this Chapter and prepare a report and recommendation to the Board of Adjustment based on the Town Code and factors in this section and the limitations in § 185-68. In conducting its public hearing and subsequent deliberations the Planning Commission shall follow the general administrative provisions of Article XI of the Chapter.
10. **Posting of Records**. Copies of the complete application file shall be provided to the members of the Board of Adjustment, and placed in Town Hall and posted on the Town web site for public inspection at least 15 working days prior to the scheduled hearing.
11. **Yard Sign.** In addition to any public notice required by this Article, the Town Manager shall cause to be posted at one or more prominent and easily visible places on the property which is the subject of the hearing, on an eighteen-inch by twenty-four-inch yellow cardboard sign provided by the Town fos such purpose, a public notice setting forth the date, time, and place at which the Board of Adjustment has scheduled the hearing, the name of the party who has requested the hearing, the application number assigned to the hearing request, a description of the property involved, and a statement, in plain language, of the nature of the matter involved. The notice shall also list the address, email, and telephone number of the Town’s Building Official for interested parties seeking further information on the hearing. One such notice sign shall be posted for each street abutting said property. It shall be the responsibility of the party who has requested the hearing, and not the responsibility of the Town, to maintain the notice sign(s) in good condition during the posting period. Said notice sign(s) shall be posted at least 15 days prior to the hearing and shall remain posted until the Board of Adjustment has taken a final action upon the requested hearing.

1. **Stay of Proceedings.** An application of appeal stays all proceedings in furtherance of the action or decision being appealed unless the Town Building Official certifies in writing to the Town that a stay would cause imminent peril to life or property. In such case proceedings shall not be stayed other than by a restraining order granted by the Board of Adjustment or by a court having jurisdiction over the application. . ~~Such actions or proceedings may be stayed by a restraining order granted by the Board of Adjustment or by a court of record based on good cause shown, including imminent peril to life or property. Any and all work done following the application of any such appeal shall be at the owner's risk that the appeal will be granted, in which case such work shall not be the basis for the granting of any subsequent request for a variance.~~
2. **Consideration.** In considering applications for an appeal, or for a special exception from or variance to the requirements of this Chapter, the Board of Adjustment shall consider and make findings of fact on the report and recommendation of the Planning Commission, all relevant materials submitted by the applicant, any registered professional land surveyor or registered professional engineer, or interested member of the public, all subsequent Board of Adjustment evaluations and considerations, and all requirements specified in other sections of this Chapter and Town code and regulations. Additional regulations and limitations related to an application for a variance from the regulations of Chapter 101 Flood Loss Reduction.

1. **Fee Schedule.** All fees and charges shall be as established from time to time by the Town Commissioners of Dewey Beach and are included in Chapter \_\_\_\_\_ of the Town Code. All fees and charges shall be submitted as a part of any application or request.

[**§ 185-66 Powers.**](http://ecode360.com/8864590#8864592)

The Board of Adjustment shall have the following powers:

1. **Interpretation.** To decide any application for an interpretation of the Official Zoning Map where there is uncertainty as to the location of a district boundary; to determine proposed how a use should be classified where there is any uncertainty, for example, is a specific use a permitted use, a permitted accessory use, a conditional use, a use permitted by special exception or a prohibited use.

1. **Appeal.** To decide any appeal where it is alleged there is an error in any order, requirement, decision or determination made by the Building Official, any other code enforcement or administrative official, or the Zoning Commission in the administration or enforcement of this Chapter. In exercising its powers, the Board of Adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision or determination being appealed and make such order, requirement, decision or determination as ought to be made. To that end the Board of Adjustment shall have all the powers of the Building Official, other Town official or Planning Commission responsible for the initial order, requirement, decision or determination.
2. **Special Exception.** To approve any applications for a special exception to requirements and regulations in this Chapter over which the Board of Adjustment is specifically authorized to regulate under the provisions of this Chapter.
3. **Variance.** To grant any application for a variance from any zoning or flood loss reduction ordinance, code or regulation unless prohibited to do so by the Town Charter or Federal regulations, provided:
	1. special conditions or exceptional situations exist such that a literal interpretation of specific zoning ordinance, code or regulation(s) will result in unnecessary hardship or exceptional practical difficulties to the owner of property; and
	2. the granting of such a variance will not be contrary to the public interest and will not result in any substantial impairment of any zoning or flood loss reduction ordinance, code, regulation or map or any other Town ordinance, code, or regulation; and
	3. the overall intent and purpose of the ordinance, code or regulation from which the variance is being sought shall be observed and substantial justice done.
4. **Subpoena Power.** The Board of Adjustment shall have the power to issue subpoenas for the attendance of witnesses and the production of records and may administer oaths and take testimony. Failure to comply with any such notification shall be subject to prosecution by the Town as a \_\_\_\_\_\_\_\_\_ violation under Town Code Chapter \_\_\_\_\_\_\_\_, and subject fines and penalties as per Section \_\_\_\_\_\_\_\_\_\_\_\_ of the Town Code.

[**§ 185-67 Special Exceptions.**](http://ecode360.com/8864590#8864599)

Special exceptions to the regulations of this Chapter serve to promote the usefulness of such regulations and to supply the necessary elasticity to their efficient operation by providing for adjustments in the relative location of structures and their uses. The Board of Adjustment may permit the following exceptions to structural limitations, and structure locations and uses as special exceptions if it finds that the approval of any such special exception application will not substantially adversely affect the uses or values of adjacent and neighboring properties.

1. **Structural limitations.** Under special circumstances play houses without plumbing larger than 150 square feet and accessory buildings greater than 200 square feet may be approved by the Board of Adjustment as a special exception to the Town Zoning Code.

1. **Yard exceptions.** Under special circumstances the Board of Adjustment may approve exceptions to required setbacks to facilitate the installation of pergolas, gazebos and similar incidental structures provided any such structure is not located closer than three feet to a property line.
2. **Uses.** Uses Permitted as Special Exceptions when approved by the Board of Adjustment under the procedures of this Article are listed in Table 1 Uses in Residential Districts and Table 3 Uses in Resort Business Districts in this Chapter.
	1. Special exceptions to the parking requirements in this Chapter may include:
		1. Provisions for required off-street parking areas to be provided in an area adjacent to or at a reasonable distance from the premises on which parking areas are required by the parking regulations in cases where practical difficulties are encountered in locating such parking areas on the premises and where the purpose of these regulations to relieve congestion in the streets would best be served by permitting such parking off the premises;
		2. A waiver or reduction of the parking requirements of a commercial-use building whenever the character of uses in the building is such as to make unnecessary the full provision of parking facilities.

[~~(c)~~](http://ecode360.com/13768801#13768801) ~~Waiver or reduction in interior drive width.~~

1. In the consideration of any request for a special exception to the regulations of this Chapter the Board of Adjustment shall only approve such exception based on specific plans as set before it by the applicant in the applicant’s application or in amended form at the time of the applicant’s hearing. If the special exception is granted such plans shall be identified as “final” and “approved” by the Secretary of the Board of Adjustment and serve as the basis for issuance of appropriate building permits.

[**§ 185-68 Variances.**](http://ecode360.com/8864590#8864602)

Subject to the provisions of this Article the Board of Adjustment shall have the power to grant the following types of variances:

1. **Area Variance.** A variation in any bulk zoning standard may be granted by the Board of Adjustment under special circumstances if it determines that the strict application of such regulation(s) or restriction(s) would result in unnecessary hardship and exceptional practical difficulties upon the owner of such property by reason of:
	1. exceptional narrowness, shallowness, or other unusual characteristic of size or shape of a specific piece of property; or
	2. exceptional topographical conditions or other extraordinary situation or condition of such piece of property; or
	3. the use or development of property immediately adjacent thereto.
2. It is the purpose of this Section to authorize the granting of a variation to Town bulk zoning standards only for reasons of demonstrable hardship and exceptional practical difficulties as distinguished from variations sought by applicants for purposes or reasons of convenience, profit, or caprice. An affirmative decision on a request for an area variance from the requirements of this Chapter shall only be issued upon:
	1. A showing of good and sufficient cause. A “good and sufficient” cause is one that deals solely with the physical characteristics of the property and cannot be based on the character of the planned construction or substantial improvement, the personal characteristics of the owner or inhabitants, or local provisions that regulate standards other than health and public safety standards; and
	2. A determination that failure to grant the variance would result in exceptional hardship due to the physical characteristics of the property; and
	3. A determination that such unnecessary hardship has not been created by the applicant or his predecessor in title; and
	4. A determination that the granting of a variance will not result in additional threats to public safety; extraordinary public expense, nuisances, fraud on or victimization of the public, or conflict with existing local laws; and
	5. A determination that the variance granted is the minimum necessary, considering the unique characteristics of the property, to afford relief from the requirements of this Chapter; and
	6. Affirmation that increased cost or inconvenience of meeting the requirements of the regulations of this Chapter do not constitute an exceptional hardship to the applicant.
3. In the consideration of any request for a variance to the regulations of this Chapter the Board of Adjustment shall only grant zoning relief based on specific plans as set before it by the applicant in the applicant’s application or in amended form at the time of the applicant’s hearing. If the variance is granted such plans shall be identified as”final” and “approved” and serve as the basis for issuance of appropriate building permits.
4. **Floodplain Variance.** The Board of Adjustment shall have the power to authorize, in specific cases, such variances from the requirements of Chapter 101 Flood Loss Reduction that will be not inconsistent with Federal regulations nor contrary to the public interest where, owing to special conditions of the lot or parcel, a literal enforcement of the provisions of the regulations included in Chapter 101 would result in unnecessary hardship. (See Chapter 101 for details, procedure and limitations.)
5. **Use Variance**. No use variance shall be authorized by the Board of Adjustment unless it finds:
	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 to circumstances or conditions generally created by the provisions of this Chapter or other Town code or regulations in the neighborhood or district in which the property is located;
	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 this Chapter and that the authorization of a use variance is, therefore, necessary to enable the reasonable use of the property;
	3. That such unnecessary hardship has not been created by the appellant or his predecessor in title;
	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 the public;
	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.

[**§ 185-69 Conditions attached to approvals.**](http://ecode360.com/8864590#8864605)

Upon consideration of the individual circumstances, the limitations and conditions, and the purposes of these regulations, the Board of Adjustment may attach such conditions to its approval of any special exception or granting of any variance as it deems to be necessary to further the purposes of the Town’s Zoning regulations including, but not limited to:

1. Control or elimination of smoke, dust, gas, noise, or vibration caused by operations, or such other conditions as the Board of Adjustment may specify; and
2. Roof type or style;
3. Architectural design standards and details, including entrance(s) and exit(s), door and window placements, and construction materials;
4. Hours of operation;
5. Prohibition on structural changes to the existing building or structure;
6. Repair and maintenance of the outside areas, including fencing, landscaping or streetscaping as appropriate, and painting;
7. Amount and location of off-street parking and loading space;
8. Amount, direction, and location of outdoor lighting;
9. Size, design and placement of any outside sign or advertising structure;
10. Such other conditions as are necessary

[**§ 185-70 Expiration, Extension, and Amendment of Special Exception or Variance.**](http://ecode360.com/8864590#8864620)

1. **Expiration.** Unless otherwise specified by the Board of Adjustment for good cause shown, any approved special exception or granted variance shall expire after six months if the applicant fails to apply for an appropriate building permit or after one year unless construction is completed or the use has taken place in accordance with the plans for which such special exception or variance was granted and the provisions of these regulations shall thereafter govern.
2. **Extension.**  The Board of Adjustment may grant one extension of a period not to exceed six months for good cause shown to any approved special exception or granted variance provided the application for such an extension is submitted prior to the initial expiration date.
3. **Amendment.** Any duly approved special exception or duly granted variance may be amended by decision of the Board of Adjustment provided the application for amendment is received by the Town prior to expiration. The Building Official and/or other cognizant Town officials do not have the authority to approve amendment of any special exception or variance granted by the Board of Adjustment. The application requirements and procedures for amendment shall be the same as for a new application, except
	1. When the proposed amendments represent minor change(s) to the original approved plans or are being required by the Town, application requirements may be reduced. Minimum application requirements shall include the required application form and a written discussion of the proposed amendments sought or required and, where appropriate, a site plan showing the changes the proposed amendment would make to the original approved plan(s). This abbreviated application shall be augmented by the full record of the original Board of Adjustment action to which the request for amendment is sought. This augmented application shall then proceed as any new application.
4. **Change of Conditions.** Changes to the conditions imposed as a condition of approval of any special exception or granting of any variance may by approved by the Board of Adjustment. The application requirements and procedures for changing conditions of approval shall be the same as for a new application, except
	1. When the proposed change(s) represent a minor change to the original condition imposed or are being required by the Town, application requirements may be reduced. Minimum application requirements shall include the required application form and a written discussion of the proposed changes sought or required and, where appropriate, a site plan showing the changes the proposed change of conditions would affect to the approved plan(s). This abbreviated application shall be augmented by the full record of the original Board of Adjustment action to which the request for amendment is sought. This augmented application shall then proceed as any new application.

[**~~§ 185-71 Amendment or Change of Conditions.~~**](http://ecode360.com/8864590#8864636) ~~RESERVED~~

[**§ 185-72 Appeal of Decision.**](http://ecode360.com/8864645#8864645)

Any person or persons, jointly or severally aggrieved by any decision of the Board of Adjustment, or any taxpayer or any officer, department, board or bureau of the Town of Dewey Beach may present to the Superior Court of Delaware a petition, duly verified, setting forth that such decision is illegal, in whole or in part, and specifying the grounds of the illegality. Such petition shall be presented to the Court within 30 calendar days after the filing of the Board of Adjustment decision at Town Hall. (See Title 22 Del. C. § 328 - § 332.)